THE GENERAL STATUTES OF NORTH CAROLINA

CONTAINING GENERAL LAWS OF NORTH CAROLINA THROUGH THE SESSION LAWS OF 1977

Prepared under the Supervision of the Department of Justice of the State of North Carolina

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Annotated, under the Supervision of the Department of Justice, by the Editorial Staff of the Publishers

UNDER THE DIRECTION OF
W. M. WILLSON, J. H. VAUGHAN AND SYLVIA FAULKNER

Volume 1C

1978 Replacement Volume

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Scope of Volume

Statutes:

Full text of Chapters 15 through 20 of the General Statutes of North Carolina, including all enactments through the Session Laws of 1977, heretofore contained in 1975 Replacement Volume 1C of the General Statutes and the 1977 Cumulative Supplement thereto.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports volumes 1-292 (p. 643).
North Carolina Court of Appeals Reports volumes 1-33 (p. 240).
Federal Reporter volumes 1-300.
Federal Reporter 2nd Series volumes 1-554 (p. 1074).
Federal Supplement volumes 1-431 (p. 434).
Federal Rules Decisions volumes 1-74 (p. 213).
United States Reports volumes 1-419 (p. 984).
Supreme Court Reporter volumes 1-97 (p. 2204).
North Carolina Law Review volumes 1-49, 55 (p. 750).
Wake Forest Intramural Law Review volumes 2-13 (p. 269).
Duke Law Journal volumes 3 (p. 485)-6 (p. 1395).
North Carolina Central Law Journal volume 2 (pp. 1-164), volume 3 (pp. 123-268), volume 7 (pp. 201-413), volume 8 (pp. 1-122).
Opinions of the Attorney General.

Abbreviations

(The abbreviations below are those found in the General Statutes which refer to prior codes.)

P. R.	Potter's Revisal (1821, 1827)
R. S.	Revised Statutes (1837)
R. C.	Revised Code (1854)
C. C. P.	Code of Civil Procedure (1868)
Code	Code (1883)
Rev.	Revisal of 1905
C. S.	Consolidated Statutes (1919, 1924)

Preface

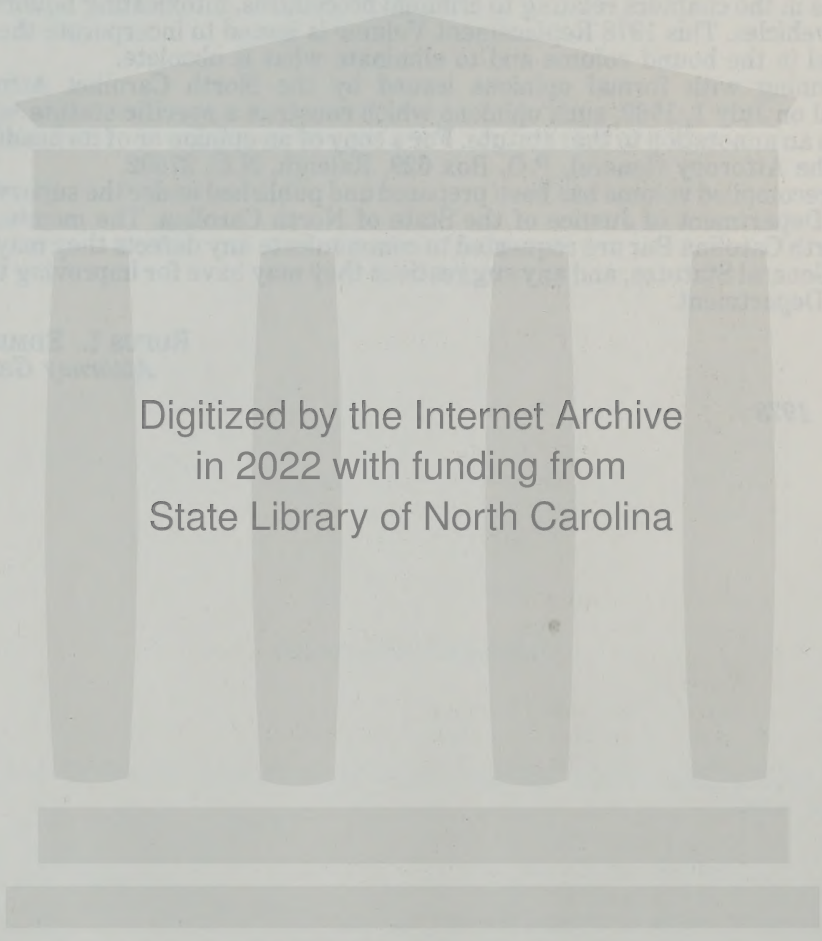
Volume 1C, last replaced in 1975, accumulated a supplement nearly equalling one half the bound volume in size and including, among other things, extensive changes in the chapters relating to criminal procedures, intoxicating liquors and motor vehicles. This 1978 Replacement Volume is issued to incorporate the new material in the bound volume and to eliminate what is obsolete.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, such opinions which construe a specific statute will be cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes, and any suggestions they may have for improving them, to the Department.

RUFUS L. EDMISTEN
Attorney General

May 1, 1978



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15-203.1. [Repealed.]
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15-205.1. [Repealed.]
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15-207. Records treated as privileged information.
15-208. [Repealed.]
15-209. Accommodations for probation officers.

Article 21.

Segregation of Youthful Offenders.

15-210 to 15-216. [Repealed.]

Article 22.

Review of Criminal Trials.

15-217. [Repealed.]
15-217.1. Filing petition with clerk; delivery of copy to district attorney; review of petition by judge.
15-218 to 15-222. [Repealed.]

Article 23.

Expunction of Records of Youthful Offenders.

15-223. Expunction of records for first offenders under the age of 18 at the time of conviction of misdemeanor.

Editor's Note. — Session Laws 1973, c. 1286, repeals, transfers and amends numerous sections in this Chapter and elsewhere in the General Statutes, largely relating to pretrial procedure, and enacts a new Chapter 15A, Criminal Procedure Act.

Session Laws 1973, c. 1286, ss. 27, 28, and 31, effective July 1, 1975, provide:

"Sec. 27. All statutes which refer to sections repealed or amended by this act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose.

"Sec. 28. None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law.

"Sec. 31. This act becomes effective on July 1, 1975, and is applicable to all criminal proceedings begun on and after that date and each provision is applicable to criminal proceedings pending on that date to the extent practicable, except § 12 [§§ 15-176.3 through 15-176.5] of this act which becomes effective on July 1, 1974."

Session Laws 1975, c. 573, amends Session Laws 1973, c. 1286, s. 31, so as to make the 1973 act effective Sept. 1, 1975, rather than July 1, 1975.

ARTICLE 1.

General Provisions.

§ 15-1. Statute of limitations for misdemeanors. — The crimes of deceit and malicious mischief, and the crime of petit larceny where the value of the property does not exceed five dollars ($5.00), and all misdemeanors except malicious misdemeanors, shall be presented or found by the grand jury within two years after the commission of the same, and not afterwards: Provided, that if any indictment found within that time shall be defective, so that no judgment can be given thereon, another prosecution may be instituted for the same offense, within one year after the first shall have been abandoned by the State. (1826, c. 11; R. C., c. 35, s. 8; Code, s. 1177; Rev., s. 3147; 1907, c. 408; C. S., s. 4512; 1943, c. 543.)

Cross Reference. — As to what are misdemeanors, see §§ 14-1 and 14-3 and annotations thereto.

Editor's Note. — For case law survey as to criminal law and procedure, see 44 N.C.L. Rev. 970 (1966); 45 N.C.L. Rev. 910 (1967). For note on the potential defendant's right to a speedy trial, see 48 N.C.L. Rev. 121 (1969).

General Consideration. — The time between the commission of the offense and the bringing into court of the presentment should be estimated in determining whether the prosecution is barred. State v. Cooper, 104 N.C. 890, 10 S.E. 510 (1889). The time stated in the indictment does not govern. State v. Newsom, 47 N.C. 173 (1855). The State can go back two years prior thereto although the indictment marks the beginning of the prosecution. The indictment arrests the running of the statute of limitations and the statute does not begin to run from an entry of nol. pros. "with leave." State v. Williams, 151 N.C. 660, 65 S.E. 908 (1909).

No statute of limitations bars the prosecution of a felony. State v. Johnson, 275 N.C. 264, 167 S.E.2d 274 (1969).

Meaning of Malicious Misdemeanors. — When, in the former wording of this section, the legislature used the words "other malicious misdemeanors," which immediately followed the words "malicious mischief," it evidently intended to describe offenses of which malice was a necessary ingredient to constitute the criminal act, as in the case of malicious mischief, and it was not the purpose to include within the exception from the operation of that section such offenses as would be misdemeanors, even in the absence of malice, and when malice, if present, would be only a circumstance of aggravation, which the court might consider in imposing the punishment. State v. Frisbee, 142 N.C. 671, 55 S.E. 722 (1906).

A violation of § 14-353 is not a malicious misdemeanor. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

A conspiracy to commit a misdemeanor is a misdemeanor. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

And Each Overt Act Tolls Statute. — A conspiracy is a continuing offense so that the statute of limitations is tolled as to the original conspiracy each time an overt act is committed in furtherance of the purpose and design of the conspiracy. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

Where a count and the indictment alleged that a conspiracy continued from time to time with the commission of overt acts by the alleged conspirators in furtherance of conspiracy and to effectuate its unlawful purpose within two years of the finding of the indictment, the trial court correctly overruled defendants' motion to quash the first count in the indictment on the ground that a prosecution on such count was barred by this section. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

Date on Which Statute Is Tolled. — In all misdemeanor cases, where there has been a conviction in an inferior court that had final jurisdiction of the offense charged, upon appeal to the superior court the accused may be tried upon the original warrant and the statute of limitations is tolled from the date of the issuance of the warrant. State v. Underwood, 244 N.C. 68, 92 S.E.2d 461 (1956); State v. Hundley, 272 N.C. 491, 158 S.E.2d 582 (1968).

In criminal cases where an indictment or presentment is required, the date on which the indictment or presentment has been brought or found by the grand jury marks the beginning of the criminal proceeding and arrests the statute of limitations. State v. Underwood, 244 N.C. 68, 92 S.E.2d 461 (1956); State v. Hundley, 272 N.C. 491, 158 S.E.2d 582 (1968).

An indictment or presentment marks the beginning of the prosecution so as to toll the statute of limitations, even though defendant be apprehended and tried more than two years after the offense was committed. State v. Best, 10 N.C. App. 62, 177 S.E.2d 772 (1970).

Meaning of "Secret Manner". — For construction of former provision, see State v. Crowell, 116 N.C. 1052, 21 S.E. 502 (1895). See for example, State v. Watts, 32 N.C. 369 (1849).

"Deceit" as Used in Former Section. — There has never been such an indictable offense as "deceit" but the meaning of this section has always been that misdemeanors, the gist of which was a malice or deceit, were within the exception of the section as formerly appearing. In State v. Christiansbury, 44 N.C. 46 (1852), it was held that there being no such offense as "deceit," it would apply to "cheating by false token" of which deceit was the gist but would not include "conspiracy to cheat" the gist of which offense is the conspiracy and the cheating but an aggravation. That decision did not restrict deceit to "cheating by false token" but instanced that as an offense coming within the general description of misdemeanors by deceit. State v. Crowell, 116 N.C. 1052, 21 S.E. 502 (1895).

What Offenses Barred. — Slandering an innocent woman is not barred within two years. State v. Claywell, 98 N.C. 731, 3 S.E. 920 (1887). No length of possession can bar an action to abate a public nuisance. State v. Holman, 104 N.C. 861, 10 S.E. 758 (1889). Seduction is not barred. State v. Crowell, 116 N.C. 1052, 21 S.E. 502 (1895).

A malicious assault cannot be the basis of an action two years after commission. State v. Frisbee, 142 N.C. 671, 55 S.E. 722 (1906).

The section has no application to conspiracy which is a felony. State v. Mallett, 125 N.C. 718, 34 S.E. 651 (1899), aff'd, 181 U.S. 589, 21 S. Ct. 730, 45 L. Ed. 1015 (1901). Bastardy proceedings are not governed by this section. State v. Perry, 122 N.C. 1043, 30 S.E. 139 (1898).

What Constitutes a Presentment. — See State v. Morris, 104 N.C. 837, 10 S.E. 454 (1889).

Trial on Second Bill after Two Years Barred. — Even an indictment within the time will not uphold a trial and conviction on a second bill found after the statutory period. State v. Tomlinson, 25 N.C. 32 (1842); State v. Hedden, 187 N.C. 803, 123 S.E. 65 (1924).

The issuance of a void warrant in a misdemeanor prosecution does not toll the running of this section, and where on appeal from a conviction upon such warrant in an inferior court defendant is tried upon an identical indictment returned by the grand jury more than two years after the commission of the offense, he is entitled to quashal of the indictment. State v. Hundley, 272 N.C. 491, 158 S.E.2d 582 (1968).

Where a warrant charging a misdemeanor is amended to charge a felony, defendant's plea of the statute of limitations on the misdemeanor count becomes immaterial. State v. Sanderson, 213 N.C. 381, 196 S.E. 324 (1938).

Preliminary Warrants Not Included. — There is no saving clause in this section as to the effect of preliminary warrants before a justice of the peace or other committing magistrate, and the law must be construed and applied as written. There must be a presentment or indictment within two years from the time of the offense committed and not afterwards. State v. Hedden, 187 N.C. 803, 123 S.E. 65 (1924).

Necessity for Pleading Statute. — For a person charged with the commission of a criminal offense to avail himself of the alleged running of the statute of limitations, he must either specifically plead it or in apt time bring it to the attention of the court. State v. Brinkley, 193 N.C. 747, 138 S.E. 138 (1927).

Whether or not the court below will allow the statute of limitations as a defense to the action, where the same has not been pleaded or mentioned until the argument before the jury, is a matter of discretion. Privett v. Calloway, 75 N.C. 23 (1876).

Upon a trial on indictment for the sale of intoxicants where there was evidence of sales at undisclosed times, it would not be presumed that such sales occurred more than two years next preceding the prosecution when defendant has not pleaded this section, or in apt time called it to the court's attention or offered evidence as to the dates of sale. State v. Colson, 222 N.C. 28, 21 S.E.2d 808 (1942).

Wrong Name in Bill of Indictment. — A bill of indictment against a person by a wrong name, which is pleaded to in abatement, and the plea found, is, nevertheless, the same clause of action, and the elapse of two years is no bar to prosecution. State v. Hailey, 51 N.C. 42 (1858).

§§ 15-2, 15-3: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to criminal process, see §§ 15A-301 through 15A-305.

§ 15-4. Accused entitled to counsel. — Every person, accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense. (1777, c. 115, s. 85, P. R.; R. C., c. 35, s. 13; Code, s. 1182; Rev., s. 3150; C. S., s. 4515.)

Cross References. — As to court's power to limit argument, see § 84-14. As to constitutional provisions for counsel, see the N.C. Const., Art. I, § 23, and the Sixth Amendment to the U.S. Constitution.

Editor's Note. — For note on the right of counsel, see 32 N.C.L. Rev. 331 (1954).

A Constitutional Right. — In all criminal prosecutions every man has the right to have counsel for his defense. N.C. Const., Art. I, § 23. State v. Sykes, 79 N.C. 618 (1878). See also State v. Hardy, 189 N.C. 799, 128 S.E. 152 (1925).

Right Is a Mandate in Capital Felony Cases. — The right to have counsel as well as the right of confrontation is guaranteed. N.C. Const., Art. I, § 23. Where the crime charged is a capital felony this right becomes a mandate. State v. Farrell, 223 N.C. 321, 26 S.E.2d 322 (1943); State v. Hedgebeth, 228 N.C. 259, 45 S.E.2d 563 (1947).

Defendant Held Entitled to Counsel. — Where defendant had waived his right to have assigned counsel at the preliminary hearing, but made a specific request for a lawyer prior to the selection of the jury at his trial in the superior court, he was entitled to be represented by counsel. State v. Haire, 19 N.C. App. 89, 198 S.E.2d 31 (1973).

Counsel Allowed Reasonable Time to Prepare Case. — The two — the right to counsel and the right of confrontation — are closely

interrelated and, together, form an integral part of a fair trial. Hence, this requirement as incorporated in this section, was not intended to be a mere formality. It does not contemplate that counsel shall "be compelled to act without being allowed reasonable time within which to understand the case and prepare for the defense." State v. Farrell, 223 N.C. 321, 26 S.E.2d 322 (1943). See note to N.C. Const., Art. I, § 23.

Applied in State v. Davis, 270 N.C. 1, 153 S.E.2d 749 (1967), commented on in 46 N.C.L. Rev. 379 (1968).

Stated in Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527 (1932).

Cited in Hammond v. North Carolina, 227 F. Supp. 1 (E.D.N.C. 1964); State v. Hill, 276 N.C. 1, 170 S.E.2d 885 (1969); State v. Anderson, 281 N.C. 261, 188 S.E.2d 336 (1972).

§§ 15-4.1 to 15-5.1: Repealed by Session Laws 1969, c. 1013, s. 12.

§ 15-5.2: Repealed by Session Laws 1969, c. 1013, s. 6.

§§ 15-5.3, 15-5.4: Repealed by Session Laws 1969, c. 1013, s. 12.

§ 15-6. Imprisonment to be in county jail. — No person shall be imprisoned except in the common jail of the county, unless otherwise provided by law: Provided, that whenever the sheriff of any county shall be imprisoned, he may be imprisoned in the jail of any adjoining county. (1797, c. 474, s. 3, P. R.; R. C., c. 35, s. 6; 1879, c. 12; Code, s. 1174; Rev., s. 3151; C. S., s. 4517; 1973, c. 1141, s. 1.)

§ 15-6.1. Changing place of confinement of prisoner committing offense. — In all cases where a defendant has been convicted in a court inferior to the superior court and sentenced to a term in the county jail or to serve in some county institution other than under the supervision of the State Department of Correction, and such defendant is subsequently brought before such court for an offense committed prior to the expiration of the term to be served in such county institution, upon conviction, plea of guilty or nolo contendere, the judge shall have the power and authority to change the place of confinement of the prisoner and commit such defendant to work under the supervision of the State Department of Correction. This provision shall apply whether or not the terms of the new sentence are to run concurrently with or consecutive to the remaining portion of the old sentence. (1953, c. 778; 1957, c. 65, s. 11; 1967, c. 996, s. 16.)

§ 15-6.2. Concurrent sentences for offenses of different grades or to be served in different places. — When by a judgment of a court or by operation of law a prison sentence runs concurrently with any other sentence a prisoner shall not be required to serve any additional time in prison solely because the concurrent sentences are for different grades of offenses or that it is required that they be served in different places of confinement. (1955, c. 57.)

Editor's Note. — For comment on this section, see 35 N.C.L. Rev. 112 (1956).

Concurrent sentences may be imposed for separate offenses, even though one is for a misdemeanor and the other a felony, so that one is required to be served in the State's prison and one in the county jail. State v. Brooks, 271 N.C. 462, 156 S.E.2d 676 (1967).

Applied in State v. Efird, 271 N.C. 730, 157 S.E.2d 538 (1967).

Cited in State v. Fields, 11 N.C. App. 708, 182 S.E.2d 213 (1971).

§ 15-6.3. Credit for service of sentence while in another jurisdiction. — When a person in actual confinement under sentence of another jurisdiction is brought for trial before a court of this State, the court may, upon sentencing, specifically impose a sentence to be concurrently served and direct that such person receive credit against the sentence imposed for all time subsequently served in the jurisdiction possessing physical custody of such person. (1971, c. 828.)

§ 15-7. Postmortem examinations directed. — In all cases of homicide, any officer prosecuting for the State may, at any time, direct a postmortem examination of the deceased to be made by one or more physicians to be summoned for the purpose; and the physicians shall be paid a reasonable compensation for such examination, the amount to be determined by the court and taxed in the costs, and if not collected out of the defendant the same shall be paid by the State. (R. C., c. 35, s. 49; Code, s. 1214; Rev., s. 3152; C. S., s. 4518; 1973, c. 1141, s. 2.)

Cross Reference. — See also § 90-217.

Section Valid. — This section is a valid exercise of the police power of the State. Withers v. Board of Comm'rs, 163 N.C. 341, 79 S.E. 615 (1913).

Coroner and physicians performing autopsy may be held liable by father of deceased for wrongful mutilation when the autopsy is ordered by the coroner on his own initiative solely to ascertain the cause of death without suspicion of foul play, since in such case the coroner is without authority to order the autopsy, and his direction therefor can confer no immunity upon the physicians. Gurganious v. Simpson, 213 N.C. 613, 197 S.E. 163 (1938).

§ 15-8. Stolen property returned to owner. — Upon the conviction of any person for robbing or stealing any money, goods, chattels, or other estate of any description whatever, the person from whom such goods, money, chattels or other estate were robbed or stolen shall be entitled to restitution thereof; and the court may award restitution of the articles so robbed or stolen, and make all such orders and issue such writs of restitution or otherwise as may be necessary for that purpose. (21 Hen. VIII, c. 11; R. C., c. 35, s. 34; Code, s. 1201; Rev., s. 3153; C. S., s. 4519; 1943, c. 543.)

§ 15-9: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross Reference. — See Editor's note following the analysis to this Chapter.

§ 15-10. Speedy trial or discharge on commitment for felony. — When any person who has been committed for treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer in open court to be brought to his trial, shall not be indicted some time in the next term of the superior or criminal court ensuing such commitment, the judge of the court, upon notice in open court on the last day of the term, shall set at liberty such prisoner upon bail, unless it appear upon oath that the witnesses for the State could not be produced at the same term; and if such prisoner, upon his prayer as aforesaid, shall not be indicted and tried at the second term of the court, he shall be discharged from his imprisonment: Provided, the judge presiding may, in his discretion, refuse to discharge such person if the time between the first and second terms of the court be less than four months. (1868-9, c. 116, s. 33; Code, s. 1658; Rev., s. 3155; 1913, c. 2; C. S., s. 4521.)

Requirements Peremptory. — This section is peremptory in its requirements; and where one so committed has formally complied with the provisions of the statute, it is the duty of the court to discharge the prisoner. State v. Webb, 155 N.C. 426, 70 S.E. 1064 (1911).

Remedy Is by Certiorari. — A certiorari is the proper procedure to review the order of the lower court in refusing to discharge a prisoner from custody under the provisions of this section. State v. Webb, 155 N.C. 426, 70 S.E. 1064 (1911).

This section is for the protection of persons held without bail. State v. Lowry, 263 N.C. 536, 139 S.E.2d 870, cert. denied, 382 U.S. 22, 86 S. Ct. 227, 15 L. Ed. 2d 16 (1965); State v. Wilburn, 21 N.C. App. 140, 203 S.E.2d 407 (1974); Farrington v. North Carolina, 391 F. Supp. 714 (M.D.N.C. 1975).

It requires simply that under certain circumstances the prisoner be discharged from custody. State v. Patton, 260 N.C. 359, 132 S.E.2d 891 (1963), cert. denied, 376 U.S. 956, 84 S. Ct. 977, 11 L. Ed. 2d 974 (1964); State v.

Lowry, 263 N.C. 536, 139 S.E.2d 870, cert. denied, 382 U.S. 22, 86 S. Ct. 227, 15 L. Ed. 2d 16 (1965); State v. Cavallaro, 274 N.C. 480, 164 S.E.2d 168 (1968).

This section merely provides that under certain circumstances a defendant who has not been speedily tried shall be released from custody. It does not require that the prosecution against him be dismissed. State v. Hardin, 20 N.C. App. 193, 201 S.E.2d 74 (1973).

In a case where the court has ordered that defendant's trial must begin within a certain time period or he must be discharged, failure to try defendant within that time period, absent determination that defendant has been deprived of a speedy trial, results only in release of defendant from custody, but not dismissal of charges against him. State v. Wilburn, 21 N.C. App. 140, 203 S.E.2d 407 (1974).

And not that he go quit of further prosecution. State v. Patton, 260 N.C. 359, 132 S.E.2d 891 (1963), cert. denied, 376 U.S. 956, 84 S. Ct. 977, 11 L. Ed. 2d 974 (1964); State v. Lowry, 263 N.C. 536, 139 S.E.2d 870, cert. denied, 382 U.S. 22, 86 S. Ct. 227, 15 L. Ed. 2d 16 (1965); State v. Cavallaro, 274 N.C. 480, 164 S.E.2d 168 (1968).

This section does not bar further prosecution. Farrington v. North Carolina, 391 F. Supp. 714 (M.D.N.C. 1975).

Convict in Penitentiary for Unrelated Crime Is Not Excepted from Guarantee. — A convict, confined in the penitentiary for an unrelated crime, is not excepted from the constitutional guarantee of a speedy trial of any other charges pending against him. State v. O'Kelly, 285 N.C. 368, 204 S.E.2d 672 (1974).

Word "speedy" cannot be defined in specific terms of days, months or years and the question of whether a defendant has been denied a speedy trial must be answered in light of the facts of each particular case. State v. Wilburn, 21 N.C. App. 140, 203 S.E.2d 407 (1974).

But Four Factors Are Considered in Determining Whether Denial of Speedy Trial Is Unconstitutional. — The four generally accepted interrelated factors to be considered together in reaching a determination of whether the denial of a speedy trial assumes due process proportions are the length of the delay, the reason for the delay, the prejudice to the defendant, and waiver by defendant. State v. Roberts, 18 N.C. App. 388, 197 S.E.2d 54 (1973); State v. O'Kelly, 285 N.C. 368, 204 S.E.2d 672 (1974); State v. Wilburn, 21 N.C. App. 140, 203 S.E.2d 407 (1974).

Whether Right Denied Is Determined in Circumstances of Each Case. — Whether defendant has been denied the right to a speedy trial is a matter to be determined by the trial judge in the circumstances of each case. State v. Setzer, 21 N.C. App. 511, 204 S.E.2d 921 (1974).

Balancing Test. — A claim that a defendant has been denied his right to a speedy trial is subject to a balancing test in which the conduct of both the prosecutor and defendant are weighed. State v. Roberts, 18 N.C. App. 388, 197 S.E.2d 54 (1973).

The burden is on an accused who asserts denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. State v. Arnold, 21 N.C. App. 92, 203 S.E.2d 395, aff'd, 285 N.C. 751, 208 S.E.2d 646 (1974).

An accused waives his right to a speedy trial unless he demands it. State v. Johnson, 3 N.C. App. 420, 165 S.E.2d 27 (1969).

§ 15-10.1. Detainer; purpose; manner of use. — Any person confined in the State prison of North Carolina, subject to the authority and control of the State Department of Correction, or any person confined in any other prison of North Carolina, may be held to account for any other charge pending against him only upon a written order from the clerk or judge of the court in which the charge originated upon a case regularly docketed, directing that such person be held to answer the charge pending in such court; and in no event shall the prison authorities hold any person to answer any charge upon a warrant or notice when the charge has not been regularly docketed in the court in which the warrant or charge has been issued: Provided, that this section shall not apply to any State agency exercising supervision over such person or prisoner by virtue of a judgment, order of court or statutory authority. (1949, c. 303; 1953, c. 603; 1957, c. 349, s. 10; 1967, c. 996, s. 13.)

§ 15-10.2. Mandatory disposition of detainers — request for final disposition of charges; continuance; information to be furnished prisoner. — (a) Any prisoner serving a sentence or sentences within the State prison system who, during his term of imprisonment, shall have lodged against him a detainer to answer to any criminal charge pending against him in any court

within the State, shall be brought to trial within eight months after he shall have caused to be sent to the district attorney of the court in which said criminal charge is pending, by registered mail, written notice of his place of confinement and request for a final disposition of the criminal charge against him; said request shall be accompanied by a certificate from the Secretary of Correction stating the term of the sentence or sentences under which the prisoner is being held, the date he was received, and the time remaining to be served; provided that, for good cause shown in open court, the prisoner or his counsel being present, the court may grant any necessary and reasonable continuance.

(b) The Secretary of Correction shall, upon request by the prisoner, inform the prisoner in writing of the source and contents of any charge for which a detainer shall have been lodged against such prisoner as shown by said detainer, and furnished the prisoner with the certificate referred to in subsection (a). (1957, c. 1067, s. 1; 1967, c. 996, s. 15; 1973, c. 47, s. 2; c. 1262, s. 10.)

Purpose of Section. — The primary purpose of this section is to provide a prisoner with a means by which he may require the State to try all the criminal charges against him to the end that he and the authorities may know the full extent of his debt to society for his criminal activities and that he may plan for his release when the debt has been satisfied. The presence of a detainer in his prison files jeopardizes his chances for parole, for proper good behavior credits, and for work release. State v. White, 270 N.C. 78, 153 S.E.2d 774 (1967).

Prisoner Must Follow Section's Requirements. — Where defendant did not follow the requirements of this section by making his demand upon the solicitor (now district attorney) by registered mail, but instead he sent a letter to the clerk of the superior court and the solicitor (now district attorney) did not receive the notice, the defendant is not entitled to his release for failure of the State to bring him to trial within eight months. State v. White, 270 N.C. 78, 153 S.E.2d 774 (1967).

An inmate must follow the section's requirements. He must send by registered mail a demand to the district attorney, and sending it to the clerk of the superior court unregistered is insufficient, when the district attorney does not know of the demand. Farrington v. North Carolina, 391 F. Supp. 714 (M.D.N.C. 1975).

Failure to send the motion by registered mail to the district attorney of the judicial district in which the charges are pending will deprive defendant of the benefit of this section. State v. Wright, 290 N.C. 45, 224 S.E.2d 624 (1976), cert. denied, 429 U.S. 1049, 97 S. Ct. 760, 50 L. Ed. 2d 765 (1977).

Defendant's letter requesting a speedy trial did not comply with the provisions of this section where, for example, he failed to send the letter by registered mail to the district attorney; he failed to give notice of his place of confinement; and he failed to include a certificate from the Secretary of Correction. Having failed to follow the provisions of the statute, defendant was not entitled to the statutory relief. State v. Wright, 28 N.C. App. 426, 221 S.E.2d 751, aff'd, 290 N.C. 45, 224 S.E.2d 624 (1976).

Effect of Detainer in File. — The presence of a detainer in a prisoner's file jeopardizes his chances for parole, proper good behavior credits and work release. Farrington v. North Carolina, 391 F. Supp. 714 (M.D.N.C. 1975).

Applied in State v. Watts, 25 N.C. App. 104, 212 S.E.2d 224 (1975).

Cited in Courtney v. Pinion, 420 F. Supp. 890 (W.D.N.C. 1976).

§ 15-10.3. Mandatory disposition of detainers — procedure; return of prisoner after trial. — The district attorney, upon receipt of the written notice and request for a final disposition as hereinbefore specified, shall make application to the court in which said charge is pending for a writ of habeas corpus ad prosequendum and the court upon such application shall issue such writ to the Secretary of Correction requiring the prisoner to be delivered to said court to answer the pending charge and to stand trial on said charge within the time hereinbefore provided; upon completion of said trial, the prisoner shall be returned to the State prison system to complete service of the sentence or sentences under which he was held at the time said writ was issued. (1957, c. 1067, s. 2; 1967, c. 996, s. 15; 1973, c. 47, s. 2; c. 1262, s. 10.)

§ 15-10.4. Mandatory disposition of detainers — exception as to prisoners who are mentally ill. — The provisions of G.S. 15-10.2 and 15-10.3 shall not apply

to any prisoner who has been transferred and assigned for observation or treatment to any unit of the prison system which is maintained for those prisoners who are mentally ill or are suffering from mental disorders. (1957, c. 1067, s. 3.)

ARTICLE 2.

Record and Disposition of Seized, etc., Articles.

§ 15-11. Sheriffs and police departments to maintain register of personal property confiscated, seized or found. — Each sheriff and police department in this State is hereby required to keep and maintain a book or register, and it shall be the duty of each sheriff and police department to keep a record therein of all articles of personal property which may be seized or confiscated by him or it, or of which he or it may have become possessed in any way in the discharge of his duty. Said sheriffs and police departments shall cause to be kept in said registers a description of such property, the name of the person from whom it was seized, if such name be known, the date and place of its seizure, and, where the article was not taken from the person of a suspect or prisoner, a brief recital of the place and circumstances concerning the possession thereof by such sheriff and police department. Such sheriff and police department shall also keep in said register appropriate entries showing the manner, date, and to whom said articles are disposed of or delivered, and, if sold as hereinafter provided, a record showing the disposition of the proceeds arising from such sale. (1939, c. 195, s. 1; 1973, c. 1141, s. 3.)

§ 15-11.1. Seizure, custody and disposition of articles; exceptions. — (a) If a law-enforcement officer seizes property pursuant to lawful authority, he shall safely keep the property under the direction of the court or magistrate as long as necessary to assure that the property will be produced at and may be used as evidence in any trial. Upon application to the court by the lawful owner or a person, firm, or corporation entitled to possession, after notice to all parties, including the defendant, and after hearing, the court may in its discretion order any or all of the property returned to the lawful owner or a person, firm, or corporation entitled to possession. The court may enter such order as may be necessary to assure that the evidence will be available for use as evidence at the time of trial, and will otherwise protect the rights of all parties. Notwithstanding any other provision of law, photographs or other identification or analyses made of the property may be introduced at the time of the trial provided that the court determines that the introduction of such substitute evidence is not likely to substantially prejudice the rights of the defendant in the criminal trial.

(b) In the case of unknown or unapprehended defendants or of defendants willfully absent from the jurisdiction, the court shall have discretion to appoint a guardian ad litem, who shall be a licensed attorney, to represent and protect the interest of such unknown or absent defendants. The judicial findings concerning identification or value that are made at such hearing whereby property is returned to the lawful owner or a person, firm, or corporation entitled to possession, may be admissible into evidence at the trial. After final judgment all property lawfully seized by or otherwise coming into the possession of law-enforcement authorities shall be disposed of as the court or magistrate in its discretion orders, and may be forfeited and either sold or destroyed in accordance with due process of law.

(c) Any property, the forfeiture and disposition of which is specified in any general or special law, shall be disposed of in accordance therewith. (1977, c. 613.)

§ 15-12. Publication of notice of unclaimed property; advertisement and sale of unclaimed bicycles. — Unless otherwise provided herein, whenever such articles in the possession of any sheriff or police department have remained unclaimed by the person who may be entitled thereto for a period of 180 days after such seizure, confiscation, or receipt thereof in any other manner, by such sheriff or police department, the said sheriff or police department in whose possession said articles are may cause to be published one time in some newspaper published in said county a notice to the effect that such articles are in the custody of such officer or department, and requiring all persons who may have or claim any interest therein to make and establish such claim or interest not later than 30 days from the date of the publication of such notice or in default thereof, such articles will be sold and disposed of. Such notice shall contain a brief description of the said articles and such other information as the said officer or department may consider necessary or advisable to reasonably inform the public as to the kind and nature of the article about which the notice relates. Provided, however, when bicycles which are in the possession of any sheriff or police department, as provided for in this Article, have remained unclaimed by the person who may be entitled thereto for a period of 30 days after such seizure, confiscation or receipt thereof, the said sheriff or police department who has possession of any such bicycle may proceed to advertise and sell such bicycles as provided by this Article. (1939, c. 195, s. 2; 1965, c. 807, s. 1; 1973, c. 1141, s. 4.)

Editor's Note. — Session Laws 1965, c. 807, which added the last sentence of this section, provides, in s. 2½: "This act shall not apply to Alamance, Cherokee, Cleveland, Columbus, Gaston, Haywood, Henderson, Hoke, Mitchell, Moore, Northampton, Pender, Scotland, Wilson Counties."

Session Laws 1965, c. 807, s. 2½, was amended by Session Laws 1973, c. 182, which deleted Gaston from the list of counties.

§ 15-13. Public sale 30 days after publication of notice. — If said articles shall remain unclaimed or satisfactory evidence of ownership thereof not be presented to the sheriff or police department, as the case may be, for a period of 30 days after the publication of the notice provided for in G.S. 15-12, then the said sheriff or police department in whose custody such articles may be is hereby authorized and empowered to sell the same at public auction for cash to the highest bidder, either at the courthouse door of the county, or at the police headquarters of the municipality in which the said articles of property are located, and at such sale to deliver the same to the purchaser or purchasers thereof. (1939, c. 195, s. 3; 1973, c. 1141, s. 5.)

§ 15-14. Notice of sale. — Before any sale of said property is made under the provisions of this Article, however, the said sheriff or police department making the same shall first advertise the sale by publishing a notice thereof in some newspaper published in the said county at least one time not less than 10 days prior to the date of sale, and by posting a notice of the sale at the courthouse door and at three other public places in the said county. Said notice shall specify the time and place of sale, and contain a sufficient description of the articles of property to be sold. It shall not be required that the sale lay open for increase bids or objections, but it may be deemed closed when the purchaser at the sale pays the amount of the accepted bid. (1939, c. 195, s. 4; 1973, c. 1141, s. 6.)

§ 15-15. Disbursement of proceeds of sale. — From the proceeds realized from the sale of said property, the sheriff, police department or other officer making the same shall first pay the costs and expenses of the sale, and all other necessary expenses incident to a compliance with this Article, and any balance then remaining from the proceeds of said sale shall be paid within 30 days after the sale to the treasurer of the county board of education of the county in which

such sale is made, for the benefit of the fund for maintaining the free public schools of such county. (1939, c. 195, s. 5; 1973, c. 1141, s. 7.)

§ 15-16. Nonliability of officers. — No sheriff, police department, or other officer shall be liable for any damages or claims on account of any such sale or disposition of such property, as provided in this Article. (1939, c. 195, s. 6; 1973, c. 1141, s. 8.)

§ 15-17. Construction of Article. — This Article shall not be construed to apply to the seizure and disposition of whiskey distilleries, game birds, and other property or articles which have been or may be seized, where the existing law now provides the method, manner, and extent of the disposition of such articles or of the proceeds derived from the sale thereof. (1939, c. 195, s. 7.)

Cross References. — As to the disposition of liquor, etc., seized, see §§ 18A-21, 18A-24. As to disposition of seized distilleries, see § 18A-22.

ARTICLE 3.

Warrants.

§§ 15-18 to 15-24: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to warrants, see §§ 15A-301 through 15A-305.

§ 15-24.1. Amendment of warrant to show ownership of property. — Any criminal warrant may be amended in the superior court, before or during the trial, when there shall appear to be any variance between the allegations in the warrant and the evidence in setting forth the ownership of property if, in the opinion of the court, such amendment will not prejudice the defendant. This section shall be construed as enlarging and not limiting the conditions and situations under which a warrant may be amended. (1965, c. 285.)

ARTICLE 4.

Search Warrants.

§ 15-25: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to search warrants, see §§ 15A-241 through 15A-259.

§§ 15-25.1, 15-25.2: Repealed by Session Laws 1969, c. 869, s. 8.

§§ 15-26 to 15-27.1: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to search warrants, see §§ 15A-241 through 15A-259.

ARTICLE 4A.

Administrative Search and Inspection Warrants.

§ 15-27.2. Warrants to conduct inspections authorized by law. — (a) Notwithstanding the provisions of Article 4 of this Chapter, any official or

employee of the State or of a unit of county or local government of North Carolina may, under the conditions specified in this section, obtain a warrant authorizing him to conduct a search or inspection of property if such a search or inspection is one that is elsewhere authorized by law, either with or without the consent of the person whose privacy would be thereby invaded, and is one for which such a warrant is constitutionally required.

(b) The warrant may be issued by any magistrate of the general court of justice, judge, clerk, or assistant or deputy clerk of any court of record whose territorial jurisdiction encompasses the property to be inspected.

(c) The issuing officer shall issue the warrant when he is satisfied the following conditions are met:

(1) The one seeking the warrant must establish under oath or affirmation that the property to be searched or inspected is to be searched or inspected as part of a legally authorized program of inspection which naturally includes that property, or that there is probable cause for believing that there is a condition, object, activity or circumstance which legally justifies such a search or inspection of that property;

(2) An affidavit indicating the basis for the establishment of one of the grounds described in (1) above must be signed under oath or affirmation by the affiant;

(3) The issuing official must examine the affiant under oath or affirmation to verify the accuracy of the matters indicated by the statement in the affidavit;

(d) The warrant shall be validly issued only if it meets the following requirements:

(1) It must be signed by the issuing official and must bear the date and hour of its issuance above his signature with a notation that the warrant is valid for only 24 hours following its issuance;

(2) It must describe, either directly or by reference to the affidavit, the property where the search or inspection is to occur and be accurate enough in description so that the executor of the warrant and the owner or the possessor of the property can reasonably determine from it what person or property the warrant authorizes an inspection of;

(3) It must indicate the conditions, objects, activities or circumstances which the inspection is intended to check or reveal;

(4) It must be attached to the affidavit required to be made in order to obtain the warrant.

(e) Any warrant issued under this section for a search or inspection shall be valid for only 24 hours after its issuance, must be personally served upon the owner or possessor of the property between the hours of 8:00 A.M. and 8:00 P.M. and must be returned within 48 hours.

(f) No facts discovered or evidence obtained in a search or inspection conducted under authority of a warrant issued under this section shall be competent as evidence in any civil, criminal or administrative action, nor considered in imposing any civil, criminal, or administrative sanction against any person, nor as a basis for further seeking to obtain any warrant, if the warrant is invalid or if what is discovered or obtained is not a condition, object, activity or circumstance which it was the legal purpose of the search or inspection to discover; but this shall not prevent any such facts or evidence to be so used when the warrant issued is not constitutionally required in those circumstances.

(g) The warrants authorized under this section shall not be regarded as search warrants for the purposes of application of Article 4 of Chapter 15 of the General Statutes of North Carolina. (1967, c. 1260.)

Editor's Note. — Article 4 of this Chapter, referred to in this section, has been repealed. For present provisions as to search warrants, see §§ 15A-241 through 15A-259.

For comment as to warrants required for administrative health inspections, see 4 Wake Forest Intra. L. Rev. 117 (1968).

ARTICLE 5.

Peace Warrants.

§§ 15-28 to 15-38: Repealed by Session Laws 1973, c. 1286, ss. 11, 26.

Cross Reference. — See Editor's note following the analysis to this Chapter.

ARTICLE 6.

Arrest.

§§ 15-39 to 15-42: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to arrest, see §§ 15A-401 through 15A-405.

§ 15-43. House broken open to prevent felony. — All persons are authorized to break open and enter a house to prevent a felony about to be committed therein. (1868-9, c. 178, subch. 1, s. 4; Code, s. 1127; Rev., s. 3179; C. S., s. 4545.)

Cited in State v. Mobley, 240 N.C. 476, 83 S.E.2d 100 (1954); State v. Miller, 16 N.C. App. 1, 190 S.E.2d 888 (1972).

§§ 15-44 to 15-47: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to arrest, see §§ 15A-401 through 15A-405.

ARTICLE 7.

Fugitives from Justice.

§ 15-48. Outlawry for felony. — In all cases where any justice or judge of the General Court of Justice shall, on written affidavit, filed and retained by such justice or judge, receive information that a felony has been committed by any person, and that such person flees from justice, conceals himself and evades arrest and service of the usual process of law, the justice or judge is hereby empowered and required to issue proclamation against him reciting his name, if known, and thereby requiring him forthwith to surrender himself; and also empowering and requiring the sheriff of any county in the State in which such fugitive shall be to take such power with him as he shall think fit and necessary for the going in search and pursuit of, and effectually apprehending, such fugitive from justice, which proclamation shall be published at the door of the courthouse of any county in which such fugitive is supposed to lurk or conceal himself, and at such other places as the justice or judge shall direct; and if any person against whom proclamation has been thus issued continues to stay out, lurks and conceals himself, and does not immediately surrender himself, any citizen of the State may capture, arrest, and bring him to justice, and in case of flight or resistance by him, after being called on and warned to surrender, may slay him without accusation of any crime. (1866, c. 62; 1868-9, c. 178, subch.

1, s. 8; Code, s. 1131; Rev., s. 3183; C. S., s. 4549; 1969, c. 44, s. 30; 1973, c. 1141, s. 9.)

Cross Reference. — As to extradition, see §§ 15A-721 through 15A-750, and Appendix V.

Editor's Note. — For note on outlawry, another "gothic column" in North Carolina, see 41 N.C.L. Rev. 634 (1963).

Constitutionality of Section. — This section is procedurally deficient under the due process clause of the Fourteenth Amendment in these respects: (1) It is not required that an impartial judicial officer determine probable cause, i.e., that a felony has been committed and that the person proposed to be outlawed probably committed it. (2) Alternatively, it is not required that an arrest warrant have been issued or an indictment returned by a grand jury. (3) It is not required that an arrest warrant or other process have been served, or an attempt made to serve it, and a return made that the accused is not to be found within the county. (4) There is no provision for notice and opportunity to be heard. Autry v. Mitchell, 420 F. Supp. 967 (E.D.N.C. 1976).

The State has failed to demonstrate a compelling governmental interest in the apprehension of all fleeing accused felons, and this section as drawn and as administered violates the equal protection clause of the Fourteenth Amendment. Autry v. Mitchell, 420 F. Supp. 967 (E.D.N.C. 1976).

Rescission of Order. — Neither statutory provision nor necessity requires the rescission of an order declaring defendant an outlaw once defendant is in custody. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

This section only applies so long as defendant remains at large. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Fugitive from Justice. — A fugitive from justice is one who, having committed a crime in one jurisdiction, flees therefrom in order to evade the law and escape punishment. State v. Hall, 115 N.C. 811, 20 S.E. 729 (1894).

Stated in State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

§ 15-49: Repealed by Session Laws 1975, c. 166, s. 26.

Cross Reference. — See Editor's note following the analysis to Chapter 15A.

§§ 15-50 to 15-52: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to extradition, see §§ 15A-721 to 15A-750.

§ 15-53. Governor may employ agents, and offer rewards. — The Governor, on information made to him of any person, whether the name of such person be known or unknown, having committed a felony or other infamous crime within the State, and of having fled out of the jurisdiction thereof, or who conceals himself within the State to avoid arrest, or who, having been convicted, has escaped and cannot otherwise be apprehended, may either employ a special agent, with a sufficient escort, to pursue and apprehend such fugitive, or issue his proclamation, and therein offer a reward, not exceeding ten thousand dollars ($10,000), according to the nature of the case, as in his opinion may be sufficient for the purpose, to be paid to him who shall apprehend and deliver the fugitive to such person and at such place as in the proclamation shall be directed. (1800, c. 561, P. R.; R. C., c. 35, s. 4; 1866, c. 28; 1868-9, c. 52; 1870-1, c. 15; 1871-2, c. 29; Code, s. 1169; 1891, c. 421; Rev., s. 3188; C. S., s. 4554; 1925, c. 275, s. 6; 1967, c. 165, s. 1.)

Cited in Madry v. Town of Scotland Neck, 214 N.C. 461, 199 S.E. 618 (1938).

§ 15-53.1. Governor may offer rewards for information leading to arrest and conviction. — When it shall appear to the Governor, upon satisfactory information furnished to him, that a felony or other infamous crime has been committed within the State, whether the name or names of the person or persons suspected of committing the said crime be known or unknown, the Governor may issue his proclamation and therein offer an award [reward] not exceeding ten thousand dollars ($10,000), according to the nature of the case as, in his opinion, may be sufficient for the purpose, to be paid to him who shall provide information leading to the arrest and conviction of such person or persons. The proclamation shall be upon such terms as the Governor may deem proper, but it shall identify the felony or felonies and the authority to whom the information is to be delivered and shall state such other terms as the Governor may require under which the reward is payable. (1967, c. 165, s. 2.)

§ 15-54. Officer entitled to reward. — Any sheriff or other officer who shall make an arrest of any person charged with crime for whose apprehension a reward has been offered is entitled to such reward, and may sue for and recover the same in any court in this State having jurisdiction: Provided, that no reward shall be paid to any sheriff or other officer for any arrest made for a crime committed within the county of such sheriff or officer making such arrest. (1913, c. 132; 1917, c. 8; C. S., s. 4555.)

Local Modification. — Wake: C. S., s. 4555.

Editor's Note. — See 13 N.C.L. Rev. 15, as to whom an offer may be made.

Law Giving Reward to Sheriff Valid. — In view of this section and § 15-53, Public Local Laws of 1925, c. 318, s. 2, providing that the board of commissioners should pay a reward to the sheriff or other police officers for arresting violators of the prohibition law, is a valid exercise of the police power of the State and not contrary to public policy. Hutchins v. Board of Comm'rs, 193 N.C. 659, 137 S.E. 711 (1927).

Applied in State v. Virgil, 276 N.C. 217, 172 S.E.2d 28 (1970).

ARTICLE 8.

Extradition.

§§ 15-55 to 15-84: Transferred to G.S. 15A-721 to 15A-750 by Session Laws 1973, c. 1286, s. 16.

Cross Reference. — See Editor's note following the analysis to this Chapter.

ARTICLE 9.

Preliminary Examination.

§§ 15-85 to 15-101: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to first appearance before a district court judge, see §§ 15A-601 through 15A-606. As to probable-cause hearing, see §§ 15A-611 through 15A-614.

ARTICLE 10.

Bail.

§§ 15-102, 15-103: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to bail, see §§ 15A-531 through 15A-547.

§ 15-103.1: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Cross Reference. — For present provisions as to pretrial release, see §§ 15A-531 through 15A-535.

§ 15-103.2: Repealed by Session Laws 1975, c. 166, s. 26.

Cross Reference. — See Editor's note following the analysis to Chapter 15A.

§ 15-104: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross Reference. — See Editor's note following the analysis to this Chapter.

§ 15-104.1: Repealed by Session Laws 1975, c. 166, s. 26.

Cross Reference. — See Editor's note following the anaylsis to Chapter 15A.

§§ 15-105 to 15-107: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross Reference. — See Editor's note following the analysis to this Chapter.

§ 15-107.1: Repealed by Session Laws 1975, c. 166, s. 26.

Cross Reference. — See Editor's note following the analysis to Chapter 15A.

§§ 15-108, 15-109: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross Reference. — See Editor's note following the analysis to this Chapter.

ARTICLE 11.

Forfeiture of Bail.

§§ 15-110 to 15-124: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Cross Reference. — For present provisions as to forfeiture of bail, see § 15A-544.

Editor's Note. — Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

ARTICLE 12.

Commitment to Prison.

§ 15-125: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to commitment to detention facility pending trial, see § 15A-521.

§ 15-126. Commitment to county jail. — All persons committed to prison before conviction shall be committed to the jail of the county in which the examination is had, or to that of the county in which the offense is charged to have been committed: Provided, if the jails of these counties are unsafe, or injurious to the health of prisoners, the committing magistrate may commit to the jail of any other convenient county. And every sheriff or jailer to whose jail any person shall be committed by any court or magistrate of competent jurisdiction shall receive such prisoner and give a receipt for him, and be bound for his safekeeping as prescribed by law. (1868-9, c. 178, subch. 2, s. 33; Code, s. 1164; Rev., s. 3231; C. S., s. 4598; 1973, c. 1286, s. 26; 1975, c. 166, s. 25.)

Editor's Note. — Session Laws 1975, c. 166, s. 25, effective Sept. 1, 1975, reinstated this section, which was repealed by Session Laws 1973, c. 1286, s. 26, effective Sept. 1, 1975. See Editor's note following the analysis to Chapter 15A.

§ 15-127: Repealed by Session Laws 1973, c. 1286, s. 26.

ARTICLE 13.

Venue.

§ 15-128: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to venue, see §§ 15A-131 through 15A-135.

§ 15-129. In offenses on waters dividing counties. — When any offense is committed on any water, or watercourse whether at high or low water, which water or watercourse, or the sides or shores thereof, divides counties, such offense may be dealt with, inquired of, tried and determined, and punished at the discretion of the court, in either of the two counties which may be nearest to the place where the offense was committed. (R. C., c. 35, s. 24; Code, s. 1193; Rev., s. 3234; C. S., s. 4601; 1973, c. 1286, s. 26; 1975, c. 166, s. 25.)

Editor's Note. — Session Laws 1975, c. 166, reinstated this section, which was repealed by Session Laws 1973, c. 1286, s. 26. See Editor's note following the analysis to Chapter 15A.

§ 15-130. Assault in one county, death in another. — In all cases of felonious homicide when the assault has been made in one county within the State, and the person assaulted dies in any other county thereof, the offender shall be indicted and punished for the crime in the county wherein the assault was made. (1831, c. 22, s. 1; R. C., c. 35, s. 27; Code, s. 1196; Rev., s. 3235; C. S., s. 4602.)

No New Offense Created by Section. — This section received a judicial construction in State v. Dunkley, 25 N.C. 116 (1842), and it was held that it did not create any new offense, but

merely removed a difficulty which existed as to the place of the trial. State v. Hall, 114 N.C. 909, 19 S.E. 602 (1894).

This section and § 15-131 were part of Chapter 22 of the Public Laws 1831 and hence this construction applies equally to § 15-131. — Ed. note.

For meaning of "assault," see note under § 15-131.

§ 15-131. Assault in this State, death in another. — In all cases of felonious homicide, when the assault has been made within this State, and the person assaulted dies without the limits thereof, the offender shall be indicted and punished for the crime in the county where the assault was made, in the same manner, to all intents and purposes, as if the person assaulted had died within the limits of this State. (1831, c. 22, s. 2; R. C., c. 35, s. 28; Code, s. 1197; Rev., s. 3236; C. S., s. 4603.)

Cross Reference. — See also § 15A-134.

Section Is Valid. — The validity of sections similar to this seems to be undisputed, and indeed it has been held in many jurisdictions that such legislation is but in affirmance of the common law. State v. Hall, 114 N.C. 909, 19 S.E. 602 (1894).

Meaning of "Assault". — The assault mentioned in this section and the preceding section evidently means not a mere attempt, but such an injury inflicted in this State as results in death in another state. State v. Hall, 114 N.C. 909, 19 S.E. 602 (1894).

Acts Causing Death Must Take Place in State. — This section plainly contemplates that every part of the offense, except the death, must have occurred in this State. State v. Hall, 114 N.C. 909, 19 S.E. 602 (1894).

Shooting Person in Adjoining State. — See § 15-132 and note thereto.

§ 15-132. Person in this State injuring one in another. — If any person, being in this State, unlawfully and willfully puts in motion a force from the effect of which any person is injured while in another state, the person so setting such force in motion shall be guilty of the same offense in this State as he would be if the effect had taken place within this State. (1895, c. 169; Rev., s. 3237; C. S., s. 4604.)

Cross Reference. — See also § 15A-134.

Editor's Note. — This section was passed in 1895 as a result of the decision in State v. Hall, 114 N.C. 909, 19 S.E. 602 (1894). In that case the defendants while in North Carolina shot across the State line and killed a person in Tennessee and being indicted for murder in North Carolina it was held that they were not guilty of the crime charged in the absence of a statute like the present. Section 15-131 was discussed and held not applicable since the stroke producing death was given not in North Carolina but in Tennessee.

§ 15-133. In county where death occurs. — If a mortal wound is given or other violence or injury inflicted or poison is administered on the high seas or land, either within or without the limits of this State, by means whereof death ensues in any county thereof, the offense may be prosecuted and punished in the county where the death happens. (1891, c. 68; Rev., s. 3238; C. S., s. 4605.)

Cross Reference. — See also § 15A-134.

Section Constitutional. — This section is constitutional and applies to foreigners as well as to citizens of this State who have inflicted mortal wounds elsewhere. State v. Caldwell, 115 N.C. 794, 20 S.E. 523 (1894).

§§ 15-134 to 15-136: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to venue, see §§ 15A-131 through 15A-135.

ARTICLE 14.

Presentment.

§§ 15-137 to 15-139: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to indictments and related instruments, see §§ 15A-641 through 15A-646.

ARTICLE 15.

Indictment.

§§ 15-140 to 15-143: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross Reference. — For present provisions as to indictments, see §§ 15A-641 through 15A-646.

§ 15-144. Essentials of bill for homicide. — In indictments for murder and manslaughter, it is not necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person accused, and the county of his residence, the date of the offense, the averment "with force and arms," and the county of the alleged commission of the offense, as is now usual, it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law; and it is sufficient in describing manslaughter to allege that the accused feloniously and willfully did kill and slay (naming the person killed), and concluding as aforesaid; and any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder or manslaughter, as the case may be. (1887, c. 58; Rev., s. 3245; C. S., s. 4614.)

Cross References. — As to homicide generally, see §§ 14-17, 14-18 and notes thereto. As to verdict in prosecution for homicide, see § 15-172 and the note thereto.

History of Section. — See State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973); State v. Watkins, 283 N.C. 17, 194 S.E.2d 800, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (1973).

Section Constitutional. — The power of the legislature to prescribe the form of indictment for murder is upheld in State v. Moore, 104 N.C. 743, 10 S.E. 183 (1889); State v. Brown, 106 N.C. 645, 10 S.E. 870 (1890); State v. Arnold, 107 N.C. 861, 11 S.E. 990 (1890).

An indictment must be sufficient in form to allege murder and support a conviction of murder in the first degree under this section. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652, death sentence vacated, 409 U.S. 1004, 93 S. Ct. 453, 34 L. Ed. 2d 295 (1972).

This section is an abbreviated form for a bill of indictment for murder. State v. Puckett, 211 N.C. 66, 189 S.E. 183 (1937).

"Willfully" Not Necessary in Indictment for Murder. — The word "willfully" is not essential to the validity of an indictment for murder, neither at common law nor under this section. State v. Kirkman, 104 N.C. 911, 10 S.E. 312 (1889); State v. Harris, 106 N.C. 682, 11 S.E. 377 (1890); State v. Arnold, 107 N.C. 861, 11 S.E. 990 (1890).

What Is Sufficient under Section. — This section declares an indictment containing certain words "sufficient," but it does not make those words essential, nor by any reasonable construction can it be held to make technical and "sacramental" words which were not theretofore necessary in indictments for murder. State v. Arnold, 107 N.C. 861, 11 S.E. 990 (1890).

An indictment in the form prescribed by this section is sufficient. State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972).

A bill of indictment drawn in the words of this section was sufficient to support a conviction of murder in the first degree. State v. Davis, 290 N.C. 511, 227 S.E.2d 97 (1976).

Same—Form of Indictment Set Out. — The following is full and sufficient in the body of an indictment for murder: "The jurors for the State on their oaths present that A.B., in the county of E., did feloniously, and of malice aforethought, kill and murder C.D." And it is sufficient in an indictment for manslaughter to follow the same form, omitting the words "and

with malice aforethought" and substituting "slay" in the stead of the word "murder." These forms contain, in the words of the statute, "every averment necessary to be proved." State v. Arnold, 107 N.C. 861, 11 S.E. 990 (1890). This form also approved in State v. Southern Ry., 125 N.C. 666, 34 S.E. 527 (1899).

An indictment charging the essential facts of murder as required by this section is sufficient to sustain the court's charge based upon the evidence in the case relative to murder committed in the perpetration of robbery or other felony. State v. Fogleman, 204 N.C. 401, 168 S.E. 536 (1933).

Statements Not Necessary. — An indictment is not defective for failure to allege whether the person killed was a man or woman, or whether the mortal wound was inflicted by poisoning, stabbing or shooting. State v. Pate, 121 N.C. 659, 28 S.E. 354 (1897).

It is not necessary that an indictment for murder committed in the attempt to perpetrate larceny should contain a specific allegation of the attempted larceny, such allegation not having been necessary in indictments prior to the adoption of the section. State v. Covington, 117 N.C. 834, 23 S.E. 337 (1895).

The omission of the word "wound" in an indictment for murder was held not fatal, long before the adoption of the present short form of indictment for murder under this section. State v. Rinehart, 75 N.C. 52 (1876); State v. Ratliff, 170 N.C. 707, 86 S.E. 997 (1915).

An indictment of murder in the first degree need not allege deliberation and premeditation, an indictment in the form prescribed by this section being sufficient. State v. Kirksey, 227 N.C. 445, 42 S.E.2d 613 (1947).

An indictment for murder need not allege deliberation and premeditation. State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972).

A bill of indictment, drawn in the statutory form as required by this section, includes the charge of murder committed in the perpetration of a robbery, without a specific allegation or count to that effect. State v. Smith, 223 N.C. 457, 27 S.E.2d 114 (1943).

It is not required that an indictment allege that a murder was committed in the perpetration of a robbery or other felony in order that it be sufficient to support a verdict of murder in the first degree. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652, death sentence vacated, 409 U.S. 1004, 93 S. Ct. 453, 34 L. Ed. 2d 295 (1972).

A murder indictment should not fail to charge malice, as it is a necessary allegation in a murder indictment. State v. Moore, 284 N.C. 485, 202 S.E.2d 169 (1974).

Indictment Will Support Conviction of First- or Second-Degree Murder or Manslaughter. — An indictment for homicide in the words of this section will support a verdict of murder in the first degree, murder in the second degree, or manslaughter. State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973).

An indictment in the form declared by this section to be sufficient to charge the offense of murder is also sufficient to sustain judgment entered upon defendant's plea of nolo contendere to the lesser included offense of voluntary manslaughter. State v. Young, 18 N.C. App. 576, 197 S.E.2d 237 (1973).

The essentials for bills of indictment charging homicide make no distinction between an indictment charging murder in the first degree from one charging murder in the second degree. State v. Castor, 28 N.C. App. 336, 220 S.E.2d 819 (1976).

Killing with Malice, Premeditation and Deliberation or in Perpetration of Felony May Be Shown. — An indictment for murder in the form prescribed by this section is sufficient to support a verdict of guilty of murder in the first degree if the jury finds from the evidence beyond a reasonable doubt that defendant killed the deceased with malice and after premeditation and deliberation or in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Moore, 284 N.C. 485, 202 S.E.2d 169 (1974); State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L. Ed. 2d 1208 (1976).

A bill is sufficient to sustain a verdict of murder in the first degree if the jury should find from the evidence, beyond a reasonable doubt, that the killing was done with malice and after premeditation and deliberation; or in the perpetration or attempt to perpetrate a robbery. State v. Haynes, 276 N.C. 150, 171 S.E.2d 435 (1970).

Felony murder may be proven by State although bill of indictment charges murder in statutory language of this section. State v. Lee, 277 N.C. 216, 176 S.E.2d 751 (1970).

An indictment under this section will support a verdict of murder in the first degree if the jury finds beyond a reasonable doubt that an accused killed with malice and after premeditation and deliberation or in the perpetration or attempted perpetration of any arson, rape, robbery, burglary or other felony the commission of which creates any substantial foreseeable human risk and actually results in loss of life. State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976).

A felony murder may be proven by the State under the statutory language of this section. State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976).

State May Show Homicide in Perpetration of Rape. — Under an indictment for murder in the first degree in the usual form under this section, the State is entitled to introduce evidence that defendant committed the homicide

in the perpetration of, or attempt to perpetrate rape, it being incumbent upon defendant if he desires more definite information to request a bill of particulars. State v. Grayson, 239 N.C. 453, 80 S.E.2d 387 (1954); State v. Scales, 242 N.C. 400, 87 S.E.2d 916 (1955).

Bill of Particulars. — If a defendant is charged with murder in the first degree by bill of indictment drawn under this section, and desires to know whether the State relies on proof the killing was done with premeditation and deliberation, or in the perpetration or attempt to perpetrate a robbery, he should apply for a bill of particulars. State v. Haynes, 276 N.C. 150, 171 S.E.2d 435 (1970). As to bill of particulars, see § 15A-925; State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L. Ed. 2d 1208 (1976).

Indictment Not Quashed Because Grand Jury Heard Hearsay Testimony. — Indictment will not be quashed on the ground that some of the testimony of the qualified witness heard by the grand jury may have been hearsay and incompetent. State v. Cade, 268 N.C. 438, 150 S.E.2d 756 (1966).

Variance between Allegata and Probata. — Where indictment charged capital felony of murder in the language of this section and contained every necessary averment, proof that murder was committed in the perpetration of felony constituted no variance between allegata and probata. State v. Mays, 225 N.C. 486, 35 S.E.2d 494 (1945); State v. Grayson, 239 N.C. 453, 80 S.E.2d 387 (1954); State v. Scales, 242 N.C. 400, 87 S.E.2d 916 (1955).

An indictment for homicide in the language of this section is sufficient and proof that the murder was committed in the perpetration of a felony constitutes no variance. State v. Crawford, 260 N.C. 548, 133 S.E.2d 232 (1963).

Variance in Time Not Fatal. — Where an indictment for murder charged the killing to have taken place December 5 and the evidence showed that, while the deceased was wounded on that day, he died three days thereafter, and before the bill of indictment was found. It was held that the variance was not fatal. State v. Pate, 121 N.C. 659, 28 S.E. 354 (1897).

Reading to Jury Not Prejudicial. — An indictment closely following this section could not have prejudiced defendant by its being read in the presence of the jury, even though it is true that in some instances bills of indictment charging murder will contain the words "premeditation and deliberation," the elements that distinguish murder in the first degree from murder in the second degree. State v. Castor, 28 N.C. App. 336, 220 S.E.2d 819 (1976).

Indictment under Section Held to Give Full Information of Crime. — Where an indictment was drawn according to this section the defendant was given full information of the crime on which he was being tried. There was nothing indefinite or uncertain about the bill of indictment. It was in the alternative, but this was merely two counts in one bill of indictment. State v. Puckett, 211 N.C. 66, 189 S.E. 183 (1937).

Where, in addition to the murder indictment, defendant was also charged in another bill of indictment with the willful discharge of a firearm into occupied property, the two indictments, when read together, informed defendant of the crimes with which he was charged. State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976).

Indictment Sufficient to Charge Conspiracy to Murder. — See State v. Graham, 24 N.C. App. 591, 211 S.E.2d 805 (1975).

Applied in State v. Kirkman, 208 N.C. 719, 182 S.E. 498 (1935); State v. Dills, 210 N.C. 178, 185 S.E. 677 (1936); State v. Hudson, 218 N.C. 219, 10 S.E.2d 730 (1940); State v. Horner, 248 N.C. 342, 103 S.E.2d 694 (1958); State v. Bailey, 254 N.C. 380, 119 S.E.2d 165 (1961); State v. Johnson, 256 N.C. 449, 124 S.E.2d 126 (1962); State v. McGirt, 263 N.C. 527, 139 S.E.2d 640 (1965); State v. Davis, 266 N.C. 633, 146 S.E.2d 646 (1966); State v. White, 271 N.C. 391, 156 S.E.2d 721 (1967); State v. Godwin, 271 N.C. 571, 157 S.E.2d 6 (1967); State v. Crump, 277 N.C. 573, 178 S.E.2d 366 (1971); State v. Allred, 279 N.C. 398, 183 S.E.2d 553 (1971); State v. Fields, 279 N.C. 460, 183 S.E.2d 666 (1971); State v. Roberts, 279 N.C. 500, 183 S.E.2d 647 (1971); State v. Smith, 279 N.C. 505, 183 S.E.2d 649 (1971); State v. Gladden, 279 N.C. 566, 184 S.E.2d 249 (1971); State v. Stimpson, 279 N.C. 716, 185 S.E.2d 168 (1971); State v. Jones, 280 N.C. 60, 184 S.E.2d 862 (1971); State v. Tart, 280 N.C. 172, 184 S.E.2d 842 (1971); State v. Bolin, 281 N.C. 415, 189 S.E.2d 235 (1972); State v. Watkins, 283 N.C. 17, 194 S.E.2d 800 (1973); State v. McLamb, 20 N.C. App. 164, 200 S.E.2d 838 (1973); State v. Castor, 285 N.C. 286, 204 S.E.2d 848 (1974); State v. Glenn, 22 N.C. App. 6, 205 S.E.2d 352 (1974); State v. Boyd, 287 N.C. 131, 214 S.E.2d 14 (1975); State v. Shrader, 290 N.C. 253, 225 S.E.2d 522 (1976); State v. Johnson, 28 N.C. App. 265, 220 S.E.2d 834 (1976).

Quoted in State v. Patterson, 284 N.C. 190, 200 S.E.2d 16 (1973); State v. Perry, 291 N.C. 586, 231 S.E.2d 262 (1977).

Cited in State v. Thornton, 211 N.C. 413, 190 S.E. 758 (1937); State v. Godwin, 211 N.C. 419, 190 S.E. 761 (1937); State v. Smith, 221 N.C. 278, 20 S.E.2d 313 (1942); State v. Roman, 235 N.C. 627, 70 S.E.2d 857 (1952); State v. Gay, 251 N.C. 78, 110 S.E.2d 458 (1959); State v. Jones, 254 N.C. 450, 119 S.E.2d 213 (1961); State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963); State v. Shaw, 263 N.C. 99, 138 S.E.2d 772 (1964); State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965); State v. Swann, 272 N.C. 215, 158 S.E.2d 80 (1967); State v. Parker, 279 N.C. 168, 181 S.E.2d 432 (1971); State v. Bunn, 283 N.C. 444, 196 S.E.2d 777

(1973); State v. Davis, 284 N.C. 701, 202 S.E.2d 770 (1974); State v. Luther, 285 N.C. 570, 206 S.E.2d 238 (1974); State v. Clark, 22 N.C. App. 81, 206 S.E.2d 252 (1974); State v. Ward, 286 N.C. 304, 210 S.E.2d 407 (1974); State v. Peterson, 24 N.C. App. 404, 210 S.E.2d 883 (1975); State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975); State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975); State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975); State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975); State v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975); State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976); State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976); State v. Cox, 289 N.C. 414, 222 S.E.2d 246 (1976); State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976); State v. Taylor, 290 N.C. 220, 226 S.E.2d 23 (1976); State v. Cawthorne, 290 N.C. 639, 227 S.E.2d 528 (1976); State v. Chavis, 30 N.C. App. 74, 226 S.E.2d 398 (1976); State v. Jones, 291 N.C. 681, 231 S.E.2d 252 (1977); State v. Hopper, 292 N.C. 580, 234 S.E.2d 580 (1977).

§ 15-144.1. Essentials of bill for rape. — (a) In indictments for rape it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the offense of rape was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing rape to allege that the accused person unlawfully, willfully, and feloniously did ravish and carnally know the victim, naming her, by force and against her will and concluding as is now required by law. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for rape in the first degree and will support a verdict of guilty of rape in the first degree, rape in the second degree, assault with intent to commit rape or assault on a female.

(b) If the victim is a virtuous female child under the age of 12 years it is sufficient to allege that the accused unlawfully, willfully, and feloniously did carnally know and abuse a virtuous child under 12, naming her, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for the rape of a virtuous female child under the age of 12 years and all lesser included offenses. (1977, c. 861, s. 1.)

§ 15-145. Form of bill for perjury. — In every indictment for willful and corrupt perjury it is sufficient to set forth the substance of the offense charged upon the defendant, and by what court, or before whom, the oath was taken (averring such court or person to have competent authority to administer the same), together with the proper averments to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceedings, either in law or equity, other than aforesaid, and without setting forth the commission or authority of the court or person before whom the perjury was committed. In indictments for perjury the following form shall be sufficient, to wit:

The jurors for the State, on their oath, present, that A.B., of . . . . . County, did unlawfully commit perjury upon the trial of an action in . . . . . court, in . . . . . County, wherein . . . . . was plaintiff and . . . . . was defendant, by falsely asserting, on oath (or solemn affirmation) (here set out the statement or statements alleged to be false), knowing the said statement, or statements, to be false, or being ignorant whether or not said statement was true. (1842, c. 49, s. 1; R. C., c. 35, s. 16; Code, s. 1185; 1889, c. 83; Rev., ss. 3246, 3247; C. S., s. 4615.)

Cross Reference. — As to perjury generally, see § 14-209 et seq.

In General. — A person charged with perjury must be indicted by the grand jury as the offense is a felony. A trial without an indictment is contrary to N.C. Const., Art. I, § 22. State v. Hyman, 164 N.C. 411, 79 S.E. 284 (1913).

But a defendant certainly can derive no just benefit from the insertion in the charge of the minutiae of what would constitute perjury. The use of such phraseology was indeed always illogical, and the experience of ages has been that it served not so much to enlighten the defendant as to the charge he was to meet, as

to present a network of technicalities which hindered the trial of the cause upon its merits and very often caused a miscarriage of justice. State v. Gates, 107 N.C. 832, 12 S.E. 319 (1890).

And thus the purpose of this section is to render unnecessary useless details and niceties, in charging the offense of perjury, that one time prevailed to the prejudice of the administration of criminal justice. State v. Robertson, 98 N.C. 751, 4 S.E. 511 (1887).

This section dispenses with the necessity of setting forth the record of the indictment, on the trial of which the false oath is alleged to have been taken, and only requires that the substance would be set forth, but it did not dispense with the necessity of making all the averments in an indictment for perjury which were all necessary to be proved, and it is necessary to prove in what court, or before whom, the oath was taken. State v. Lewis, 93 N.C. 581 (1885).

The effect of this section is not to change in any respect the constituent elements of perjury nor the nature or mode of proof. It only relieves the State from charging in the indictment the details, or rather the definition of the offense, and makes it sufficient to allege that the defendant unlawfully committed perjury, charging the name of the action and of the court in which committed, setting out the matter alleged to have been falsely sworn and averring further that the defendant knew such to be false, or that he was ignorant whether or not it was true. State v. Lucas, 244 N.C. 53, 92 S.E.2d 401 (1956).

Section Constitutional. — The form of indictment for perjury prescribed by this section is sufficient and legal. State v. Gates, 107 N.C. 832, 12 S.E. 319 (1890); State v. Peters, 107 N.C. 876, 12 S.E. 74 (1890); State v. Hawley, 186 N.C. 433, 119 S.E. 888 (1923), overruling State v. Cline, 150 N.C. 854, 64 S.E. 591 (1909).

Section Read with § 15-146. — Since the commission of perjury by another is the basic element in the crime of subornation of perjury, it is appropriate to read this section and § 15-146 together. State v. Lucas, 244 N.C. 53, 92 S.E.2d 401 (1956); State v. Lucas, 247 N.C. 208, 100 S.E.2d 366 (1957).

Word "Feloniously" Not Necessary. — In the cases of State v. Shaw, 117 N.C. 764, 23 S.E. 246 (1895) and State v. Bunting, 118 N.C. 1200, 24 S.E. 118 (1896), which were indictments for perjury, it was expressly held that the term "feloniously" was required to make a good bill of indictment for this offense. Both of them, too, were on indictments instituted after the adoption of this section which established the form for indictment for perjury. The court, however, in rendering these decisions, was evidently not advertent to the statute above referred to, for the reason probably that it does not appear in the general Code of 1883, and was, therefore, not called to its attention; the statute having been enacted at a subsequent session and being Chapter 83, Laws of 1889. State v. Harris, 145 N.C. 456, 59 S.E. 115 (1907).

But this section does not make the word "feloniously" a part of the bill, and it does not appear in the form set out, and the same is, therefore, no longer required. State v. Harris, 145 N.C. 456, 59 S.E. 115 (1907); State v. Holder, 153 N.C. 606, 69 S.E. 66 (1910).

Sufficient Averment of Jurisdiction. — The jurisdiction of the justice of the peace of the complaint upon the examination whereof the alleged perjury was committed is sufficiently averred where it is averred, that the justice had power to administer the oath. State v. Davis, 69 N.C. 495 (1873).

Style of Court. — The style of the court before which the perjury is alleged to have been committed must be legally set forth. State v. Street, 5 N.C. 156, 3 Am. Dec. 682 (1807).

Proceedings Not Set Out. — Where an indictment for perjury alleges that the false oath was taken before a justice of the peace upon the trial of a warrant, etc., it is not necessary to set forth the proceedings in which the false oath was alleged to have been made. State v. Roberson, 98 N.C. 751, 4 S.E. 511 (1887).

Indictment Need Not Charge Materiality of False Testimony. — Prior to the adoption of this section it was settled that in indictments for perjury the indictment must charge that the alleged false testimony was material to the issue. See State v. Mumford, 12 N.C. 519 (1828); State v. Davis, 69 N.C. 495 (1873). Since this section was passed, however, it has been repeatedly held that this need not appear in the indictment. State v. Hawley, 186 N.C. 433, 119 S.E. 888 (1923), overruling State v. Cline, 150 N.C. 854, 64 S.E. 591 (1909).

But the averment in a bill that defendant committed perjury includes the necessity for proving that the false testimony was material to the issue. State v. Cline, 146 N.C. 640, 61 S.E. 522 (1908).

Variance Held Fatal. — Where an indictment for perjury charged that the false oath was taken at one term of a court in a trial between A and B and the records of that court showed that at that term there was no trial between these parties, but the record showed that at a term other than the one alleged in the indictment there was such a trial, and the judge allowed this record to be introduced, this was held error, and the variance was fatal. State v. Lewis, 93 N.C. 581 (1885).

Not Quashed for Omissions. — Although an indictment for perjury, which fails to allege that the defendant "knew the said statement to be false," or that "he was ignorant whether or not said statement was false," is defective, the court should not quash it, but the defendant should be held until a proper indictment is had. State v. Flowers, 109 N.C. 841, 13 S.E. 718 (1891).

Surplusage. — Where perjury was alleged to have been committed in the trial of a "suit, controversy, or investigation," without a definite statement of the nature of the proceeding, the words, "suit, controversy, or investigation," under this section, may be regarded as surplusage in a bill of indictment charging perjury, and a motion to quash upon the ground that there was indefiniteness of statement of the nature of the proceeding will not be sustained. State v. Hawley, 186 N.C. 433, 119 S.E. 888 (1923).

An indictment for perjury, alleged to have been committed upon a trial in the court of a justice of the peace, is not defective because it sets out the name of the justice before whom the case was tried. State v. Flowers, 109 N.C. 841, 13 S.E. 718 (1891).

No Change in Proof Required. — This section has merely simplified the form of the indictment for perjury, and the constituent elements of the offense remain unchanged and require the same proof to establish the commission of the crime. State v. Peters, 107 N.C. 876, 12 S.E. 74 (1890); State v. Cline, 146 N.C. 640, 61 S.E. 522 (1908).

Applied in State v. Rhinehart, 209 N.C. 150, 183 S.E. 388 (1936); State v. Wilson, 30 N.C. App. 149, 226 S.E.2d 518 (1976).

Cited in State v. Watkins, 256 N.C. 606, 124 S.E.2d 570 (1962).

§ 15-146. Bill for subornation of perjury. — In every indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit willful and corrupt perjury, it is sufficient to set forth the substance of the offense charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration or any part of any record or proceedings, and without setting forth the commission or authority of the court or person before whom the perjury was committed or was agreed or promised to be committed. (1842, c. 49, s. 2; R. C., c. 35, s. 17; Code, s. 1186; Rev., s. 3248; C. S., s. 4616.)

Form Required to Be Followed. — Since the commission of the crime of perjury is the basic element in the crime of subornation of perjury, it is appropriate to read this section and § 15-145 in reference to each other. And if it be essential to charge the offense of perjury in conformity to the form of indictment prescribed in § 15-145, it would seem equally clear that in an indictment charging subornation of perjury the crime of perjury constituting the basis therefor is required to be set forth in conformity to the form of indictment so prescribed. State v. Lucas, 244 N.C. 53, 92 S.E.2d 401 (1956); State v. Lucas, 247 N.C. 208, 100 S.E.2d 366 (1957).

Allegations Required. — This section requires that an indictment for subornation of perjury should charge that the defendant did unlawfully, willfully, and feloniously procure another to willfully and corruptly commit perjury. State v. Watkins, 256 N.C. 606, 124 S.E.2d 570 (1962).

An indictment under this section should designate the court and the nature of the case wherein the alleged perjury occurred, and set out either the false statement or statements defendant is alleged to have procured another to make, or that the defendant knew said statement or statements to be false, or that he was ignorant as to whether or not such statement or statements were true. State v. Watkins, 256 N.C. 606, 124 S.E.2d 570 (1962).

§ 15-147: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to allegations of previous convictions, see §§ 15A-645 and 15A-928.

§ 15-148. Manner of alleging joint ownership of property. — In any indictment wherein it is necessary to state the ownership of any property whatsoever, whether real or personal, which belongs to, or is in the possession of, more than one person, whether such persons be partners in trade, joint tenants or tenants in common, it is sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others as the case may be; and whenever, in any such indictment, it is necessary to mention, for any purpose whatsoever, any partners, joint tenants or tenants in common, it is sufficient to describe them in the manner aforesaid; and this

provision shall extend to all joint-stock companies and trustees. (R. C., c. 35, s. 19; Code, s. 1188; Rev., s. 3250; C. S., s. 4618.)

Apparent Variance Cured. — Where property is charged in an indictment for larceny as belonging to A and another, and it is proved on the trial to be the property of A and B, a firm well known in the community, the apparent variance is cured by this section. State v. Capps, 71 N.C. 93 (1874).

Where A makes a crop of cotton on the plantation of B, under a verbal agreement that B is to have half of it, it was held that in an indictment for larceny the cotton was properly charged to be the property of A and another. State v. Patterson, 68 N.C. 292 (1873).

Variance Not Cured. — Upon the trial of an indictment for injury to livestock, it was held to be a variance where the property was laid in "L.S. and others," and the proof was that L.S. was the exclusive owner. State v. Hill, 79 N.C. 657 (1878).

Words "and Another or Others" Invalidates. — An indictment for larceny, which charges the thing taken to be the property of J.R.D. "and another or others" is fatally defective under this section. State v. Harper, 64 N.C. 129 (1870).

Quoted in State v. Gallimore, 272 N.C. 528, 158 S.E.2d 505 (1968).

Cited in State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

§ 15-149. Description in bill for larceny of money. — In every indictment in which it is necessary to make any averment as to the larceny of any money, or United States treasury note, or any note of any bank whatsoever, it is sufficient to describe such money, or treasury note, or bank note, simply as money, without specifying any particular coin, or treasury note, or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, or treasury note, or bank note, although the particular species of coin, of which such amount was composed, or the particular nature of the treasury note, or bank note, shall not be proven. (1876-7, c. 68; Code, s. 1190; Rev., s. 3251; C. S., s. 4619.)

Purpose of Section. — An indictment, before 1877, for stealing "money" without further description could not have been sustained, and the legislature, to remedy the difficulty of describing and identifying bank bills, treasury notes, etc., which may be stolen, passed this section. State v. Reese, 83 N.C. 637 (1880).

Amount Should Be Charged. — The term "money," without anything added to make it more definite, is too loose in indictments, and it should be described at least by the amount, as to how many dollars and cents. State v. Reese, 83 N.C. 637 (1880).

Charge Sufficient. — The charge of the theft of "five dollars in money of the value of five dollars" is good under this section and is sustained by the proof of the theft of any kind of coin or treasury or bank notes without proof of the particular kind of coin or treasury or bank notes. State v. Carter, 113 N.C. 639, 18 S.E. 517 (1893).

Inasmuch as money is the measure of values a charge in an indictment of taking "ten dollars in money" is an allegation of taking "the value of ten dollars." State v. Brown, 113 N.C. 645, 18 S.E. 51 (1893).

Variance Allowed. — Where an indictment charged the larceny of "thirty dollars in money," and the proof was that defendant stole "three ten-dollar bills" it was held, no variance. State v. Freeman, 89 N.C. 469 (1883).

Cited in State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

§ 15-150. Description in bill for embezzlement. — In indictments for embezzlement, except when the offense relates to a chattel, it is sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved. (1871-2, c. 145, s. 2; Code, s. 1020; Rev., s. 3252; C. S., s. 4620.)

Cross Reference. — As to embezzlement in general, see § 14-90 et seq. and § 53-129.

Sufficient Description of Property. — The description of the property embezzled, as "one

note for five dollars in money of the value of five dollars," is sufficiently specific. State v. Fain, 106 N.C. 760, 11 S.E. 593 (1890).

Surplusage Which Does Not Vitiate. — An allegation in an indictment for embezzlement that the defendant "did steal, take, carry away" the property alleged to have been embezzled, is surplusage, and will not vitiate an indictment otherwise sufficient. State v. Fain, 106 N.C. 760, 11 S.E. 593 (1890).

Variance. — In a prosecution for embezzlement the failure of proof of embezzlement of the whole sum charged in the bill of indictment does not constitute a fatal variance between allegation and proof where there is proof of embezzlement of a sum less than that charged in the indictment. State v. Dula, 206 N.C. 745, 175 S.E. 80 (1934).

Cited in State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

§ 15-151. Intent to defraud; larceny and receiving. — In any case where an intent to defraud is required to constitute the offense of forgery, or any other offense whatever, it is sufficient to allege in the indictment an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded; and on the trial of such indictment, it shall be sufficient, and shall not be deemed a variance, if there appear to be an intent to defraud the United States, or any state, county, city, town, or parish, or body corporate, or any public officer in his official capacity, or any copartnership or member thereof, or any particular person. The defendant may be charged in the same indictment in several counts with the separate offenses of receiving stolen goods, knowing them to be stolen, and larceny. (1852, c. 87, s. 2; R. C., c. 35, ss. 21, 23; 1874-5, c. 62; Code, s. 1191; Rev., s. 3253; C. S., s. 4621.)

Cross Reference. — As to larceny and receiving stolen goods generally, see § 14-70 et seq.

In General. — An indictment charging the employee with the indictable offense of making a false entry on the books of a bank in which he was employed need not necessarily specify all those whom he has thereby intended to defraud; and where it has named the officers of the bank and a depositor, "and other persons to the jurors unknown," it is sufficient to show that the false entry was entered to deceive the bank examiners in concealing his defalcation, who were present making an examination of his books, both under the common law and the statute. State v. Hedgecock, 185 N.C. 714, 117 S.E. 47 (1923).

A bill of indictment charging the uttering of a forged check which charges all the essential elements of the offense but not specifying to whom checks were uttered is sufficient. State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975).

This section modifies the common law. It is not now necessary to name the injured party where prosecution is based on forgery or other fraud. It is, however, necessary to allege and prove the evil intent when fraud is the foundation for the prosecution. State v. Bissette, 250 N.C. 514, 108 S.E.2d 858 (1959).

Solicitor (Now District Attorney) Need Not Elect Count. — On trial of an indictment for larceny and receiving, etc., the two counts relating to the same transaction and varied to meet the probable proofs, the court will not order the solicitor (now district attorney) to elect upon which count he will proceed. State v. Morrison, 85 N.C. 561 (1881).

General Verdict Correct. — A general verdict of guilty upon an indictment of two counts — one for stealing and the other for receiving stolen goods of a value less than five dollars — is correct and if one count is defective the verdict will be taken upon the good count, and there may be judgment. State v. Bailey, 73 N.C. 70 (1875); State v. Leak, 80 N.C. 403 (1879).

Cited in State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

§ 15-152: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to joinder of offenses and consolidation of indictments, see § 15A-643.

§ 15-153. Bill or warrant not quashed for informality. — Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the

court to proceed to judgment. (37 Hen. VIII, c. 8; 1784, c. 210, s. 2, P. R.; 1811, c. 809, P. R.; R. C., c. 35, s. 14; Code, s. 1183; Rev., s. 3254; C. S., s. 4623.)

I. Nature and Purpose.
II. General Effect.
III. Defects Cured.
A. In General.
B. Omissions and Mistakes.
C. Allegations Differing from Proof.

Cross References.

As to particular defects which do not vitiate, see § 15-155. For examples of sufficient indictments, see the notes under the various sections dealing with particular crimes.

I. NATURE AND PURPOSE.

Editor's Note. — For note on the sufficiency of indictments in statutory language, see 35 N.C.L. Rev. 118 (1956).

Purpose of Section. — As far back as State v. Moses, 13 N.C. 452 (1830), the court, speaking of this section, says: "This law was certainly designed to uphold the execution of public justice, by freeing the courts from those fetters of form, technicality, and refinement, which do not concern the substance of the charge, and the proof to support it. Many of the stages of the law had before called nice objections of this sort a disease of the law, and a reproach to the bench, and lamented that they were bound down to strict and precise precedents.... We think the legislature meant to disallow the whole of them, and only require the substance, that is a direct averment of those facts and circumstances which constitute the crime, to be set forth. It is to be remarked that the act directs the court to proceed to judgment, without regard to two things — one of the form, the other refinement." State v. Hester, 122 N.C. 1047, 29 S.E. 380 (1898). See State v. Barnes, 122 N.C. 1031, 29 S.E. 381 (1898), which uses the same language. See also State v. Hedgecock, 185 N.C. 714, 117 S.E. 47 (1923); State v. Switzer, 187 N.C. 88, 121 S.E. 43 (1924); Ryals v. Carolina Contracting Co., 219 N.C. 479, 14 S.E.2d 531 (1941) (dissenting opinion).

This section and § 15-155 were passed to forbid refinements and technicalities which, without being any aid to the innocent, brought the administration of justice into disrepute. State v. Leeper, 146 N.C. 655, 61 S.E. 585 (1908).

The whole purpose of the law is to administer justice and that law and order and orderly government may at all times be maintained. State v. Walls, 211 N.C. 487, 191 S.E. 232, cert. denied, 302 U.S. 635, 58 S. Ct. 18, 82 L. Ed. 494 (1937).

The purpose of the warrant or indictment is (1) to give the defendant notice of the charge against him to the end that he may prepare his defense and to be in a position to plead former acquittal or former conviction in the event he is again brought to trial for the same offense; (2) to enable the court to know what judgment to pronounce in case of conviction. State v. Dorsett, 272 N.C. 227, 158 S.E.2d 15 (1967).

This section was designed to free the courts from the fetters of form, technicality and refinement not concerned with the substance of the charge. State v. Taylor, 280 N.C. 273, 185 S.E.2d 677 (1972).

This section was enacted to simplify forms of indictment. State v. Russell, 282 N.C. 240, 192 S.E.2d 294 (1972).

The authorities are in unison that an indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. The purpose of such constitutional provisions is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of nolo contendere or guilty, to pronounce sentence according to the rights of the case. State v. Arnold, 285 N.C. 751, 208 S.E.2d 646 (1974).

The purpose of the rule as to variance in an indictment is to avoid surprise and to protect the accused from another prosecution for the same offense. State v. Martin, 29 N.C. App. 17, 222 S.E.2d 718 (1976).

The verdict and judgment were vacated because the warrant was fatally defective. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

But this did not bar further prosecution of the defendant if the solicitor (now district attorney) deemed it advisable. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Quashing Indictments Not Favored. — Quashing indictments is not favored. It releases recognizances and sets the defendant at large where, it may be, he ought to be held to answer upon a better indictment, though allowable, where it will put an end to the prosecution altogether, and advisable where it appears that the court has not jurisdiction, or where the matter charged is not indictable in any form.... It is, therefore, a general rule that no indictment

which charges the higher offenses, as treason or felony or those crimes which immediately affect the public at large, as perjury, forgery, etc., will be thus summarily dealt with. The example is a bad one, and the effect upon the public injurious, to allow the defendant to escape upon matters of form. State v. Colbert, 75 N.C. 368 (1876); State v. Russell, 282 N.C. 240, 192 S.E.2d 294 (1972). See State v. Flowers, 109 N.C. 841, 13 S.E. 718 (1891).

Quashing of indictments and warrants is not favored. State v. Abernathy, 265 N.C. 724, 145 S.E.2d 2 (1965).

Quashal of indictments is not favored where they do not affect the merits of the case. State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976).

A motion to quash is a proper method of testing the sufficiency of the warrant to charge a criminal offense; it is not a means of testing the guilt or innocence of the defendant with respect to a crime properly charged. State v. Tenore, 280 N.C. 238, 185 S.E.2d 644 (1972).

But It Lies Only for Defect Appearing on Face. — While a motion to quash is an appropriate method of testing the sufficiency of the bill of indictment to charge a criminal offense, it lies only for a defect appearing on the face of the warrant or indictment. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Defect Cannot Be Established by Evidence Outside the Record. — The court, in ruling on a motion to quash an indictment is not permitted to consider extraneous evidence; therefore, when the defect must be established by evidence outside the record, the motion must be denied. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

A motion to quash for redundancy in the affidavit portion of a warrant upon which the order of arrest portion is based is addressed to the sound discretion of the trial judge. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Approved Forms Should Be Followed. — This section was enacted to prevent miscarriage of justice, but not to encourage prosecuting officers to try experiments with new forms, or to excuse them from the duty of ascertaining and following those which have been approved by long use or by statute. The object of the statute in disregarding refinements and informalities is to secure trials upon the merits, and solicitors (now district attorneys) will best serve that end by observing approved forms so as not to raise unnecessary questions as to what are refinements and informalities and what are indispensable allegations. State v. Barnes, 122 N.C. 1031, 29 S.E. 381 (1898); State v. Marsh, 132 N.C. 1000, 43 S.E. 828 (1903); State v. Hammonds, 241 N.C. 226, 85 S.E.2d 133 (1954); State v. Russell, 282 N.C. 240, 192 S.E.2d 294 (1972).

Prosecuting officers should ordinarily follow approved forms in drafting bills of indictment so as to avoid raising questions unnecessarily as to what are refinements and what are essential allegations. State v. Taylor, 280 N.C. 273, 185 S.E.2d 677 (1972).

Applied in State v. Teeter, 264 N.C. 162, 141 S.E.2d 253 (1965); State v. Bowden, 272 N.C. 481, 158 S.E.2d 493 (1968); State v. Shipman, 14 N.C. App. 577, 188 S.E.2d 741 (1972); State v. Locklear, 21 N.C. App. 48, 203 S.E.2d 63 (1974); State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975); State v. Hill, 31 N.C. App. 248, 229 S.E.2d 810 (1976).

Quoted in State v. Crutchfield, 5 N.C. App. 586, 169 S.E.2d 43 (1969).

Stated in State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970); State v. Frinks, 19 N.C. App. 271, 198 S.E.2d 570 (1973).

Cited in State v. Greenlee, 272 N.C. 651, 159 S.E.2d 22 (1968).

II. GENERAL EFFECT.

Liberal Construction. — This section has received a very liberal construction, and its efficacy has reached and healed numerous defects in the substance as well as in form of indictment. State v. Smith, 63 N.C. 234 (1869); State v. Carpenter, 173 N.C. 767, 92 S.E. 373 (1917).

Under this section bills and warrants are no longer subject to quashal "by reason of any informality or refinement." State v. Anderson, 208 N.C. 771, 182 S.E. 643 (1935); State v. Dale, 218 N.C. 625, 12 S.E.2d 556 (1940).

This section provides against quashal for mere informality or refinement, and judgments are no longer stayed or reversed for nonessential or minor defects. State v. Davenport, 227 N.C. 475, 42 S.E.2d 686 (1947).

This section has received a very liberal construction. State v. Greer, 238 N.C. 325, 77 S.E.2d 917 (1953); State v. Russell, 282 N.C. 240, 192 S.E.2d 294 (1972); State v. Beach, 283 N.C. 261, 196 S.E.2d 214 (1973).

Since the enactment of this section it has been liberally construed. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

This section does not dispense with requirement that essential elements of offense must be charged. State v. Gibbs, 234 N.C. 259, 66 S.E.2d 883 (1951); State v. Nugent, 243 N.C. 100, 89 S.E.2d 781 (1955); State v. Sossamon, 259 N.C. 374, 130 S.E.2d 638 (1963); State v. Guffey, 265 N.C. 331, 144 S.E.2d 14 (1965); State v. McBane, 276 N.C. 60, 170 S.E.2d 913 (1969); State v. Beach, 283 N.C. 261, 196 S.E.2d 214 (1973); State v. Cannady, 18 N.C. App. 213, 196 S.E.2d 617 (1973); State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

It is an essential of jurisdiction that a criminal offense shall be sufficiently charged in the indictment. State v. Guffey, 265 N.C. 331, 144 S.E.2d 14 (1965).

A charge in a bill of indictment must be

complete in itself, and contain all of the material allegations which constitute the offense charged. State v. Guffey, 265 N.C. 331, 144 S.E.2d 14 (1965).

In order to constitute a valid charge under a statute, the essential elements of the offense must be set forth in the warrant. State v. Williams, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

Where a warrant does not charge that defendant operated a motor vehicle on a public highway, such warrant fails to allege an essential element of the offense as defined in § 20-28(a). State v. Cook, 272 N.C. 728, 158 S.E.2d 820 (1968).

A warrant charging that defendant did "unlawfully and willfully appear off of his premises in a drunken condition" is insufficient to charge the offense of public drunkenness proscribed by § 14-335, since it fails to charge that defendant was in a public place. State v. Williams, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

Plain, Intelligible and Explicit Charge Sufficient. — The current is all one way, sweeping away by degrees "informalities and refinements," until a plain, intelligible and explicit charge is all that is now required in any criminal proceeding. State v. Smith, 63 N.C. 234 (1869); State v. Caylor, 178 N.C. 807, 101 S.E. 627 (1919). See also State v. Everhardt, 203 N.C. 610, 166 S.E. 738 (1932); State v. Howley, 220 N.C. 113, 16 S.E.2d 705 (1941).

If a warrant is sufficiently intelligible and explicit to (1) inform the defendant of the charge he must answer, (2) enable him to prepare his defense, and (3) sustain the judgment, it meets the requirements of this section. State v. Sumner, 232 N.C. 386, 61 S.E.2d 84 (1950).

All that is required in a warrant or bill of indictment, since the adoption of this section, is that it be sufficient in form to express the charge against the defendant in a plain, intelligible, and explicit manner, and to contain sufficient matter to enable the court to proceed to judgment and thus bar another prosecution for the same offense. State v. Hammonds, 241 N.C. 226, 85 S.E.2d 133 (1954); State v. Anderson, 259 N.C. 499, 130 S.E.2d 857 (1963); State v. Hunt, 265 N.C. 714, 144 S.E.2d 890 (1965); Godlock v. Ross, 259 F. Supp. 659 (E.D.N.C. 1966); State v. Pinyatello, 272 N.C. 312, 158 S.E.2d 596 (1968); State v. Clontz, 4 N.C. App. 667, 167 S.E.2d 520 (1969); State v. Hawkins, 19 N.C. App. 674, 199 S.E.2d 746 (1973).

An indictment following substantially the language of the statute is sufficient only when it thereby charges the essential elements of the offense in a plain, intelligible and explicit manner, and if the statutory words fail to do this, they must be supplemented in the indictment by other allegations which explicitly and accurately set forth every essential element of the offense with such exactitude as to leave no doubt in the minds of the accused and the court as to the specific offense intended to be charged. State v. Eason, 242 N.C. 59, 86 S.E.2d 774 (1955); State v. Jordan, 247 N.C. 253, 100 S.E.2d 497 (1957); State v. Sossamon, 259 N.C. 374, 130 S.E.2d 638 (1963); State v. Lackey, 271 N.C. 171, 155 S.E.2d 465 (1967); State v. Cook, 272 N.C. 728, 158 S.E.2d 820 (1968).

A bill of indictment that charges "in a plain, intelligible and explicit manner," under this section, the criminal offense the accused is "put to answer," affords the protection guaranteed by N.C. Const., Art. I, §§ 22, 23. State v. Helms, 247 N.C. 740, 102 S.E.2d 241 (1958).

A warrant sufficient to inform a person of the offense with which he is charged and adequate to protect him against further prosecution for that offense is sufficient. State v. Daniel, 255 N.C. 717, 122 S.E.2d 704 (1961).

A joint indictment of two defendants for murder charged that defendants "of his malice aforethought" committed the act. It was held that the use of the word "his" instead of "their" is insufficient ground for arresting the judgment, informalities and refinements being disregarded if the indictment is sufficient to inform defendants of the charge against them and to enable them to prepare their defense, and to protect them from another prosecution. State v. Linney, 212 N.C. 739, 194 S.E. 470 (1938).

A charge of the receipt by defendant of official ballots, knowing that he had no legal right to them, amounts to a charge of interference with the duty of the county board of elections to safely keep the ballots until time for delivery to the registrars, within the provisions of this section, and the bill of indictment should not have been quashed because it failed to charge the manner in which the election officials were interfered with. State v. Abernethy, 220 N.C. 226, 17 S.E.2d 25 (1941).

A warrant or indictment following substantially the language of the statute is sufficient if and when it thereby charges the essentials of the offense in a plain, intelligible, and explicit manner. If the statutory words fail to do this they must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged. State v. McBane, 276 N.C. 60, 170 S.E.2d 913 (1969); State v. Kelly, 13 N.C. App. 588, 186 S.E.2d 631, rev'd on other grounds, 281 N.C. 618, 189 S.E.2d 163 (1972).

A bill is sufficient if it charges the offense in a plain, intelligible and explicit manner, with averments sufficient to enable the court to proceed to judgment and to bar a subsequent prosecution for the same offense. State v. Taylor, 280 N.C. 273, 185 S.E.2d 677 (1972); State v. Arnold, 285 N.C. 751, 208 S.E.2d 646 (1974).

If an indictment charges the offense in a plain, intelligible and explicit manner and contains

averments sufficient to enable the court to proceed to judgment, and to bar a subsequent prosecution for the same offense, it is sufficient. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

The requirements of this section are met where the indictment sets forth in a plain, intelligible and explicit manner all elements of the crime charged. State v. Page, 32 N.C. App. 478, 232 S.E.2d 460 (1977).

Where the bills of indictment contained allegations sufficient to set forth fully and clearly all essential elements of the offenses charged, denial of defendant's motion to quash on the ground that the bills were "too vague and insufficient, too broad and general" was proper. State v. Coleman, 24 N.C. App. 530, 211 S.E.2d 542 (1975).

This section provides against quashal for informality if the charge be plain, intelligible, and explicit, and sufficient matter appear in the bill to enable the court to proceed to judgment. State v. Russell, 282 N.C. 240, 192 S.E.2d 294 (1972).

The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words. This rule does not apply where the words of the statute do not, without uncertainty or ambiguity, set forth all the essential elements necessary to constitute the offense sought to be charged in the indictment. In such a situation the statutory words must be supplemented in the indictment by other allegations which explicitly and accurately set forth every essential element of the offense with such exactitude as to leave no doubt in the minds of the accused and the court as to the specific offense intended to be charged. State v. Beach, 283 N.C. 261, 196 S.E.2d 214 (1973).

It is not necessary to charge in the precise words of a statute. Under this section, every criminal proceeding by warrant is sufficient for all intents and purposes if it expresses the charge in a plain, intelligible and explicit manner. State v. Bigelow, 19 N.C. App. 570, 199 S.E.2d 494 (1973).

Same — Describing Property. — The description in an indictment must be in the common and ordinary acceptation of property and with certainty sufficient to enable the jury to say that the article proved to be stolen is the same, and to enable the court to see that it is the subject of larceny and also to protect the defendant in any subsequent prosecution for the same offense. State v. Campbell, 76 N.C. 261 (1877); State v. Martin, 82 N.C. 672 (1880); State v. Caylor, 178 N.C. 807, 101 S.E. 627 (1919).

The Supreme Court on its own motion directed an arrest in judgment where indictments for larceny and receiving stolen property merely used the word "meat" in describing property taken, since the description was fatally defective. State v. Nugent, 243 N.C. 100, 89 S.E.2d 781 (1955).

The description of the property alleged to have been stolen must be of sufficient certainty to enable the jury to say that the article proved to be stolen is the same. State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

The description in a warrant or bill of indictment of the goods alleged to have been stolen is sufficient if from it defendant can have a fair and reasonable opportunity to prepare his defense, can avail himself of his conviction or acquittal as a bar to subsequent prosecution for the same offense, and the court is enabled, on conviction, to pronounce sentence according to law. State v. Fuller, 13 N.C. App. 193, 185 S.E.2d 312 (1971).

The description of property alleged to have been stolen must be plain and intelligible, and must correspond to the different forms of existence in which the same article is found. In its raw or unmanufactured state it may be described by its ordinary name, but if it be worked up into some other forms, etc., when stolen, it must be described by the name by which it is generally known. State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

The object of describing property stolen by its quality and quantity, is that it may appear to the court to be of value. State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

The object of describing property stolen by its usual name, ownership, etc., is to enable the defendant to make his defense, and to protect himself against a second conviction. State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

Trend Is Not to Consider Objections Founded on Mere Matter of Form. — The trend of judicial decision and the tendency of legislation is towards the practical view that objections founded upon mere matter of form should not be considered by the courts unless there is reason to believe that a defendant has been misled by the form of the charge, or was not apprised by its terms of the nature of the offense which he was held to answer. State v. Russell, 282 N.C. 240, 192 S.E.2d 294 (1972).

The requirements for a valid indictment are (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial; and (4) to enable the court, on conviction or plea of nolo contendere or guilty to pronounce sentence according to the rights of the case. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970); State v. Hinson, 17 N.C. App. 25, 193 S.E.2d 415 (1972); State v. Beach, 283 N.C. 261, 196 S.E.2d 214 (1973); State v. Reavis, 19 N.C. App. 497, 199 S.E.2d 139 (1973).

Order of Arrest and Affidavit Constitute Warrant. — The order of arrest and the attached affidavit on which it is based are to be read and considered as a single document and together constitute a warrant. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Requirements for Valid Warrant. — A warrant meets minimum standards for validity if it (1) informed the defendant of the charge against him, (2) enabled him to prepare his defense, and (3) enabled the court to proceed to judgment and thereby barred another prosecution for the same offense. State v. Letterlough, 6 N.C. App. 36, 169 S.E.2d 269 (1969).

A valid warrant must charge the offense with sufficient certainty to apprise the defendant of the specific accusation against him so as to enable him to prepare his defense and to protect him from a subsequent prosecution for the same offense, and to enable the court to proceed to judgment. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

A valid warrant of arrest must be based on an examination of the complainant under oath; it must identify the person charged; it must contain directly or by proper reference at least a defective statement of the crime charged; and it must be directed to a lawful officer or to a class of officers commanding the arrest of the accused. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

The prerequisites of the affidavit portion of a warrant properly charging the offense of resisting arrest are set forth in State v. Wiggs, 269 N.C. 507, 153 S.E.2d 84 (1967) and State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965); State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

One of the prerequisites of the affidavit portion of a warrant properly charging the offense of resisting arrest is that the affidavit upon which the order of arrest is based shall identify by name the person alleged to have been resisted, delayed or obstructed, and describe his official character with sufficient certainty to show that he was a public officer within the purview of the statute. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Defects, if any, in the warrant affect its validity as a basis for a criminal prosecution on the charge set forth in the affidavit as well as its validity as a basis for a legal arrest. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

The warrant in the instant case was fatally defective and void because of the combination of failing to identify the assaulted officer by name in the affidavit and failing to order the defendant arrested in the order of arrest. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Where, in the order of arrest portion of the purported warrant, the person ordered arrested was "Dempsey Roy Smith" and not the defendant, "Dempsey Roy Powell," the instrument did not meet the requirement that it be directed to a lawful officer commanding the arrest of the accused. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Merely charging in general terms a breach of the statute and referring to it in the indictment is not sufficient. State v. Sossamon, 259 N.C. 374, 130 S.E.2d 638 (1963); State v. Cook, 272 N.C. 728, 158 S.E.2d 820 (1968).

A warrant or indictment merely charging in general terms a breach of the statute and referring to it in the indictment is not sufficient. State v. McBane, 276 N.C. 60, 170 S.E.2d 913 (1969).

Following Words of Statute. — Where an indictment follows the words of a statute it is sufficient under this section. State v. Harrison, 145 N.C. 408, 59 S.E. 867 (1907); State v. Leeper, 146 N.C. 655, 61 S.E. 585 (1908). See also State v. Davis, 203 N.C. 47, 164 S.E. 732, cert. denied, 203 N.C. 327, 166 S.E. 297, 287 U.S. 645, 53 S. Ct. 91, 77 L. Ed. 558 (1932).

If a warrant avers facts which constitute every element of an offense, it is not necessary that it be couched in the language of the statute. State v. Anderson, 259 N.C. 499, 130 S.E.2d 857 (1963).

Ordinarily, an indictment for a statutory offense is sufficient if the offense is charged in the words of the statute. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

An indictment for a statutory offense is sufficient as a general rule when it charges the offense in the language of the statute. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

Rule Also Applied in Defendant's Favor. — Although the rule prohibiting reliance upon technicalities applies only against defendants, it is in accordance with the spirit of the section that it should be invoked in their favor also, for example as to the form of defendant's objection to the indictment. State v. Wood, 175 N.C. 809, 95 S.E. 1050 (1918).

The use of abbreviations in warrants and indictments is not to be encouraged. State v. Letterlough, 6 N.C. App. 36, 169 S.E.2d 269 (1969).

A warrant and the affidavit upon which it is based will be construed together and will be tested by rules less strict than those applicable to indictments, but, nevertheless, the warrant and the affidavit together must charge facts sufficient to constitute an offense. State v. Williams, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

A warrant must contain directly or by proper reference at least a defective statement of the crime charged. State v. Williams, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

Fatal Defect Cannot Be Cured by Amendment. — Where a warrant or indictment is fatally defective in failing to charge an

essential element of the offense, the defect cannot be cured by amendment. State v. Williams, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

Substance of Indictment May Not Be Amended after Returned as True Bill. — The substance of a bill of indictment used in a trial may not be amended by the court or the solicitor (now district attorney) after it has been returned by the grand jury as a true bill. State v. Haigler, 14 N.C. App. 501, 186 S.E.2d 586 (1972).

An indictment for an offense created by statute must be framed upon the statute, and this fact must distinctly appear upon the face of the indictment itself; and in order that it shall so appear, the bill must either charge the offense in the language of the act, or specifically set forth the facts constituting the same. State v. Gibbs, 234 N.C. 259, 66 S.E.2d 883 (1951).

In a criminal prosecution for a statutory offense, including the violation of a municipal ordinance, the warrant or indictment is sufficient if and when it follows the language of the statute or ordinance and thereby charges the essentials of the offense "in a plain, intelligible, and explicit manner." If the words of the statute fail to do this they must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged. State v. Dorsett, 272 N.C. 227, 158 S.E.2d 15 (1967).

The indictment should not charge a party disjunctively or alternatively, in such a manner as to leave it uncertain what is relied on as the accusation against him. State v. Kelly, 13 N.C. App. 588, 186 S.E.2d 631, rev'd on other grounds, 281 N.C. 618, 189 S.E.2d 163 (1972).

Two or more offenses cannot, in the absence of statutory permission, be alleged alternatively in the same count. State v. Kelly, 13 N.C. App. 588, 186 S.E.2d 631, rev'd on other grounds, 281 N.C. 618, 189 S.E.2d 163 (1972).

Where a statute specifies several means or ways in which an offense may be committed in the alternative, it is bad pleading to allege such means or ways in the alternative; the proper way is to connect the various allegations in the accusing pleading with the conjunctive term "and" not with the word "or." State v. Kelly, 13 N.C. App. 588, 186 S.E.2d 631, rev'd on other grounds, 281 N.C. 618, 189 S.E.2d 163 (1972).

In an indictment it is always the better practice to use the conjunctive "and" rather than the disjunctive "or" where a statute sets forth disjunctively several means or ways by which an offense may be committed. State v. Kelly, 13 N.C. App. 588, 186 S.E.2d 631, rev'd on other grounds, 281 N.C. 618, 189 S.E.2d 163 (1972).

Determination Whether Improper Use of Disjunctive Constitutes Fatal Defect. — Whether the improper use of the disjunctive constitutes a fatal defect in an indictment, or simply poor pleading, depends upon whether such use renders the indictment uncertain. State v. Kelly, 13 N.C. App. 588, 186 S.E.2d 631, rev'd on other grounds, 281 N.C. 618, 189 S.E.2d 163 (1972).

Offense Not Charged in Alternative. — An indictment charging that defendant did unlawfully and willfully build or install a septic tank, without procuring a permit and having the tank inspected as required by law, should not be quashed on the ground that the offense charged is alleged in the alternative, since the words "build" and "install" in the sense in which they were used in the ordinance, the violation of which is alleged in the indictment, are synonymous. State v. Jones, 242 N.C. 563, 89 S.E.2d 129 (1955).

It is not necessary that the indictment refer to a particular statute. Godlock v. Ross, 259 F. Supp. 659 (E.D.N.C. 1966).

Reference to a specific statute, upon which the charge in a warrant or bill of indictment is laid, is not necessary to its validity. State v. Hunt, 265 N.C. 714, 144 S.E.2d 890 (1965).

An indictment need not set forth the specific facts or means by which an accused aided and abetted in the commission of a crime. State v. Beach, 283 N.C. 261, 196 S.E.2d 214 (1973).

The uniform traffic ticket's use as a warrant should not be encouraged. This form lacks that degree of clarity desirable in a warrant which should "express the charge against the defendant in a plain, intelligible, and explicit manner." State v. Letterlough, 6 N.C. App. 36, 169 S.E.2d 269 (1969).

Motion in Arrest of Judgment. — A motion in arrest of judgment after conviction, on the ground that the bill of indictment is defective, will not be granted unless it appears that the bill is so defective that judgment cannot be pronounced upon it. State v. Francis, 157 N.C. 612, 72 S.E. 1041 (1911); State v. Ratliff, 170 N.C. 707, 86 S.E. 997 (1915); State v. Sauls, 190 N.C. 810, 130 S.E. 848 (1925).

And where sufficient matter appears on the face of a bill of indictment to enable the court to proceed to judgment, an arrest of judgment is forbidden by this section. State v. Darden, 117 N.C. 697, 23 S.E. 106 (1895).

A judgment may be arrested only for some error or defect appearing on the face of the record. State v. Eason, 242 N.C. 59, 86 S.E.2d 774 (1955).

A motion in arrest of judgment should have been granted where indictment for resisting a public officer failed to identify the public officer and did not point out even in a general way the manner in which the defendant resisted. State v. Eason, 242 N.C. 59, 86 S.E.2d 774 (1955).

A motion in arrest of judgment was properly denied where the indictment charged substantially in the language of the statute that the defendant drove a motor vehicle without

lights during the period from a half hour after sunset to a half hour before sunrise, and further charged the essential elements of the offense in a plain, intelligible, and explicit manner. State v. Eason, 242 N.C. 59, 86 S.E.2d 774 (1955).

Where the defendant thinks an indictment fails to impart information sufficiently specific as to the nature of the charge he may, before trial, move the court to order that a bill of particulars be filed, and the court will not arrest the judgment after verdict where he attempts to reserve his fire until he takes first the chance of acquittal. State v. Tessnear, 254 N.C. 211, 118 S.E.2d 393 (1961).

Indictment Not Quashed for Mere Informality or Minor Defects. — In light of the provisions of this section, it is the practice of the Supreme Court not to sustain motions to quash bills of indictment for mere informality or minor defects which do not affect the merits of the case. State v. Brady, 273 N.C. 675, 75 S.E.2d 791 (1953).

Indictment under Private Law. — Upon an indictment under a private statute, it is sufficient if the same is set forth by chapter and date and its material provisions incorporated in the indictment. State v. Heaton, 77 N.C. 505 (1877).

Does Not Supply Essential Averments. — By the many adjudications construing this section it has been definitely settled that the section neither supplies nor remedies the omission of any distinct averment of any fact or circumstance which is an essential constituent of the offense charged. State v. Cole, 202 N.C. 592, 163 S.E. 594 (1932). See State v. Tarlton, 208 N.C. 734, 182 S.E. 481 (1935).

Where the indictment contains sufficient matter to enable the court to proceed to judgment a motion to quash for duplicity or indefiniteness is properly refused, and a motion to quash for redundancy or inartificiality is addressed to the sound discretion of the trial court. State v. Davis, 203 N.C. 13, 164 S.E. 737, cert. denied, 287 U.S. 649, 53 S. Ct. 95, 77 L. Ed. 561 (1932); State v. Davenport, 227 N.C. 475, 42 S.E.2d 686 (1947).

Prisoner Is Held Although Indictment Is Defective. — Where the indictment should have been quashed because it was defective in form, the prisoner could still be held for a proper bill under this section. State v. Callett, 211 N.C. 563, 191 S.E. 27 (1937).

Identity of Accused. — For an indictment to be valid, the name of the accused must be alleged in a manner sufficient to identify him with certainty. State v. Bagnard, 24 N.C. App. 566, 211 S.E.2d 471 (1975).

Bill of indictment identifying the accused in the body thereof as "John Doe AKA 'Varne' " was insufficient to charge a defendant named "Vaughn Bagnard" with any offense. State v. Bagnard, 24 N.C. App. 566, 211 S.E.2d 471 (1975).

Identifying Premises Entered. — An indictment for burglary is fatally defective if it fails to identify the premises broken into and entered with sufficient certainty to enable the defendant to prepare his defense and to offer him protection from another prosecution for the same incident. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

The indictment for burglary must specify the particular felony which the defendant is alleged to have intended to commit at the time of the breaking and entering, and it is not sufficient to charge generally an intent to commit an unspecified felony. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

But Felony Need Not Be Set Out as Specifically. — In an indictment for burglary, the felony intended need not be set out as fully and specifically as would be required in an indictment for the actual commission of that felony. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

In specifying the felony intended in an indictment for burglary it is enough to state the offense generally and to designate it by name. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

It is not necessary that an indictment for burglary describe the property stolen by the burglar. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

Applied in State v. Blanton, 227 N.C. 517, 42 S.E.2d 663 (1947); State v. Avery, 236 N.C. 276, 72 S.E.2d 670 (1952); State v. Smith, 240 N.C. 99, 81 S.E.2d 263 (1954); State v. Cruse, 253 N.C. 456, 117 S.E.2d 49 (1960).

Quoted in State v. Wilson, 218 N.C. 769, 12 S.E.2d 654 (1941).

Cited in State v. Beal, 199 N.C. 278, 154 S.E. 604 (1930); State v. Puckett, 211 N.C. 66, 189 S.E. 183 (1937); State v. Miller, 231 N.C. 419, 57 S.E.2d 392 (1950); State v. Felton, 239 N.C. 575, 80 S.E.2d 625 (1954); State v. Bissette, 250 N.C. 514, 108 S.E.2d 858 (1959); State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963); Klopfer v. North Carolina, 368 U.S. 213, 87 S. Ct. 226, 17 L. Ed. 2d 141 (1967).

III. DEFECTS CURED.

A. In General.

Sufficiency of Warrant as to Definiteness. — A charge must be sufficiently definite to enable the defendant to prepare his defense, to enable the court to proceed to judgment and to bar a subsequent prosecution for the same offense. This is the test of the sufficiency of a warrant as to the definiteness of its allegations. State v. Tenore, 280 N.C. 238, 185 S.E.2d 644 (1972).

Superfluous Words Disregarded. — The use of superfluous words in a bill of indictment will be disregarded. State v. Guest, 100 N.C. 410, 6

S.E. 253 (1888); State v. Arnold, 107 N.C. 861, 11 S.E. 990 (1890); State v. Darden, 117 N.C. 697, 23 S.E. 106 (1895); State v. Piner, 141 N.C. 760, 53 S.E. 305 (1906); State v. Wynne, 151 N.C. 644, 65 S.E. 459 (1909); State v. Taylor, 280 N.C. 273, 185 S.E.2d 677 (1972).

Nonessential Allegations May Be Treated as Surplusage. — Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage. State v. Taylor, 280 N.C. 273, 185 S.E.2d 677 (1972).

Waiver of Duplicity in Indictment. — By going to trial without making a motion to quash, defendant waived any duplicity that might have existed in the bill of indictment. State v. Kelly, 13 N.C. App. 588, 186 S.E.2d 631, rev'd on other grounds, 281 N.C. 618, 189 S.E.2d 163 (1972).

Variance Must Be Material to Vitiate. — A variance now, since this section was passed, to be fatal must be substantial and material. State v. Ridge, 125 N.C. 655, 34 S.E. 439 (1899).

Immaterial Words May Be Omitted. — The inadvertent omission of words not affecting the substances of the charge or prejudicing the defendant is not fatal. State v. Burke, 108 N.C. 750, 12 S.E. 1000 (1891), and cases there cited; State v. Ratliff, 170 N.C. 707, 86 S.E. 997 (1915).

Stripping Nonessential Words from Warrant. — A warrant which, stripped of nonessential words, charges defendant with unlawful possession of a quantity of nontaxpaid whiskey, is sufficient to survive a motion to quash. State v. Camel, 230 N.C. 426, 53 S.E.2d 313 (1949).

Incorporation of Essential Information by Reference. — Reference in the second count of an indictment for forgery and for uttering a bad check to the first count, wherein the check was fully described, was sufficient to incorporate by reference essential information necessary to sustain the second count. State v. Russell, 282 N.C. 240, 192 S.E.2d 294 (1972).

Endorsement by Grand Jury Unnecessary. — No endorsement on a bill of indictment by the grand jury is necessary. The record that it was presented by the grand jury is sufficient in the absence of evidence to impeach it. State v. McBroom, 127 N.C. 528, 37 S.E. 193 (1900), is overruled. State v. Sultan, 142 N.C. 569, 54 S.E. 841 (1906); State v. Long, 143 N.C. 670, 57 S.E. 349 (1907).

B. Omissions and Mistakes.

In the Complaint. — The omission of the name of the party in the complaint, against whom a criminal offense is charged, will not of itself invalidate the indictment, when the warrant of arrest thereto attached and referred to contains his name and clearly indicates him as the person charged, the complaint and warrant being read together, and in this way they are sufficient in form to proceed to judgment upon conviction. State v. Poythress, 174 N.C. 809, 93 S.E. 919 (1917).

In Describing a Lease. — In describing a lease the omission of the word "year" after the word "one," is one of the informalities cured by this section. State v. Walker, 87 N.C. 541 (1882).

Incorrect Spelling. — Charging that one committed a crime in the "count aforesaid" instead of "county aforesaid" is an informality which is cured by this section. State v. Smith, 63 N.C. 234 (1869); State v. Evans, 69 N.C. 40 (1873).

Wrong County in Caption. — A misrecital of the proper county in the caption of an indictment furnishes no ground for arrest of judgment, and it seems that such an indictment would have been sufficient even before this section was adopted. State v. Sprinkle, 65 N.C. 463 (1871); State v. Davis, 225 N.C. 117, 33 S.E.2d 623 (1945).

Omission of Caption. — The omission of the caption of a bill of indictment does not constitute ground for arrest of judgment. State v. Davis, 225 N.C. 117, 33 S.E.2d 623 (1945).

Foreman's Failure to Sign Bill. — The report of the grand jury, signed by the foreman, in which was listed the bill against defendant as having been returned a true bill charging a noncapital felony, rendered the foreman's failure to sign the bill itself amendable, and defendant's motion to quash the indictment was properly denied. State v. Spinks, 24 N.C. App. 548, 211 S.E.2d 476 (1975).

Name of Court Incorrect. — Describing the court in which the false oath is alleged to have been taken as "before Joseph Z. Pratt, a justice of the peace, in and for said county," instead of as "a court of a justice of the peace for township A, of Chowan County," is not a substantial variance from the true description and is cured by this section. State v. Davis, 69 N.C. 495 (1873).

Failure to Repeat Names in Charging Scienter. — Where defendants contended that a count in the indictment charging receiving stolen goods was fatally defective in that the names of defendants were not repeated in charging scienter, it was held that the defect was merely an informality or refinement not sufficient to support a quashal of the indictment, the charge being plain, explicit and sufficient to enable the court to proceed to judgment. State v. Whitley, 208 N.C. 661, 182 S.E. 338 (1935).

Ownership of Property in Arson. — In a prosecution under §§ 14-5, 14-65, an indictment stating that the defendant procured another to burn a certain house owned by the defendant and another as tenants in common is sufficient, and the fact that the same parties owned other houses in like capacity is not ground for demurrer or quashal. State v. McKeithan, 203 N.C. 494, 166 S.E. 336 (1932).

Omission of Defendant's Name from Affidavit. — Where defendant's name appears in the warrant which refers to the affidavit,

forming a part thereof, the omission of defendant's name from the affidavit is not a fatal defect. However, an affidavit form which fails to name the person charged is disapproved. State v. St. Clair, 246 N.C. 183, 97 S.E.2d 840 (1957).

Reference to a specific statute upon which the charge in a warrant is laid is not necessary to its validity. State v. Anderson, 259 N.C. 499, 130 S.E.2d 857 (1963).

Or to Statute That Is Not Pertinent. — Where a warrant charges a criminal offense but refers to a statute that is not pertinent, such reference does not invalidate the warrant. State v. Anderson, 259 N.C. 499, 130 S.E.2d 857 (1963).

C. Allegations Differing from Proof.

Names of Parties. — Where the indictment charged an assault, etc., upon "Lila" Hatcher, and the evidence tended to show that it was made upon "Liza" Hatcher, the variance is immaterial. State v. Drakeford, 162 N.C. 667, 78 S.E. 308 (1913).

Where indictment alleged that Thomas R. Robertson was defendant, and the proof was that "Thomas Robertson" was the defendant in said action and there was evidence of the identity of Thomas Robertson and Thomas R. Robertson, this is an informality cured by the section. State v. Hester, 122 N.C. 1047, 29 S.E. 380 (1898).

Where, in an indictment for murder, the assault is charged to have been made on one "N.S. Jarrett," and in subsequent parts of the indictment he is described as "Nimrod S. Jarrett," there is no variance. State v. Henderson, 68 N.C. 348 (1873).

Where the bill of indictment alleges a sale of narcotics to one person and the proof tends to show only a sale to a different person, the variance is fatal. State v. Ingram, 20 N.C. App. 464, 201 S.E.2d 532 (1974).

Name of Article Stolen. — In an indictment for larceny, when the article stolen is described as a "calf" skin and is proven on the trial to be a "kip" skin, there is no variance between the allegation and the proof. State v. Campbell, 76 N.C. 261 (1877).

Object Used in Commission of Assault. — Evidence that defendant committed the assault with a "brick or a rock or what" was not fatal variance with a warrant charging that the assault was committed with a brick, the evidence being sufficient to justify the jury in inferring that the assault was committed with a brick as charged, and there being no element of surprise in the evidence, especially since defendant's defense was that of an alibi. State v. Hobbs, 216 N.C. 14, 3 S.E.2d 431 (1939).

Number of Victims. — In a prosecution for armed robbery, where the indictment referred only to the robbery of a single victim but the trial judge in his charge to the jury referred to another victim, there was no prejudicial variance since there was only a single criminal transaction, and defendant therefore was in no danger of a subsequent prosecution for the robbery of the other victim. State v. Martin, 29 N.C. App. 17, 222 S.E.2d 718 (1976).

§ 15-154: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross Reference. — See Editor's note following the analysis to this Chapter.

§ 15-155. Defects which do not vitiate. — No judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved, nor for omission of the words "as appears by the record," or of the words "with force and arms," nor for the insertion of the words "against the form of the statutes" instead of the words "against the form of the statute," or vice versa; nor for omission of the words "against the form of the statute" or "against the form of the statutes," nor for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened; nor for want of a proper and perfect venue, when the court shall appear by the indictment to have had jurisdiction of the offense. (7 Hen. VIII, c. 8; R. C., c. 35, s. 20; Code, s. 1189; Rev., s. 3255; C. S., s. 4625.)

Cross Reference. — As to other defects which do not vitiate an indictment, see the notes under § 15-153 and under the various sections dealing with the particular crimes.

In General. — The refined technicalities of the procedure at common law, in both civil and criminal cases, have almost entirely, if not quite, been abolished by the statute. State v. Hedgecock, 185 N.C. 714, 117 S.E. 47 (1923).

The modern tendency is against technical objections which do not affect the merits of the case. Hence judgments are not to be stayed or reversed for nonessential or minor defects. State v. Anderson, 208 N.C. 771, 182 S.E. 643 (1935).

The purpose of the rule as to variance in an indictment is to avoid surprise and to protect the accused from another prosecution for the same offense. State v. Martin, 29 N.C. App. 17, 222 S.E.2d 718 (1976).

Section Cures Formal Defects. — This section is intended to cure only formal defects in the indictment after judgment, and not omissions of averments necessary to enable the court to give judgment intelligently. State v. Wise, 66 N.C. 120 (1872).

Nothing in § 15-153 or in this section dispenses with the requirement that the essential elements of the offense must be charged. State v. Sossamon, 259 N.C. 374, 130 S.E.2d 638 (1963); State v. McBane, 276 N.C. 60, 170 S.E.2d 913 (1969); State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

The words "with force and arms" constitute a formal phrase traditionally included in bills of indictment, but have no significance as an element of the specific crime charged in the bill of indictment. State v. Acrey, 262 N.C. 90, 136 S.E.2d 201 (1964); State v. Coleman, 24 N.C. App. 530, 211 S.E.2d 542 (1975).

Locality May Be Omitted. — Formerly failure to allege and prove the locality, appropriate to the forum, was fatal, because essential to the jurisdiction, both in civil and criminal actions, but this has been wisely reversed by this section. State v. Long, 143 N.C. 670, 57 S.E. 349 (1907).

Other Expressions Omitted. — Omitting the statement, that the "prisoner, not having the fear of God before his eyes, but being moved and seduced by the instigations of the devil," and the further omission of an averment that the "deceased was in the peace of God and the State," are not fatal defects. State v. Howard, 92 N.C. 772 (1885).

When Time Need Not Be Charged. — Where time is not of the essence of a crime, "the omission to charge any date" is immaterial by this section, though the allegation of time can do no harm. State v. Taylor, 83 N.C. 602 (1880); State v. Arnold, 107 N.C. 861, 11 S.E. 990 (1890); State v. Peters, 107 N.C. 876, 12 S.E. 74 (1890); State v. Williams, 117 N.C. 753, 23 S.E. 250 (1895).

Where time is not of the essence of the offense and the statute of limitations is not involved, a discrepancy between the date alleged in the indictment and the date shown by the State's evidence is ordinarily not fatal; this rule, however, cannot be used to ensnare a defendant and thereby deprive him of an opportunity to present his defense adequately, as where he relies upon alibi. State v. Lemmond, 12 N.C. App. 128, 182 S.E.2d 636 (1971).

Thus time is not of the essence of carrying a concealed weapon, and it may be shown at a previous time to that alleged in the bill. State v. Spencer, 185 N.C. 765, 117 S.E. 803 (1923).

When time is not of the essence of the offense, leaving out the date does not make the bill of indictment defective, and the crime of receiving stolen goods is not one of the offenses in which time is of the essence. State v. Tessnear, 254 N.C. 211, 118 S.E.2d 393 (1961).

The time named in a bill of indictment is not usually an essential ingredient of the crime charged, and the State may prove that it was in fact committed on some other date. State v. Whittemore, 255 N.C. 583, 122 S.E.2d 396 (1961); State v. Wilson, 264 N.C. 373, 141 S.E.2d 801 (1965).

But this salutary rule, preventing a defendant who does not rely on time as a defense from using a discrepancy between the time named in the bill and the time shown by the evidence for the State, cannot be used to ensnare a defendant and thereby deprive him of an opportunity to adequately present his defense. State v. Whittemore, 255 N.C. 583, 122 S.E.2d 396 (1961); State v. Wilson, 264 N.C. 373, 141 S.E.2d 801 (1965).

Indictment alleging violation of § 14-54 "on or about the . . . day of June, A.D. 1956" was not fatally defective. Time not being of the essence of the offense charged, it was not necessary that the exact date be specified. State v. Andrews, 246 N.C. 561, 99 S.E.2d 745 (1957).

While an appeal from conviction in a recorder's court upon a warrant, charging unlawful possession on a certain date of intoxicating liquors for the purpose of sale, was pending in the superior court, that court had jurisdiction to try defendant on a bill of indictment of a later date charging the same offense, where the record contains nothing to show that the offenses are identical. Time is not of the essence and need not be specified in the indictment. State v. Suddreth, 223 N.C. 610, 27 S.E.2d 623 (1943).

Where the warrant upon which defendant was tried placed the time of the offense as "on or about the 19 day of June, 19 . . .," the failure to insert the year being defendant's only assignment of error, the warrant was not fatally defective. State v. Hawkins, 19 N.C. App. 674, 199 S.E.2d 746 (1973).

The date upon which an allegedly stolen credit card was issued is not necessary to describe the card, is not an essential element of the offense charged, and therefore is not a material fact which the State must allege and prove. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Failure to specify a particular day in an

indictment for abandonment is not fatal especially in view of an instruction that the jury should consider only such evidence as tends to show that the defendant violated the statute after a particular date. State v. Jones, 201 N.C. 424, 160 S.E. 468 (1931).

Time of Birth in Bastardy Proceeding. — Indictment, in a bastardy proceeding, which states that the child was born on August 13, 1941, whereas the evidence was that the birth occurred on November 13, 1940, is not fatally defective. State v. Moore, 222 N.C. 356, 23 S.E.2d 31 (1942).

Conclusion Simplified. — The formal conclusion, "against the peace and dignity of the State," and "against the form of the statute," etc., are not necessary in an indictment for any offense whatever, but are mere surplusage. State v. Kirkman, 104 N.C. 911, 10 S.E. 312 (1889), overruling State v. Joyner, 81 N.C. 534 (1879); State v. Sykes, 104 N.C. 694, 10 S.E. 191 (1889); State v. Peters, 107 N.C. 876, 12 S.E. 74 (1890); State v. Dudley, 182 N.C. 822, 109 S.E. 63 (1921).

That an indictment concludes against the form of the statute instead of statute, is no ground for an arrest of judgment. State v. Smith, 63 N.C. 234 (1869).

An indictment concluding against the "force" instead of the "form" of the statute is sufficient under this section. State v. Davis, 80 N.C. 385 (1879).

Variance. — In a prosecution of defendant for being an accessory before the fact of murder, variance of a few days between the indictment and proof as to the day the murder was committed is not fatal under this section. State v. Gore, 207 N.C. 618, 178 S.E. 209 (1935).

It is to the girl's first act of intercourse with a man when she is under 16 years of age, that the law attaches criminality on the part of the man, and a variance between allegation and proof as to time is not material where no statute of limitations is involved. State v. Trippe, 222 N.C. 600, 24 S.E.2d 340 (1943).

Variance between allegation and proof as to time is not material where no statute of limitations is involved. State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972).

Variance between indictments which charged the defendant with purchasing heroin on July 8 and marijuana on July 11 and evidence which showed that the dates of purchase were reversed was not such a fatal variance as to require a new trial. State v. Knight, 9 N.C. App. 62, 175 S.E.2d 332 (1970).

Where the bill of indictment alleges a sale of narcotics to one person and the proof tends to show only a sale to a different person, the variance is fatal. State v. Ingram, 20 N.C. App. 464, 201 S.E.2d 532 (1974).

Where bill of indictment charges that defendant escaped while lawfully confined in the North Carolina State Prison System in the lawful custody of the North Carolina Department of Correction, and the evidence shows he escaped while assigned by an official of the Department of Correction to work under an employee of the State Highway Commission, the variance is not fatal. State v. Coleman, 24 N.C. App. 530, 211 S.E.2d 542 (1975).

Where a larceny indictment describes the stolen property as "a 1970 Plymouth, Serial # PM14360F239110, the personal property of George Edison Biggs," and the evidence shows the taking by defendant of a 1970 Plymouth which was owned by George Edison Biggs but there is no evidence as to the serial number, the variance is not fatal. State v. Coleman, 24 N.C. App. 530, 211 S.E.2d 542 (1975).

In a prosecution for armed robbery, where the indictment referred only to the robbery of a single victim but the trial judge in his charge to the jury referred to another victim, there was no prejudicial variance since there was only a single criminal transaction, and defendant therefore was in no danger of a subsequent prosecution for the robbery of the other victim. State v. Martin, 29 N.C. App. 17, 222 S.E.2d 718 (1976).

Jurisdiction. — Where the jurisdiction of the court is not ousted on the face of the indictment the position that the court does not have jurisdiction is not available on a plea in abatement. State v. Davis, 203 N.C. 13, 164 S.E. 737, cert. denied, 287 U.S. 649, 53 S. Ct. 95, 77 L. Ed. 561 (1932).

A charge in a murder prosecution in the alternative was not a vitiating defect, and the motion in arrest after verdict was properly denied, such motion being available only for vitiating defects upon the record proper. State v. Puckett, 211 N.C. 66, 189 S.E. 183 (1937).

Variance Raised by Motion for Judgment of Nonsuit. — A fatal variance between the indictment and the proof is properly raised by motion for judgment of nonsuit. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Substance of Indictment May Not Be Amended after Returned as True Bill. — The substance of a bill of indictment used in a trial may not be amended by the court or the solicitor (now district attorney) after it has been returned by the grand jury as a true bill. State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

Amendment of Description of Stolen Property Did Not Invalidate Breaking and Entering Court. — An amendment by the solicitor (now district attorney) of the description of the stolen property in felonious larceny and receiving counts of an indictment, if error, did not invalidate a count charging felonious breaking and entering, and was not prejudicial where the only sentence imposed was for breaking and entering. State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

Applied in State v. Foster, 282 N.C. 189, 192

S.E.2d 320 (1972); State v. Dollar, 292 N.C. 344, 233 S.E.2d 521 (1977).

Quoted in State v. Lilley, 3 N.C. App. 276, 164 S.E.2d 498 (1968); State v. Raynor, 19 N.C. App. 191, 198 S.E.2d 198 (1973).

Cited in State v. Dale, 218 N.C. 625, 12 S.E.2d 556 (1940); State v. Wilson, 218 N.C. 769, 12 S.E.2d 654 (1941); State v. Hall, 251 N.C. 211, 110 S.E.2d 868 (1959); State v. Whitley, 264 N.C. 742, 142 S.E.2d 600 (1965); Klopfer v. North Carolina, 368 U.S. 213, 87 S. Ct. 226, 17 L. Ed. 2d 141 (1967); State v. Greenlee, 272 N.C. 651, 159 S.E.2d 22 (1968).

ARTICLE 15A.

Investigation of Offenses Involving Abandonment and Nonsupport of Children.

§ 15-155.1. Reports to district attorneys of aid to dependent children and illegitimate births. — The Department of Human Resources, by and through the Secretary of Human Resources, shall promptly after June 19, 1959, make a report to each district attorney of superior court, setting out the names and addresses of all mothers who reside in his judicial district and are recipients of aid to dependent children under the provisions of Part 2, Article 3, Chapter 108 of the General Statutes. Such report shall in some manner show the identity of the unwed mothers and shall set forth the number of children born to each said mother. Such a report shall also be made monthly thereafter setting out the names and addresses of all such mothers who reside in the district and who may have become recipients of aid to dependent children since the date of the last report. (1959, c. 1210, s. 1; 1973, c. 47, s. 2; c. 476, s. 138.)

Editor's Note. — Section 5 of the act inserting this Article provides that its provisions shall not apply to the Counties of Gaston and Mecklenburg.

§ 15-155.2. District attorney to take action on report of aid to dependent child or illegitimate birth. — (a) Upon receipt of such reports as are provided for in G.S. 15-155.1, the district attorney of superior court may make an investigation to determine whether the mother of an illegitimate child or who is a recipient of aid to a dependent child or children, has abandoned, is willfully neglecting or is refusing to support and maintain the child within the meaning of G.S. 14-326 or 49-2 or is diverting any part of the funds received as aid to a dependent child to any purpose other than for the support and maintenance of such dependent child in violation of G.S. 108-76.1. In making this investigation the district attorney is authorized to call upon:

(1) Any county board of social services or the Department of Human Resources for personal, clerical or investigative assistance and for access to any records kept by either such board and relating to the matter under investigation and such boards are hereby directed to assist in all investigations hereunder and to furnish all records relating thereto when so requested by the district attorney;

(2) The board of county commissioners of any county within his district for legal or clerical assistance in making any investigation or investigations in such county and such boards are hereby authorized to furnish such assistance in their discretion; and

(3) The district attorney of any inferior court in his district for personal assistance in making any investigation or investigations in the county in which the court is located and any district attorney so called upon is hereby authorized to furnish such assistance by and with the consent of the board of county commissioners of the county in which the court is located, which board shall provide and fix his compensation for assistance furnished.

(b) If following the investigation the district attorney has reasonable grounds

to believe that a violation of G.S. 49-2, 14-326, 108-76.1 or any other criminal offense is being or has been committed, he shall send to the grand jury of the county in which he believes the offense is being or has been committed a bill of indictment charging the commission of the offense. Sole and exclusive jurisdiction of offenses discovered as a result of investigations under this section shall be vested in the superior court notwithstanding any other provisions of law, whether general, special or local. Provided nothing in this Article shall be construed to take from the inferior courts any authority or responsibility now vested in them by existing law or to compel the district attorney to again prosecute a crime that has been disposed of in the inferior courts.

(c) If, however, as a result of the investigation provided for in subsection (a) of this section the district attorney has reason to believe that the mother of the illegitimate child or who is recipient of aid to a dependent child, is a mental defective or suffers from a mental disease, mental disorder or mental illness within the meaning of G.S. 122-35.1, he shall make the affidavit provided for in G.S. 122-42 looking to the commitment of such person to the State hospital pursuant to Article 3, Chapter 122 of the General Statutes. (1959, c. 1210, s. 1; 1969, c. 982; 1973, c. 47, s. 2; c. 476, s. 138.)

Editor's Note. — Former § 122-35.1, referred to in this section, was redesignated § 122-36 by Session Laws 1963, c. 1166, s. 2. The subject matter of former § 122-42 is now covered by § 122-58.3, and the subject matter of former Article 3 of Chapter 122 is now covered by Article 5A of Chapter 122.

G.S. 108-76.1, cited in the introductory language of subsection (a), was not retained in the 1969 revision of Chapter 108.

§ 15-155.3. Disclosure of information by district attorney or agent. — No such district attorney, assistant district attorney, or any attorney-at-law especially appointed to assist said district attorney, or any agent or employee of such district attorney's office shall disclose any information, record, report, case history or any memorandum or document or any information contained therein, which may relate to or be connected with the mother or father of any illegitimate child, or any illegitimate child, unless in the opinion of such district attorney it is necessary or is required in the prosecution and performance of such district attorney's duties as set forth in the provisions of this Article. (1959, c. 1210, s. 4; 1973, c. 47, s. 2.)

ARTICLE 15B.

Pretrial Examination of Witnesses and Exhibits of the State.

§§ 15-155.4, 15-155.5: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to discovery in criminal cases, see §§ 15A-901 through 15A-910.

ARTICLE 16.

Trial before Justice.

§§ 15-156 to 15-158: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross Reference. — See Editor's note following the analysis to this Chapter.

§ 15-159: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Cross References. — For provisions as to commitment to Department of Correction or local confinement facility, see §§ 15A-1352, 15A-1353. For provisions to post-trial relief, see §§ 15A-1411 through 15A-1422.

Editor's Note. — Session Laws 1975, c. 166, s. 25, reinstated this section, which was repealed by Session Laws 1973, c. 1286, s. 26.

See Editor's note following the analysis to Chapter 15A.

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, "Parole" shall not apply to persons sentenced before July 1, 1978."

§§ 15-160, 15-161: Repealed by Session Laws 1973, c. 1286, s. 26.

ARTICLE 17.

Trial in Superior Court.

§ 15-162: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross Reference. — See Editor's note following the analysis to this Chapter.

§ 15-162.1: Repealed by Session Laws 1971, c. 1225.

Editor's Note. — Former § 15-162.1 was enacted by Session Laws 1953, c. 616, and repealed by Session Laws 1969, c. 117. The repealing act was itself repealed, and the section reenacted, by Session Laws 1971, c. 562, which was in turn repealed by Session Laws 1971, c. 1225.

§§ 15-163 to 15-165: Repealed by Session Laws 1967, c. 218, s. 4.

Cross References. — For present provisions as to peremptory challenges in criminal cases, see § 9-21. As to challenge to special venire, see § 9-11.

§ 15-166. Exclusion of bystanders in trial for rape. — In the trial of cases for rape and of assault with the intent to commit rape, the trial judge may, during the taking of the testimony of the prosecutrix, exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case. (1907, c. 21; C. S., s. 4636; 1973, c. 1141, s. 14.)

Exclusion of Bystanders Does Not Deny Right to Public Trial. — There was no merit in the contention of the defendants that the exclusion of bystanders during the testimony of the prosecutrix in a prosecution for rape denied them the right to a public trial. State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967).

§ 15-167. Extension of session of court by trial judge. — Whenever a trial for a felony is in progress on the last Friday of any session of court and it appears to the trial judge that it is unlikely that such trial can be completed before 5:00 P.M. on such Friday, the trial judge may extend the session as long as in his opinion it shall be necessary for the purposes of the case, but he may recess court on Friday or Saturday of such week to such time on the succeeding

Sunday or Monday as, in his discretion, he deems wise. The trial judge, in his discretion, may exercise the same power in the trial of any other cause under the same circumstances, except civil actions begun after Thursday of the last week. The length of time such court shall remain in session each day shall be in the discretion of the trial judge. Whenever a trial judge continues a session pursuant to this section, he shall cause an order to such effect to be entered in the minutes, which order may be entered at such time as the judge directs, either before or after he has extended the session. (1830, c. 22; R. C., c. 31, s. 16; C. C. P., s. 397; Code, s. 1229; 1893, c. 226; Rev., s. 3266; C. S., s. 4637; 1961, c. 181; 1973, c. 1141, s. 15.)

Section Constitutional. — This section is constitutional. State v. Adair, 66 N.C. 298 (1872); State v. Jefferson, 66 N.C. 309 (1872); State v. Taylor, 76 N.C. 64 (1877); State v. Monroe, 80 N.C. 373 (1879). See also National Bank v. Gilmer, 116 N.C. 684, 22 S.E. 2 (1895).

Expiration of Term (Now Session) No Ground for Discharging Jury. — The expiration of a term (now session) of court is no ground for discharging a jury before verdict, for the term (now session) may be continued for the purposes of the trial. State v. McGimsey, 80 N.C. 377 (1879).

Special Term Extended. — Where a trial began on Wednesday of the last week of a special term and the jury had not agreed upon a verdict on Saturday night, it was not improper for the trial judge to open and conduct the regular term on Monday following and to continue the special term into that week for the purpose of receiving the verdict of the jury, since the rights of the parties were not prejudiced thereby. National Bank v. Gilmer, 116 N.C. 684, 22 S.E. 2 (1895).

Daily entries on the journal during the trial of a felony, stating the name of the case and that the court takes a recess "until 9:30 A.M. tomorrow," and the entry next day "court convened at 9:30 A.M. pursuant to recess," etc., in regular form, constitute a sufficient compliance with this section. State v. Harris, 181 N.C. 600, 107 S.E. 466 (1921).

§ 15-168. Justification as defense to libel. — Every defendant who is charged by indictment with the publication of a libel may prove on the trial for the same the truth of the facts alleged in the indictment; and if it shall appear to the satisfaction of the jury that the facts are true, the defendant shall be acquitted of the charge. (R. C., c. 35, s. 26; Code, s. 1195; Rev., s. 3267; C. S., s. 4638.)

Cross Reference. — As to effect of publication in good faith and retraction by a newspaper, see § 99-2.

Truth of Entire Charge Must Be Proved. — Where the matter set out in the indictment is libelous, in order for the defendant to justify he must show that the entire charge imputed to the prosecutor is true. State v. Lyon, 89 N.C. 568 (1883).

General Report Insufficient. — In an indictment for a libel, it is not competent for the defendant to justify by proving that there was, and long had been, a general report in the neighborhood, of the truth of his charge. State v. White, 29 N.C. 180 (1847).

Proof of Specific Charge Necessary. — Proof of the general bad character of an officer in other matters of which he had taken cognizance will not be received to establish the truth of libelous charge in reference to a particular matter. State v. Lyon, 89 N.C. 568 (1883).

Cited in Garrison v. Louisiana, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964).

§ 15-169. Conviction of assault, when included in charge. — On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding; and when such verdict is found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character. (1885, c. 68; Rev., s. 3268; C. S., s. 4639.)

Cross Reference. — As to arbitrary right of jury to convict defendant of lesser degree of the crime charged, see § 15-170 and notes thereto.

Section Refers to Assault Generally. — This section does not describe the kind of assault, but refers to an assault generally and without regard to its degree of punishment under the law. State v. Smith, 157 N.C. 578, 72 S.E. 853 (1911).

When Section Applicable. — This section and § 15-170 are applicable only where there is evidence tending to show that defendant is guilty of a crime of lesser degree than that charged in the indictment. State v. Jackson, 199 N.C. 321, 154 S.E. 402 (1930); State v. Sawyer, 224 N.C. 61, 29 S.E.2d 34 (1944); State v. Jones, 249 N.C. 134, 105 S.E.2d 513 (1958); State v. Stalnaker, 1 N.C. App. 524, 162 S.E.2d 76 (1968); State v. Williams, 275 N.C. 77, 165 S.E.2d 481 (1969); State v. Murry, 277 N.C. 197, 176 S.E.2d 738 (1970); State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976).

This section and § 15-170 are applicable only when there is evidence tending to show that the defendant may be guilty of a lesser offense. State v. Carnes, 279 N.C. 549, 184 S.E.2d 235 (1971); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated and remanded, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976).

This section is not applicable where all the evidence for the State, uncontradicted by any evidence for the defendant, if believed by the jury, shows that the crime charged in the indictment was committed as alleged therein, and there is no evidence tending to support a contention that the defendants, if not guilty of the crime charged in the indictment, were guilty of a crime of less degree. State v. Cox, 201 N.C. 357, 160 S.E. 358 (1931); State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966).

This section is not applicable, where all the evidence for the State, uncontradicted by any evidence for the defendant, if believed by the jury, shows that the crime charged in the indictment was committed as alleged therein. State v. LeGrande, 1 N.C. App. 25, 159 S.E.2d 265 (1968).

What Indictment Includes. — An indictment for any offense against the criminal law includes all lesser degrees of the same crime known to the law; and conviction may be had of the lesser offense when the charge is inclusive of both. State v. Williams, 185 N.C. 685, 116 S.E. 736 (1923).

Same—Murder. — Under an indictment for murder, the defendant may be convicted either of murder in the first degree, murder in the second degree, or manslaughter, and even of assault with a deadly weapon, or simple assault, "if the evidence shall warrant such finding" when he is not acquitted entirely. State v. Williams, 185 N.C. 685, 116 S.E. 736 (1923).

Notwithstanding the provisions of this section, when it is sought to fall back on the lesser offense of assault and battery or assault with a deadly weapon in case the greater offense of murder or manslaughter is not made out, the indictment for murder should be so drawn as necessarily to include an assault and battery or assault with a deadly weapon, or it should contain a separate count to that effect. State v. Rorie, 252 N.C. 579, 114 S.E.2d 233 (1960).

Same—Rape. — An indictment for rape, as this section declares, includes an assault against the person; and where there is evidence sufficient to warrant such finding, the jury may acquit of the felony of rape and return a verdict of guilty of a lesser criminal assault. State v. Jones, 249 N.C. 134, 105 S.E.2d 513 (1958).

An assault with intent to commit rape is a lesser degree of the crime of rape. Therefore, a conviction or acquittal of the former bars a subsequent prosecution of the latter based on the same act or transaction. State v. Birckhead, 256 N.C. 494, 124 S.E.2d 838 (1962).

In a rape case, the trial court did not err in failing to submit the lesser included offenses of assault with intent to commit rape and assault on a female where all the State's evidence tended to show commission of rape and the defendant's evidence was that he had never had intercourse with the prosecutrix nor did he touch her in a manner constituting an assault. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976).

Same—Assault with Intent to Rape. — Under a bill of indictment charging an assault with an intent to commit rape, the lesser offense of assault and battery may be found to have been committed, and in such instance a special issue may be submitted to the jury, if necessary, so that, in accordance with the jury's finding, the court may determine the grade of the punishment. State v. Smith, 157 N.C. 578, 72 S.E. 853 (1911).

Upon an indictment charging an assault with intent to commit rape, defendant may be convicted of an assault upon a female as though separately charged, and motion to dismiss under § 15-173 was properly refused where there was sufficient evidence to convict of an assault. State v. Jones, 222 N.C. 37, 21 S.E.2d 812 (1942).

Upon an indictment for an assault with intent to commit rape, even though the evidence is insufficient to support a verdict, motion for judgment of dismissal or nonsuit cannot be granted, as defendant may be convicted of an assault. State v. Gay, 224 N.C. 141, 29 S.E.2d 458 (1944).

Where in a prosecution under a bill of indictment charging assault with intent to commit rape the evidence discloses an assault

but is insufficient to prove the intent necessary for a conviction of this offense, defendant is entitled to nonsuit on the offense charged, but is not entitled to his discharge, since he may be convicted under the bill of indictment for assault upon a female as though this offense had been separately charged in the bill. State v. Moore, 227 N.C. 326, 42 S.E.2d 84 (1947).

In a prosecution of a defendant for assault with intent to commit rape, nonsuit of the felony does not entitle the defendant to his discharge, but the State may put defendant on trial under the same indictment for assault on a female, defendant being a male over the age of 18. State v. Gammons, 260 N.C. 753, 133 S.E.2d 649 (1963).

Assault is not a less degree of the crime of larceny from the person, and therefore, in a prosecution for larceny, the court is not required to submit the question of defendant's guilt of assault, even though there be evidence thereof. State v. Acrey, 262 N.C. 90, 136 S.E.2d 201 (1964).

Duty of Judge. — Upon the trial under an indictment for murder it is the duty of the trial judge, under supporting evidence, to declare and explain the law upon the less offense of manslaughter, with the burden of proof on defendant, and a statement of the contentions of the parties, etc., with a mere announcement of the principle is insufficient. State v. Hardee, 192 N.C. 533, 135 S.E. 345 (1926).

In a prosecution for armed robbery, where the evidence tends to show that the defendant had committed the armed robbery as alleged in the indictment or that the defendant was innocent, the trial court is not required to instruct the jury on the lesser included offenses of assault with a deadly weapon and simple assault. State v. Martin, 6 N.C. App. 616, 170 S.E.2d 539 (1969).

Where the evidence tended to show that defendant was apprehended by the owner of a filling station after defendant had broken into the station, and that defendant, by the use of a pistol, disarmed such owner and took his rifle, even conceding that defendant took the rifle "for a temporary use" and that he intended thereafter to abandon the rifle at the first opportunity, the evidence conclusively showed that defendant intended to deprive the owner permanently of the rifle or to leave the recovery of the rifle by the owner to mere chance; therefore the evidence disclosed the animus furandi, and did not require the court to submit the question of defendant's guilt of assault as a less degree of the offense of robbery with firearms. State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966).

The trial court in a rape prosecution did not err in failing to submit to the jury the lesser included offenses of assault with intent to commit rape and of assault on a female, where the State's evidence was positive as to each and every element of the crime of rape and there was no conflict in the evidence relating to any element thereof. State v. Flippin, 280 N.C. 682, 186 S.E.2d 917 (1972).

Same—Prosecution for Robbery. — The crime of robbery ex vi termini includes an assault on the person, and in a prosecution for robbery, the court must submit the question of defendant's guilt of assault in those instances where the evidence warrants such finding, even in the absence of a request, and even though the State contends solely for conviction of robbery and the defendant contends solely for complete acquittal. State v. Hicks, 241 N.C. 156, 84 S.E.2d 545 (1954).

If the State's evidence tends to show a completed robbery and there is no conflicting evidence relating to the elements of this offense, the court is not required to submit the question of defendant's guilt of assault, notwithstanding the jury's right to accept the State's evidence in part and reject it in part. State v. Hicks, 241 N.C. 156, 84 S.E.2d 545 (1954).

Same—Failure to Charge upon Lesser Degree. — The error of the judge in failing to charge on the supporting evidence, upon the lesser degree of the crime of rape, under a charge thereof in the indictment, is not cured by the verdict finding that the defendant was guilty of the greater degree of the crime charged in the indictment. State v. Williams, 185 N.C. 685, 116 S.E. 736 (1923).

Where the indictment is sufficient and the evidence is conflicting as to whether the defendant committed highway robbery or an assault with a deadly weapon, the jury may find for the lesser offense, and it is the duty of the trial judge to so instruct the jury, though a special request therefor has not been aptly tendered in writing. State v. Holt, 192 N.C. 490, 135 S.E. 324 (1926); State v. Davis, 242 N.C. 476, 87 S.E.2d 906 (1955).

Where the State's evidence in a prosecution under an indictment for rape, if believed to its fullest extent, established the crime of rape but the defendant testified the intercourse was with the girl's consent and the evidence was conflicting in other respects, it would have been error for the court not to have charged the jury on the lesser offenses. State v. Green, 246 N.C. 717, 100 S.E.2d 52 (1957).

It is a well recognized principle that where one is indicted for a crime, and under the same bill he may be convicted of a lesser degree of the same crime, and there is evidence tending to support the milder verdict, the prisoner is entitled to have this view presented to the jury under a correct charge, and an error in this respect is not cured by a verdict convicting the prisoner of a higher offense, for in such case it cannot be determined that the jury would not have convicted of the lesser crime if the view had been correctly presented by the judge, upon

evidence. State v. Bass, 249 N.C. 209, 105 S.E.2d 645 (1958).

The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. State v. Williams, 275 N.C. 77, 165 S.E.2d 481 (1969); State v. Murry, 277 N.C. 197, 176 S.E.2d 738 (1970); State v. Carnes, 279 N.C. 549, 184 S.E.2d 235 (1971); State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976).

The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is no conflicting evidence relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice. State v. LeGrande, 1 N.C. App. 25, 159 S.E.2d 265 (1968); State v. Norman, 14 N.C. App. 394, 188 S.E.2d 667 (1972).

The court is not required to submit to the jury a lesser included offense when there is no evidence of such lesser included offense. State v. LeGrande, 1 N.C. App. 25, 159 S.E.2d 265 (1968).

The trial judge is not required to submit to the jury a lesser included offense unless there is evidence thereof. State v. Alexander, 13 N.C. App. 216, 185 S.E.2d 302 (1971).

The trial court is not required to charge the jury upon the question of the defendant's guilt of lesser degrees of the crime charged in the indictment when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976).

Where all the evidence points to a graver crime and the jury's verdict is for an offense of a lesser degree, although illogical and incongruous, it will not be disturbed, since it is favorable to accused. State v. Bentley, 223 N.C. 563, 27 S.E.2d 738 (1943); State v. Roy, 233 N.C. 558, 64 S.E.2d 840 (1951).

Effect of Simple Verdict of Guilty. — While this section permits a verdict for an assault when it is embraced in the charge of a greater offense, as rape or other felony, a verdict simply of "guilty," and not specifying a lower offense, is a verdict of guilty of the offense charged in the indictment. State v. Barnes, 122 N.C. 1031, 29 S.E. 381 (1898); State v. Lee, 192 N.C. 225, 134 S.E. 458 (1926).

Applied in State v. Johnson, 227 N.C. 587, 42 S.E.2d 685 (1947); State v. Lunsford, 229 N.C. 229, 49 S.E.2d 410 (1948), treated in note under § 15-170; State v. Matthews, 231 N.C. 617, 58 S.E.2d 625 (1950); State v. Fletcher, 268 N.C. 140, 150 S.E.2d 54 (1966); State v. Hamm, 1 N.C. App. 444, 161 S.E.2d 758 (1968).

Cited in State v. Hairston, 222 N.C. 455, 23 S.E.2d 885 (1943); State v. Gregory, 223 N.C. 415, 27 S.E.2d 140 (1943); State v. Farrell, 223 N.C. 804, 28 S.E.2d 560 (1944); State v. Bell, 228 N.C. 659, 46 S.E.2d 834 (1948), treated under § 15-170; State v. Werst, 232 N.C. 330, 59 S.E.2d 835 (1950); State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965); Bumper v. North Carolina, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968).

§ 15-170. Conviction for a less degree or an attempt. — Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime. (1891, c. 205, s. 2; Rev., s. 3269; C. S., s. 4640.)

Application of Section. — Where there are several counts in a bill, if the jury find the defendant guilty on one count and say nothing in their verdict concerning the other counts, it will be equivalent to a verdict of not guilty as to them. This principle should not be confused with the practice, authorized by this section, which permits the conviction of a "less degree of the same crime" when included in a single count. State v. Hampton, 210 N.C. 283, 186 S.E. 251 (1936).

The State's evidence tended to show that defendant broke and entered the dwelling house in question at night while same was occupied as a sleeping apartment, stole some money and ran when the female occupant discovered him and screamed. Defendant contended, upon supporting evidence, that at the time he was too drunk to know where he was or what he was doing. The court instructed the jury that defendant might be convicted of burglary in the first degree, or of burglary in the second degree, if they found that the room was unoccupied, but if they found defendant was too drunk to form felonious intent they should return a verdict of not guilty. It was held that the instruction required the jury to find the defendant guilty of burglary in the first degree or not guilty, since

there was no evidence that the room was unoccupied, and defendant was entitled to a new trial for error of the court in failing to instruct that defendant might be found guilty of breaking and entering otherwise than burglariously, or of an attempt to commit the offense. State v. Feyd, 213 N.C. 617, 197 S.E. 171 (1938).

This section and § 15-169 are applicable only when there is evidence tending to show that the defendant may be guilty of a lesser offense. State v. Jones, 249 N.C. 134, 105 S.E.2d 513 (1958), commented on in 41 N.C.L. Rev. 118 (1962); State v. Stalnaker, 1 N.C. App. 524, 162 S.E.2d 76 (1968); State v. Williams, 275 N.C. 77, 165 S.E.2d 481 (1969); State v. Murry, 277 N.C. 197, 176 S.E.2d 738 (1970); State v. Carnes, 279 N.C. 549, 184 S.E.2d 235 (1971); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated and remanded, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976); State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976).

When a defendant is indicted for a criminal offense he may be convicted of the charged offense or of a lesser included offense when the greater offense charged in the bill contains all the essential elements of the lesser offense, all of which could be proved by proof of the allegations of fact contained in the indictment. State v. Riera, 276 N.C. 361, 172 S.E.2d 535 (1970); State v. Arnold, 285 N.C. 751, 208 S.E.2d 646 (1974); State v. Aiken, 286 N.C. 202, 209 S.E.2d 763 (1974).

Section 15-169 and this section are applicable only when there is evidence tending to show the defendant may be guilty of an included crime of lesser degree. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

Election by Solicitor. — Upon the return of an indictment sufficient in form to support a conviction of the defendant of either the maximum degree of the offense charged, a lesser degree thereof or a lesser offense, all of the elements of which are included in the crime charged, the solicitor (now district attorney) has the authority to elect not to try the defendant on the maximum degree of the offense charged but to put him on trial for the lesser degree thereof and lesser offenses included therein. The effect of such election by the solicitor (now district attorney), announced in open court, is that of a verdict of not guilty upon the maximum degree of the offense charged, leaving for trial the lesser degree and the lesser included offenses. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971).

Crime of Accessory Included. — The crime of accessory before the fact is included in the charge of the principal crime within the meaning of this section. State v. Bryson, 173 N.C. 803, 92 S.E. 698 (1917), discussing and, it seems, overruling State v. Green, 119 N.C. 899, 26 S.E. 112 (1896); State v. Simons, 179 N.C. 700, 103 S.E. 5 (1920).

The crime of accessory before the fact is included in the charge of the principal crime. Not so, accessory after the fact. State v. Jones, 254 N.C. 450, 119 S.E.2d 213 (1961), commented on in 41 N.C.L. Rev. 118 (1962).

The crime of accessory before the fact to the crime charged in an original indictment is, in North Carolina, a lesser includable offense. Richardson v. Ross, 310 F. Supp. 134 (E.D.N.C. 1970).

The crime of accessory before the fact is a lesser offense of a felony charged in the bill of indictment, and a defendant may be convicted of accessory before the fact on an indictment charging the principal crime. State v. Buie, 26 N.C. App. 151, 215 S.E.2d 401 (1975).

Joinder Mere Surplusage. — Since this section was adopted the joinder in an indictment of a count for a lesser offense, or for an attempt to commit the same, is mere surplusage. State v. Brown, 113 N.C. 645, 18 S.E. 51 (1893).

Equivalent of Verdict of Not Guilty. — When, upon arraignment, or thereafter in open court, and in the presence of the defendant, the solicitor announces the State will not ask for a verdict of guilty of the maximum crime charged but will ask for a verdict of guilty on a designated and included lesser offense embraced in the bill, and the announcement is entered in the minutes of the court, the announcement is the equivalent of a verdict of not guilty on the charge or charges the solicitor (now district attorney) has elected to abandon. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

A defendant may plead guilty to less degrees of the same crimes charged in the indictments against him, and the State may accept such pleas. State v. Woody, 271 N.C. 544, 157 S.E.2d 108 (1967).

Sufficiency of Indictment or Information. — An indictment or information is insufficient to charge the accused with the commission of a minor offense, or one of less degree, unless, in charging the major offense, it necessarily includes within itself all of the essential elements of the minor offense. State v. Chavis, 9 N.C. App. 430, 176 S.E.2d 388 (1970).

An indictment or information is insufficient to charge the accused with the commission of a minor offense or one of less degree unless, in charging the major offense, it necessarily includes within itself all of the essential elements of the minor offense, or sufficiently sets them forth by separate allegations in an added count; but when the indictment or information contains all the essential constituents of the minor offense, it sufficiently alleges that offense. State v. Rorie, 252 N.C. 579, 114 S.E.2d 233 (1960).

Indictment for Attempt or Complete Offense. — An attempt to commit a crime is an indictable offense, and on proper evidence, a conviction may be sustained on a bill of indictment making a specific and sufficient charge thereof, or one which charges a complete offense. State v. Addor, 183 N.C. 687, 110 S.E. 650 (1922); State v. Parker, 224 N.C. 524, 31 S.E.2d 531 (1944).

An attempt to commit a crime is an indictable offense and as a matter of form and on proper evidence, in this jurisdiction, a conviction may be sustained on a bill of indictment making a specific charge, or one which charges a completed offense. State v. Arnold, 285 N.C. 751, 208 S.E.2d 646 (1974).

Intent Alone Not Sufficient. — The intent, though connected with preparations to commit a criminal offense, is not alone sufficient for a conviction of the attempt, unless connected with some overt act or acts toward the end in view that will, in the judgment of the one charged, and as matters appeared to him, result in the consummation of the contemplated purpose. State v. Addor, 183 N.C. 687, 110 S.E. 650 (1922).

Defendant Entitled to Complete Charge. — Under the provisions of this section when the bill of indictment is sufficient with the supporting evidence upon the trial, the defendant may be convicted of the criminal offense charged or of a lesser degree thereof, and he is entitled to a charge from the court on all degrees of the crime thus encompassed by the indictment; and an error in failing to charge upon the lesser degrees of the crime is not cured by a verdict of conviction upon one of a greater degree. State v. Robinson, 188 N.C. 784, 125 S.E. 617 (1924). See also State v. Keaton, 206 N.C. 682, 175 S.E. 296 (1934).

When there is evidence tending to support a milder verdict than the one charged in the bill of indictment the defendant is entitled to have the different views presented to the jury under a proper charge, and an error in this respect is not cured by a verdict convicting him of the crime as charged in the bill of indictment, for in such case it cannot be known whether the jury would have convicted of a less degree if the different views, arising on the evidence, had been correctly presented by the trial court. State v. Burnette, 213 N.C. 153, 195 S.E. 356 (1938); State v. DeGraffenreid, 223 N.C. 461, 27 S.E.2d 130 (1943). See also State v. Chambers, 218 N.C. 442, 11 S.E.2d 280 (1940).

Where there is evidence of defendant's guilt of a lesser degree of the crime charged in the indictment, the court must submit defendant's guilt of the lesser included offense to the jury, and if the court fails to do so, the error is not cured by a verdict convicting defendant of the offense charged. State v. Putnam, 24 N.C. App. 570, 211 S.E.2d 493 (1975).

And Conviction of Offense Charged Does Not Cure Error. — A verdict of guilty of the offense charged in the indictment does not cure error of the court in failing to submit to the jury the question of defendant's guilt of less degrees of the crime. State v. McNeill, 229 N.C. 377, 49 S.E.2d 733 (1948); State v. Davis, 242 N.C. 476, 87 S.E.2d 906 (1955).

The general rule of practice is, that when it is permissible under the indictment to convict the defendant of "a less degree of the same crime," and there is evidence to support the milder verdict, the defendant is entitled to have the different views arising on the evidence presented to the jury under proper instructions, and an error in this respect is not cured by a verdict finding the defendant guilty of a higher degree of the same crime, for in such case, it cannot be known whether the jury would have convicted of the lesser degree if the different views, arising on the evidence, had been correctly presented in the court's charge. State v. Childress, 228 N.C. 208, 45 S.E.2d 42 (1947).

Evidence Must Justify Conviction in Lesser Degree. — The provisions of this section in regard to conviction of a less degree of the crime charged in a bill of indictment applies only where there is some evidence that a less degree of the crime had been committed, and where the State's uncontradicted evidence is to the effect that the crime of rape had been committed and the defendant relies solely upon an alibi, the refusal of the court to charge upon the lesser degrees of the crime or of an attempt is not error. State v. Smith, 201 N.C. 494, 160 S.E. 577 (1931).

This section does not make mandatory the submission to the jury of a lesser included offense where the indictment does not charge such offense and where there is no evidence of such offense. State v. McLean, 2 N.C. App. 460, 163 S.E.2d 125 (1968); State v. Stevenson, 3 N.C. App. 46, 164 S.E.2d 24 (1968).

Where all the evidence at the trial of a criminal action, if believed by the jury, tends to show that the crime charged in the indictment was committed as alleged therein, and there is no evidence tending to show the commission of a crime of less degree, it is not error for the court to fail to instruct the jury that they may acquit the defendant of the crime charged in the indictment and convict him of a crime of less degree. State v. Cox, 201 N.C. 357, 160 S.E. 358 (1931); State v. Manning, 221 N.C. 70, 18 S.E.2d 821 (1942); State v. Sawyer, 224 N.C. 61, 29 S.E.2d 34 (1944).

A defendant may be convicted of a less degree of the crime charged, or for which he is being tried, when there is evidence to support the milder verdict. State v. Jordan, 226 N.C. 155, 37 S.E.2d 111 (1946).

Where the evidence was sufficient to carry the case to the jury upon the charge of assault with intent to commit rape but the jury returned a verdict of guilty of an assault upon a female, the

defendant being a male person over 18 years of age, such verdict was authorized by this section. State v. Morgan, 225 N.C. 549, 35 S.E.2d 621 (1945).

Where the evidence justified such action, the court properly charged the jury that defendant might be acquitted of felonious assault and battery with intent to kill charged in the indictment, and convicted of an assault of lower degree, namely, an assault with a deadly weapon. State v. Anderson, 230 N.C. 54, 51 S.E.2d 895 (1949).

Measuring Sufficiency of Evidence to Support Conviction of Lesser Degree. — When the solicitor (now district attorney) announces that he will not seek a conviction upon the maximum degree of the crime charged in the bill of indictment, and the defendant interposes no objection to being tried upon the lesser degree of the offense, the sufficiency of the evidence to support a conviction of the lesser degree must be measured by the same standards which would be applied had the bill of indictment charged only the lesser degree of the offense. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971).

A conviction of the maximum degree of the offense, for which the defendant was indicted and tried, will not be disturbed because of his contention that the trial court failed to instruct the jury as to a lesser degree of the offense, or failed to instruct them that they might return a verdict of guilty of such lesser degree, or expressly withheld from their consideration a verdict of guilty of such lesser degree. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971).

Uncontradicted Evidence Showing Defendant Guilty of More Serious Offense. — This section and § 15-169 were not intended to give to the jury the arbitrary right or discretion to convict a defendant of a lesser degree of the crime charged or of a less serious offense than that charged, if the uncontradicted evidence shows beyond a reasonable doubt that the defendant is guilty of the more serious offense charged in the bill of indictment. State v. Brown, 227 N.C. 383, 42 S.E.2d 402 (1947).

Where all the evidence tends to show that defendants feloniously took money from the person of prosecuting witness by violence and against his will through the use or threatened use of firearms, the court properly limits the jury to a verdict of guilty of robbery with firearms or a verdict of not guilty, there being no evidence warranting court in submitting the question of defendants' guilt of less degrees of the crime. State v. Bell, 228 N.C. 659, 46 S.E.2d 834 (1948).

When the State, either through a bill of indictment as returned by the grand jury or through the election of its solicitor (now district attorney) to seek a lesser verdict, brings the defendant to trial on a lesser degree of the offense charged, the case can be submitted to the jury if the uncontradicted evidence, as thereafter developed, shows the defendant is guilty of the more serious degree of the crime. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971).

Where the uncontradicted evidence is that the deceased was murdered by poison, there is no basis for a verdict of second-degree murder or manslaughter. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971).

Where the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime, the court is not required to submit an issue as to defendant's guilt or innocence of a lesser included offense. State v. Owen, 24 N.C. App. 598, 211 S.E.2d 830 (1975).

It would be without precedent to try defendant for one offense and to convict him of another and greater offense, even though the conviction be of a higher degree of the same offense for which he is being tried. State v. Jordan, 226 N.C. 155, 37 S.E.2d 111 (1946).

Error Not Prejudicial. — Error committed by the court in submitting the question of defendant's guilt of a lesser degree of the offense charged cannot be prejudicial to defendant. State v. Chase, 231 N.C. 589, 58 S.E.2d 364 (1950).

Instruction Limiting Verdict to Less Degree. — Where, in an indictment charging an assault with intent to commit rape, the evidence shows an assault but fails to show an intent to commit rape, at all events and notwithstanding any resistance on the part of the intended victim, the court would err in refusing to give an instruction to limit the verdict to a less degree of the same crime. State v. Jones, 222 N.C. 37, 21 S.E.2d 812 (1942); State v. Gay, 224 N.C. 141, 29 S.E.2d 458 (1944).

Simple assault is a lesser degree of the crime of aggravated assault. State v. Jeffries, 3 N.C. App. 218, 164 S.E.2d 398 (1968).

An indictment for rape includes an assault with intent to commit rape. State v. Green, 246 N.C. 717, 100 S.E.2d 52 (1957); State v. Birckhead, 256 N.C. 494, 124 S.E.2d 838 (1962).

An assault upon a woman is not a less degree of the crime of sodomy. State v. Jernigan, 255 N.C. 732, 122 S.E.2d 711 (1961).

Nor is assault a less degree of the crime of larceny from the person. State v. Acrey, 262 N.C. 90, 136 S.E.2d 201 (1964).

The misdemeanor of larceny is a less degree of the felony of larceny within the meaning of this section. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Summers, 263 N.C. 517, 139 S.E.2d 627 (1965); State v. Respass, 27 N.C. App. 137, 218 S.E.2d 227 (1975).

In a prosecution for murder, where the evidence raises a question as to whether or not the killing was intentional, this section requires

that the question of the defendant's guilt of manslaughter be submitted to the jury with proper instructions. State v. McNeill, 229 N.C. 377, 49 S.E.2d 733 (1948).

Where there is evidence to support a charge of murder and evidence to support the defendant's plea of homicide by misadventure, and also evidence of manslaughter, this section requires that the "less degree of the same crime" be submitted to the jury with proper instructions. State v. Childress, 228 N.C. 208, 45 S.E.2d 42 (1947).

Where the evidence in a first-degree murder prosecution is susceptible to the interpretation that defendant killed in self-defense, the court must submit the question of defendant's guilt of manslaughter. State v. Holloway, 7 N.C. App. 147, 171 S.E.2d 475 (1970).

An original indictment of murder in the first degree, handed down by a grand jury, is sufficient to support a plea of guilty to the lesser includable offense of accessory before the fact. Richardson v. Ross, 310 F. Supp. 134 (E.D.N.C. 1970).

Charge as to Assault Unnecessary Where Homicide Admitted. — While under the provisions of this section the trial judge is required to charge upon evidence on the less degrees of the same crime concerning which the prisoner was being tried, it is not required that he charge upon the principles of an assault with a deadly weapon, where the prisoner is charged with murder, and the killing of the deceased by him has been admitted, and the judge has correctly charged upon the crime of manslaughter, the lowest degree of an unlawful killing of a human being. State v. Lutterloh, 188 N.C. 412, 124 S.E. 752 (1924).

Instructions as to Second Degree Murder Where Evidence Shows First Degree. — Where upon the trial for murder all the evidence tends to show that if the defendant is guilty, he is guilty of the crime of murder in the first degree, the failure of the trial court to charge upon the law of murder in the second degree or manslaughter is not error under this section. State v. Ferrell, 205 N.C. 640, 172 S.E. 186 (1934).

Same—Assault. — Where the evidence tended to show a simple assault by defendant on prosecuting witness and a later encounter between the parties in which defendant was armed with a deadly weapon, it was error, under this section, for the court to charge the jury that they could convict defendant of assault with the intent to kill, or assault with a deadly weapon or not guilty, and refuse to charge the jury that they might convict defendant of simple assault. State v. Lee, 206 N.C. 472, 174 S.E. 288 (1934).

In prosecution for assault with a deadly weapon with intent to kill, the court's instruction that the jury might find defendant guilty of a less degree of the crime, including assault with a deadly weapon, if they so found beyond a reasonable doubt, is held without error. State v. Elmore, 212 N.C. 531, 193 S.E. 713 (1937).

Where a warrant charges a criminal assault with a deadly weapon, specifying the weapon, and the jury convicts of simple assault, a less degree of the same crime and the evidence warrants the verdict, the jury is empowered by this section to return such verdict. State v. Gooding, 251 N.C. 175, 110 S.E.2d 865 (1959).

Assault with a deadly weapon is an essential element of the felony created and defined by § 14-32, being an included "less degree of the same crime." State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965).

An indictment sufficiently charging defendant with assault with a deadly weapon, to wit, a pistol, with intent to kill and inflicting serious injury not resulting in death, includes the offense of assault with a deadly weapon. State v. Caldwell, 269 N.C. 521, 153 S.E.2d 34 (1967).

In a prosecution for burglary in the first degree, it is permissible for the jury to convict the defendant of an attempt to commit burglary in the second degree. State v. Surles, 230 N.C. 272, 52 S.E.2d 880 (1949).

A felonious entering into a house otherwise than burglariously with intent to commit larceny, a violation of § 14-54, is a less degree of the felony of burglary in the first degree. State v. Fikes, 270 N.C. 780, 155 S.E.2d 277 (1967).

The defendant was charged with burglary in the first degree in the bill of indictment. And when the solicitor (now district attorney) stated that he would not ask for a verdict of first degree burglary, but would only ask for a verdict of second degree burglary on the indictment, it was tantamount to taking a nolle prosequi with leave on the capital charge. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

Where the bill of indictment returned by the grand jury charged all elements of burglary in the first degree, the bill of indictment would have supported a verdict of guilty of either first-degree burglary or second-degree burglary as the evidence might warrant. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971).

Upon a trial under an indictment for first-degree burglary, there being no announcement by the solicitor (now district attorney) of his intent to seek a milder verdict, the prosecuting witness testified that the defendant broke and entered her dwelling house in the nighttime and assaulted and raped her therein and the defense is alibi, to instruct the jury that it might return a verdict of second-degree burglary is simply to invite a compromise verdict. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971).

Where the solicitor's (now district attorney) announcement precluded a verdict of guilty of

burglary in the first degree, it was, in effect, a stipulation by the State that the house was not actually occupied at the time of the breaking and entering. The defendant, not having objected thereto at the time of the announcement, may not await the outcome of the trial and then attack the validity of the verdict that he was guilty of second-degree burglary on the ground that the house was occupied and so he was guilty of the more serious crime. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971).

If the bill of indictment, by omitting any allegation as to occupancy of the building, charged second-degree burglary only, and if the evidence is sufficient to show all of the elements thereof, proof of actual occupancy of the dwelling at the time of the breaking and entering is not a defense to the charge. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971).

In Prosecution for Robbery. — Testimony of defendants in a prosecution for robbery that they took the pistol from prosecuting witness to prevent him from harming them or some other person, requires the court to submit the question of each defendant's guilt of simple assault to the jury as a lesser offense included in the crime charged, since such verdict would be justified in the event the jury should find that defendants took the pistol without intent to steal it, but were not warranted in doing so on the principle of self-protection. State v. Lunsford, 229 N.C. 229, 49 S.E.2d 410 (1948).

An instruction by the trial judge that he was submitting the case to the jury "as to the charge of common-law robbery, that is the attempt to rob," was clearly understandable, though "attempt to commit robbery" was not defined in detail. State v. McNeely, 244 N.C. 737, 94 S.E.2d 853 (1956).

It is true that in a prosecution for robbery with firearms, an accused may be acquitted of the major charge and convicted of an included or lesser offense, such as common-law robbery, or assault, or larceny from the person, or simple larceny, if a verdict for the included or lesser offense is supported by allegations of the indictment and by evidence on the trial. State v. McLean, 2 N.C. App. 460, 163 S.E.2d 125 (1968); State v. Black, 286 N.C. 191, 209 S.E.2d 458 (1974).

An indictment for armed robbery under § 14-87 will support a verdict of guilty of common-law robbery. State v. Jackson, 6 N.C. App. 406, 170 S.E.2d 137 (1969).

Where the evidence was not sufficient to make out a case of common-law robbery, the court properly submitted the case on larceny from the person. State v. Kirk, 17 N.C. App. 68, 193 S.E.2d 377 (1972).

Where the evidence necessarily restricted the jury to the return of one of two verdicts; namely, a verdict of guilty of robbery with a dangerous weapon, or a verdict of not guilty, the trial court did not err by failing to instruct the jury that it might acquit the defendant of the crime of robbery with a dangerous weapon as charged in the bill of indictment and convict him of the lesser offense of common-law robbery. State v. Black, 286 N.C. 191, 209 S.E.2d 458 (1974).

A violation of § 14-54 is a less degree of the felony of burglary in the first degree. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

Breaking and Entering. — Any person who breaks or enters any building described in § 14-54, with intent to commit any felony or larceny therein, is guilty of a felony. A wrongful breaking or entering into such building, without the intent to commit any felony therein, is a misdemeanor, a lesser included offense within the meaning of this section. State v. Dozier, 19 N.C. App. 740, 200 S.E.2d 348 (1973).

In a prosecution for the crime against nature, the accused may be convicted of the offense charged therein or the attempt to commit the offense. State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

In Prosecution for Rape. — The trial court in a rape prosecution did not err in failing to submit to the jury the lesser included offenses of assault with intent to commit rape and of assault on a female, where the State's evidence was positive as to each and every element of the crime of rape and there was no conflict in the evidence relating to any element thereof. State v. Flippin, 280 N.C. 682, 186 S.E.2d 917 (1972).

In a rape case, the trial court did not err in failing to submit the lesser included offenses of assault with intent to commit rape and assault on a female where all the State's evidence tended to show commission of rape and the defendant's evidence was that he had never had intercourse with the prosecutrix nor did he touch her in a manner constituting an assault. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976).

Rape and carnally knowing a female between the ages of 12 and 16 years are of such a nature as to come within the provisions of this section, permitting the jury to find the defendants guilty of the lesser crime, if they do not deem the evidence sufficient to warrant a conviction on the first. State v. Hall, 214 N.C. 639, 200 S.E. 375 (1939).

In Prosecution for Arson. — The felony created by § 14-67 is a lesser included offense of the crime of arson. State v. Arnold, 285 N.C. 751, 208 S.E.2d 646 (1974).

A motion for judgment as of nonsuit addressed to the entire bill is properly overruled if there is evidence sufficient to support a conviction of the crime charged or of an included crime. State v. Virgil, 263 N.C. 73, 138 S.E.2d 777 (1964).

Necessity for instructing jury as to included crime of lesser degree than that charged arises

when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. State v. Jones, 264 N.C. 134, 141 S.E.2d 27 (1965); State v. Williams, 2 N.C. App. 194, 162 S.E.2d 688 (1968); State v. Stevenson, 3 N.C. App. 46, 164 S.E.2d 24 (1968); State v. Lilley, 3 N.C. App. 276, 164 S.E.2d 498 (1968); State v. Williams, 275 N.C. 77, 165 S.E.2d 481 (1969); State v. Bailey, 4 N.C. App. 407, 167 S.E.2d 24 (1969); State v. Jones, 6 N.C. App. 712, 171 S.E.2d 17 (1970); State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970); State v. Murry, 277 N.C. 197, 176 S.E.2d 738 (1970); State v. Carnes, 279 N.C. 549, 184 S.E.2d 235 (1971); State v. Black, 286 N.C. 191, 209 S.E.2d 458 (1974); State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976); State v. Putnam, 24 N.C. App. 570, 211 S.E.2d 493 (1975).

When there is evidence to support a milder verdict, the court must charge upon it even when there is no specific prayer for the instruction. State v. Riera, 276 N.C. 361, 172 S.E.2d 535 (1970).

When a lesser included offense is supported by some evidence, a defendant is entitled to have the different views arising on the evidence presented to the jury upon proper instructions, and an error in this respect is not cured by a verdict finding the defendant guilty of a higher degree of the same crime, for in such case, it cannot be known whether the jury would have convicted of the lesser degree if the different views, arising on the evidence, had been correctly presented in the court's charge. State v. Riera, 276 N.C. 361, 172 S.E.2d 535 (1970).

Where there is evidence of defendant's guilt of a lesser degree of the crime charged in the indictment, the court must submit to the jury the issue of defendant's guilt of such lesser included offense, and the error of failure to submit such issue to the jury is not cured by a verdict convicting defendant of the offense as charged. State v. Jones, 6 N.C. App. 712, 171 S.E.2d 17 (1969).

Where there is evidence that would support a lesser degree of the crime charged in the bill of indictment, a defendant is entitled to have the question of his guilt of the lesser crime submitted to the jury. If the court fails to do so, the error is not cured by a verdict of guilty of a higher offense. State v. Holloway, 7 N.C. App. 147, 171 S.E.2d 475 (1970).

The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is no conflicting evidence relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice. State v. McLean, 2 N.C. App. 460, 163 S.E.2d 125 (1968).

This section does not compel the trial court to charge on the lesser included offense where the evidence is such that the jury could not find that such lesser crime was committed. State v. Stevenson, 3 N.C. App. 46, 164 S.E.2d 24 (1968).

Where one is indicted for a crime and under the same bill it is permissible to convict the defendant of a less degree of the same crime and there is evidence tending to support a milder verdict the prisoner is entitled to have the different views presented to the jury under a proper charge, but where there is no evidence to support such milder verdict the court is not required to submit the question of such verdict to the jury. State v. Thacker, 13 N.C. App. 299, 185 S.E.2d 455 (1971).

A court is not required to submit a lesser included offense to the jury when there is no evidence to support such a charge. State v. Carriker, 24 N.C. App. 91, 210 S.E.2d 98 (1974), rev'd on other grounds, 287 N.C. 530, 215 S.E.2d 134 (1975).

An attempt to commit barratry is an offense in this State and a defendant may be convicted of an attempt to commit the offense upon an indictment charging the common-law offense of barratry. State v. Batson, 220 N.C. 411, 17 S.E.2d 511, 139 A.L.R. 614 (1941).

New Trial Must Be on Full Charge. — Upon an appeal from a conviction for a lesser offense than that charged in the indictment, a new trial, if granted, must be upon the full charge in the bill. State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906).

Applied in State v. Jones, 227 N.C. 402, 42 S.E.2d 465 (1947); State v. Jones, 229 N.C. 276, 49 S.E.2d 463 (1948); State v. Matthews, 231 N.C. 617, 58 S.E.2d 625 (1950); State v. Lambe, 232 N.C. 570, 61 S.E.2d 608 (1950); State v. Fletcher, 268 N.C. 140, 150 S.E.2d 54 (1966); State v. Worthey, 270 N.C. 444, 154 S.E.2d 515 (1967); State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Martin, 6 N.C. App. 616, 170 S.E.2d 539 (1969); State v. Accor, 281 N.C. 287, 188 S.E.2d 332 (1972); State v. McKenzie, 292 N.C. 170, 232 S.E.2d 424 (1977).

Quoted in State v. Hairston, 222 N.C. 455, 23 S.E.2d 885 (1943); State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961); State v. Perry, 265 N.C. 517, 144 S.E.2d 591 (1965); State v. Barksdale, 16 N.C. App. 559, 192 S.E.2d 659 (1972).

Cited in State v. Colson, 194 N.C. 206, 139 S.E. 230 (1927); State v. Ratcliff, 199 N.C. 9, 153 S.E. 605 (1930); State v. Palmer, 212 N.C. 10, 192 S.E. 896 (1937); State v. Hobbs, 216 N.C. 14, 3 S.E.2d 431 (1939); State v. Johnson, 218 N.C. 604, 12 S.E.2d 278 (1940); State v. Gregory, 223 N.C. 415,

27 S.E.2d 140 (1943); State v. Farrell, 223 N.C. 804, 28 S.E.2d 560 (1944); State v. Grimes, 226 N.C. 523, 39 S.E.2d 394 (1946); State v. Fowler, 230 N.C. 470, 53 S.E.2d 853 (1949); State v. Stone, 245 N.C. 42, 95 S.E.2d 77 (1956); Bumper v. North Carolina, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968); State v. Dickens, 272 N.C. 515, 158 S.E.2d 614 (1968).

§ 15-171: Repealed by Session Laws 1953, c. 100.

§ 15-172. Verdict for murder in first or second degree. — Nothing contained in the statute law dividing murder into degrees shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree. (1893, c. 85, s. 3; Rev., s. 3271; C. S., s. 4642.)

History of Section. — See State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973); State v. Watkins, 283 N.C. 17, 194 S.E.2d 800, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (1973).

Object of Section. — The object of this section is, of course, to place it beyond doubt in what degree of murder the prisoner was convicted. State v. Wiggins, 171 N.C. 813, 89 S.E. 58 (1916).

Purpose of Requirement That Jury Determine Degree. — The purpose of the requirement that the jury determine whether one charged under the statutory form is guilty of murder in the first or second degree was merely to eliminate that uncertainty when the defendant's plea was not guilty. State v. Watkins, 283 N.C. 17, 194 S.E.2d 800, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (1973).

In requiring the jury to determine the degree of homicide of which defendant is guilty, this section merely codified the well established rule that a verdict which leaves the matter in conjecture will not support a judgment. State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973).

Such Requirement Is Only Incidentally Related to Death Penalty. — The statutory requirement that the jury determine the degree of murder of which a defendant is guilty is only incidentally related to the death penalty. State v. Watkins, 283 N.C. 17, 194 S.E.2d 800, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (1973).

Section Applies to All Indictments for Murder. — This section applies to all indictments for murder, whether perpetrated by means of poisoning, lying in wait, imprisonment, starving, torture, or otherwise. State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906); State v. Simmons, 236 N.C. 340, 72 S.E.2d 743 (1952).

Sufficiency of Indictment. — For a brief history of this section in connection with sufficiency of indictment for first degree murder, see State v. Kirksey, 227 N.C. 445, 42 S.E.2d 613 (1947).

Jury Must Determine Degree. — For a conviction of murder in the first degree under this section and § 14-17, the jury must find specially under the evidence that this degree of crime has been committed by the defendant, and the verdict must be received in open court in the presence of the presiding judge under constitutional mandate, Const., Art. I, §§ 13, 17, which right may not be waived. State v. Bazemore, 193 N.C. 336, 137 S.E. 172 (1927).

By this section it is made the duty of the jury alone to determine in their verdict whether the crime is murder in the first or second degree. State v. Gadberry, 117 N.C. 811, 23 S.E. 477 (1895); State v. Murphy, 157 N.C. 614, 72 S.E. 1075 (1911); State v. Bagley, 158 N.C. 608, 73 S.E. 995 (1912). And the record must show that they have so done, in order that there may be a proper judgment. State v. Lucas, 124 N.C. 825, 32 S.E. 962 (1899); State v. Truesdale, 125 N.C. 696, 34 S.E. 646 (1899).

Failure to Determine Degree. — Where the degree of murder is not expressed in the verdict, the judge should tell the jury to reconsider their finding, for the purpose of specifying the crime, and upon response being made by them of murder in the first degree, the verdict is properly recorded accordingly. State v. Bagley, 158 N.C. 608, 73 S.E. 995 (1912).

A defendant will not be permitted to plead guilty to murder in the first degree. State v. Blue, 219 N.C. 612, 14 S.E.2d 635 (1941). For it is provided by this section that the "jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree." State v. Simmons, 236 N.C. 340, 72 S.E.2d 743 (1952); State v. Watkins, 283 N.C. 17, 194 S.E.2d 800, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (1973).

Though there is no statute in this State specifically prohibiting a court from accepting a plea of guilty to a capital crime, the judiciary has observed that prohibition and it has become the public policy of the State. State v. Watkins, 283 N.C. 17, 194 S.E.2d 800, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (1973).

But He May Plead Guilty Where Maximum Punishment Is Life Imprisonment. — There is no rule which precludes a plea of guilty to a

crime for which the maximum punishment is life imprisonment. State v. Watkins, 283 N.C. 17, 194 S.E.2d 800, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (1973).

The basis of the rule that a defendant cannot plead guilty to a capital crime is the fixed belief that a person should not sign his own death warrant and hang himself. State v. Watkins, 283 N.C. 17, 194 S.E.2d 800, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (1973).

Judge May Exclude Second Degree in Charge. — When the entire evidence shows, and no other reasonable inference can be fairly drawn therefrom, that the murder was committed either by lying in wait or in an attempt to perpetrate a felony, and the controverted question is the identity of prisoner as the murderer, the trial judge does not commit error in charging the jury to render a verdict of guilty of murder in the first degree or not guilty. State v. Spevey, 151 N.C. 676, 65 S.E. 995 (1909); State v. Wiggins, 171 N.C. 813, 89 S.E. 58 (1916).

In prosecution for murder, defendant's premeditation and deliberation are questions of fact, to be determined by jury under this section and § 14-17, and not questions of law for judge, and must be proved beyond a reasonable doubt. State v. Newsome, 195 N.C. 552, 143 S.E. 187 (1928).

Verdict Construed According to Charge. — The verdict must be construed according to the charge and the evidence and when these make it certain beyond question, the law has been complied with. State v. Gilchrist, 113 N.C. 673, 18 S.E. 319 (1893); State v. Wiggins, 171 N.C. 813, 89 S.E. 58 (1916).

Verdicts of "guilty as charged" in prosecutions under § 15-144 have been held sufficient to support the judgment when the judge has instructed the jury to return a verdict of murder in the first degree or not guilty and there was no evidence to warrant a verdict of guilty of murder in the second degree or manslaughter. In such a situation the verdict will be taken with reference to the charge and the evidence in the case and interpreted as a verdict of guilty of the only charge submitted. This holding is an application of the general rule that a verdict apparently ambiguous may be given significance and correctly interpreted by reference to the allegations, the facts in evidence, and the instructions of the court. State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973).

When, in a prosecution for homicide upon an indictment drawn under § 15-144, the judge accepts a verdict of "guilty as charged" after having instructed the jury that it might return a verdict of guilty of murder in the first or second degree, or guilty of murder in either degree or manslaughter, such a verdict on such an indictment cannot be sustained. In such case the verdict is a general one without a response as to what grade of homicide the defendant was guilty, and a new trial must be ordered. State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973).

Mere Killing Presumes Second Degree Murder. — Since the act of 1893, the killing being proved, and nothing else appearing, the law presumes malice, but not premeditation and deliberation, and the killing is murder in the second degree. State v. Hicks, 125 N.C. 636, 34 S.E. 247 (1899).

In all indictments for homicide, when the intentional killing is established or admitted, the law presumes malice from the use of a deadly weapon, and the defendant is guilty of murder (now in the second degree) unless he can satisfy the jury of the truth of facts which justify or excuse his act, or mitigate it to manslaughter. State v. Lane, 166 N.C. 333, 81 S.E. 620 (1914).

But a conviction of murder in the first degree may be had upon sufficient circumstantial evidence. State v. Matthews, 66 N.C. 106 (1872); State v. Melton, 187 N.C. 481, 122 S.E. 17 (1924); State v. Bazemore, 193 N.C. 336, 137 S.E. 172 (1927).

When First Degree Presumed. — A homicide committed in the perpetration of, or in an attempt to perpetrate, a robbery will be deemed murder in the first degree, the jury being governed by the evidence under proper instructions in finding that or a less offense. State v. Lane, 166 N.C. 333, 81 S.E. 620 (1914).

In an indictment for murder, when the homicide is shown or admitted to have been intentionally committed by lying in wait, poisoning, starvation, imprisonment, or torture, the law raises the presumption of murder in the first degree, but nonetheless if the jury convict of a less offense, it is within their power so to do under the statute, and the prisoner has no cause to complain that he was not convicted of the higher offense. State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906).

A defendant will not be permitted to plead guilty to murder in the first degree under this section, and this rule applies to all indictments for murder, including murder perpetrated by means of poison, lying in wait, imprisonment, starving, torture or otherwise. State v. Blue, 219 N.C. 612, 14 S.E.2d 635 (1941).

Evidence. — Where all the evidence at a trial for murder tends to show murder in the first degree in that the murder was committed by poisoning, starvation, lying in wait, imprisonment, torture, or in the perpetration or attempt to perpetrate a felony, the trial court may instruct the jury that they may render only one of two verdicts, murder in the first degree, or not guilty. But where the evidence tends to show that the killing was with a deadly weapon, and the State in one phase of its case relies on premeditation and deliberation, the presumption is that the murder was in the second degree, with the burden of proving premeditation beyond a reasonable doubt on the State, in order to

constitute it murder in the first degree, and under these circumstances it is error for the trial court to fail to charge the jury that they might find the prisoner guilty of murder in the second degree. State v. Newsome, 195 N.C. 552, 143 S.E. 187 (1928); State v. Gause, 227 N.C. 26, 40 S.E.2d 463 (1946).

Instruction Held Error. — An instruction to the effect that defendant's counsel had argued that the jury should return a verdict of guilty of murder in the first degree with recommendation for life imprisonment must be held for prejudicial error as tantamount to stating that counsel had tendered a plea of guilty to this offense. The error is not cured by the court's statement that if he was wrong he desired to be corrected, since a defendant will not be permitted to plead guilty to murder in the first degree, and tender of such plea would not be binding on him. State v. Simmons, 236 N.C. 340, 72 S.E.2d 743 (1952).

Quoted in State v. Puckett, 211 N.C. 66, 189 S.E. 183 (1937); State v. Perry, 291 N.C. 586, 231 S.E.2d 262 (1977).

Cited in State v. Gooding, 196 N.C. 710, 146 S.E. 806 (1929); State v. Thornton, 211 N.C. 413, 190 S.E. 758 (1937); State v. Goodwin, 211 N.C. 419, 190 S.E. 761 (1937).

§ 15-173. Demurrer to the evidence. — When on the trial of any criminal action in the superior or district court, the State has introduced its evidence and rested its case, the defendant may move to dismiss the action, or for judgment as in case of nonsuit. If the motion is allowed, judgment shall be entered accordingly; and such judgment shall have the force and effect of a verdict of "not guilty" as to such defendant. If the motion is refused and the defendant does not choose to introduce evidence, the case shall be submitted to the jury as in other cases, and the defendant may on appeal urge as ground for reversal, the trial court's denial of his motion without the necessity of the defendant's having taken exception to such denial.

If the defendant introduces evidence, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal. The defendant, however, may make such motion at the conclusion of all the evidence in the case, irrespective of whether or not he made a motion for dismissal or judgment as in case of nonsuit theretofore. If the motion is allowed, or shall be sustained on appeal, it shall in all cases have the force and effect of a verdict of "not guilty." If the motion is refused, the defendant may on appeal, after the jury has rendered its verdict, urge as ground for reversal the trial court's denial of his motion made at the close of all the evidence without the necessity of the defendant's having taken exception to such denial. (1913, c. 73; Ex. Sess. 1913, c. 32; C. S., s. 4643; 1951, c. 1086, s. 1; 1973, c. 1141, s. 16.)

Editor's Note. — For brief comment on 1951 amendment, see 29 N.C.L. Rev. 374.

Civil and Criminal Actions Compared. — This section serves, and was intended to serve, the same purpose in criminal prosecutions as was accomplished by former § 1-183, in civil actions. State v. Fulcher, 184 N.C. 663, 113 S.E. 769 (1922); State v. Sigmon, 190 N.C. 684, 130 S.E. 854 (1925); State v. Norris, 206 N.C. 191, 173 S.E. 14 (1934); State v. Ormond, 211 N.C. 437, 191 S.E. 22 (1937); State v. Hill, 225 N.C. 74, 33 S.E.2d 470 (1945); State v. Bryant, 235 N.C. 420, 70 S.E.2d 186 (1952); State v. Sears, 235 N.C. 623, 70 S.E.2d 907 (1952); State v. Nall, 239 N.C. 60, 79 S.E.2d 354 (1953).

Former § 1-183 was the statute setting forth the procedure to make a motion for judgment of compulsory nonsuit in civil actions and this section is the statute setting forth the procedure to make a motion for judgment of compulsory nonsuit in criminal actions. Jenkins v. Hawthorne, 269 N.C. 672, 153 S.E.2d 339 (1967).

No Difference in Motion to Dismiss and Motion for Judgment as in Case of Nonsuit. — As used in this section, there is no difference in legal significance between a motion "to dismiss the action" and a motion "for judgment as in case of nonsuit." State v. Cooper, 275 N.C. 283, 167 S.E.2d 266 (1969); State v. Everhart, 291 N.C. 700, 231 S.E.2d 604 (1977).

A motion to dismiss will be treated the same as a motion for judgment of nonsuit. State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977).

Motion for a directed verdict of not guilty will be treated as a motion for judgment of nonsuit under this section. State v. Holton, 284 N.C. 391, 200 S.E.2d 612 (1973).

The test of the sufficiency of the evidence to withstand motions for a directed verdict and for judgment of nonsuit is the same. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Motions for a directed verdict and for a

judgment of nonsuit are the same in legal effect. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

A motion for a directed verdict of not guilty has the same effect as a motion for nonsuit. State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595 (1976).

The standard governing the granting or not of a motion as of nonsuit is the same with regard to a motion for a directed verdict. State v. Flannery, 31 N.C. App. 617, 230 S.E.2d 603 (1976).

A motion for judgment as in case of nonsuit challenges the sufficiency of the State's evidence to warrant its submission to the jury and to support a verdict of guilty of the criminal offense charged in the warrant or indictment on which the prosecution is based. State v. Vaughan, 268 N.C. 105, 150 S.E.2d 31 (1966).

Defendant's motion for nonsuit at the close of all the evidence draws into question the sufficiency of all of the evidence to go to the jury. State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977).

Defendant's later motion for nonsuit, made at the close of all the evidence, draws into question the sufficiency of all the evidence to go to the jury. State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977).

Means of Raising Objection That Evidence Insufficient for Jury. — Objection that the evidence is not sufficient to carry the case to the jury must be raised by motion to nonsuit under this section, or by prayer for instructions to the jury, and may not be raised after verdict by motion for new trial or motion in arrest of judgment. State v. Gaston, 236 N.C. 499, 73 S.E.2d 311 (1952); State v. Wiggs, 269 N.C. 507, 153 S.E.2d 84 (1967).

The objection that the evidence is not sufficient to carry the case to the jury must be raised during the trial by a motion for a compulsory nonsuit under this section or by a prayer for instruction to the jury. State v. Glover, 270 N.C. 319, 154 S.E.2d 305 (1967); State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972).

In a criminal case the proper motion to test the sufficiency of the State's evidence to carry the case to the jury is a motion to dismiss the action or a motion for judgment as in case of nonsuit. State v. Dickens, 278 N.C. 537, 180 S.E.2d 844 (1971); State v. Everette, 284 N.C. 67, 199 S.E.2d 409 (1973); State v. Holton, 284 N.C. 391, 200 S.E.2d 612 (1973); State v. Chavis, 30 N.C. App. 75, 226 S.E.2d 389 (1976).

On motion to nonsuit, the court is required merely to ascertain whether there is any competent evidence to sustain the allegations of the indictment. State v. Landin, 209 N.C. 20, 182 S.E. 689 (1935). See also State v. Lefevers, 216 N.C. 494, 5 S.E.2d 552 (1939); State v. Alston, 233 N.C. 341, 64 S.E.2d 3 (1951).

When the court is to rule upon a demurrer to the evidence in a criminal case, it is required merely to ascertain whether there is any competent evidence to sustain the allegations of the indictment, the evidence being construed in the light most favorable to the State. State v. Murdock, 225 N.C. 224, 34 S.E.2d 69 (1945).

A trial judge, in passing upon a motion for a judgment as of nonsuit, under the provisions of this section is not bound by the measure or quantum of proof by which the State must prove a defendant's guilt before the jury can convict him. State v. Davenport, 227 N.C. 475, 42 S.E.2d 686 (1947).

A motion for judgment as of nonsuit should be denied if there is any evidence tending to prove the fact in issue, or which reasonably conduces the conclusion of guilt as a fairly logical and legitimate deduction, but evidence which merely raises a suspicion or conjecture of the fact of guilt is insufficient to be submitted to the jury. State v. Stephenson, 218 N.C. 258, 10 S.E.2d 819 (1940); State v. Simmons, 240 N.C. 780, 83 S.E.2d 904 (1954).

On motion for nonsuit, it is a question of law for the court to determine, in the first instance, whether the evidence adduced, when considered in its light most favorable to the State, is of sufficient probative force to justify the jury in drawing the affirmative inference of guilt. State v. Needham, 235 N.C. 555, 71 S.E.2d 29 (1952).

On demurrer to the evidence and motion to nonsuit, the evidence must be considered in the light most favorable to the State, and contradictions and discrepancies in the testimony of the State's witnesses are to be resolved by the jury. State v. Simpson, 244 N.C. 325, 93 S.E.2d 425 (1956); State v. Walker, 251 N.C. 465, 112 S.E.2d 61, cert. denied, 364 U.S. 832, 81 S. Ct. 45, 5 L. Ed. 2d 58 (1960).

The only question presented by a motion under this section for judgment as in case of nonsuit is whether the evidence is sufficient to require submission to the jury. State v. Thompson, 256 N.C. 593, 124 S.E.2d 728, cert. denied, 371 U.S. 820, 83 S. Ct. 36, 9 L. Ed. 2d 60 (1962).

The court is required, in a motion for judgment of nonsuit, to consider all the State's voluminous and interlocking evidence in the light most favorable to it. State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334, cert. denied, 377 U.S. 978, 84 S. Ct. 1884, 12 L. Ed. 2d 747 (1964).

The question for the court in considering a motion for judgment of nonsuit is whether there is reasonable basis upon which the jury might find that an offense charged in the indictment has been committed and the defendant is the perpetrator, or one of the perpetrators, of it. State v. Price, 280 N.C. 154, 184 S.E.2d 866 (1971).

On a motion for nonsuit the sole question for decision is whether upon a consideration of all the evidence admitted — whether competent or incompetent — in the light most favorable to the State, there is substantial evidence to support the finding that the offenses charged in the bills of indictment were committed by defendant. State v. Allen, 279 N.C. 406, 183 S.E.2d 680 (1971).

To withstand defendant's motion for judgment as of nonsuit, there must be substantial evidence against the accused of every essential element that goes to make up the crime charged and whether the State has offered such substantial evidence presents a question of law for the court. State v. Allred, 279 N.C. 398, 183 S.E.2d 553 (1971).

In considering a motion for judgment as of nonsuit, the court is not concerned with the weight of the testimony, or with its truth or falsity, but only with the question of whether there is sufficient evidence for the jury to find that the offense charged has been committed and that defendant committed it. State v. Hines, 286 N.C. 377, 211 S.E.2d 201 (1975); State v. Williams, 31 N.C. App. 588, 229 S.E.2d 839 (1976); State v. Flannery, 31 N.C. App. 617, 230 S.E.2d 603 (1976).

Nonsuit should be denied where there is sufficient evidence, direct, circumstantial or both, from which the jury could find that the offense charged has been committed and that defendant committed it. State v. Abrams, 29 N.C. App. 144, 223 S.E.2d 516 (1976).

Upon considering a motion for nonsuit, the court must find that there is substantial evidence both that an offense charged has been committed and that the defendant committed it before such motion can be overruled. State v. McCall, 289 N.C. 512, 223 S.E.2d 303, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

Motion for directed verdict or for judgment of nonsuit should be denied when, upon such consideration of the evidence, there is substantial evidence to support a finding that an offense charged in the bill of indictment has been committed and the defendant committed it. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Upon motions for directed verdict of not guilty and nonsuit, the court must find that there is substantial evidence both that an offense charged has been committed and that the defendant committed it before it can overrule the motions. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, U.S. , 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Upon motion for judgment as of nonsuit in a criminal prosecution, the questions before the court are whether there is substantial evidence of each essential element of the crime charged, and whether the accused was the perpetrator of the charged offense. State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Upon motion for nonsuit, the question for the court is whether, upon consideration of the evidence in the light most favorable to the State, there is reasonable basis upon which the jury might find that the offense charged in the indictment has been committed and the defendant was the perpetrator or one of the perpetrators of the crime. State v. Covington, 290 N.C. 313, 226 S.E.2d 629 (1976); State v. Thomas, 292 N.C. 527, 234 S.E.2d 615 (1977).

Upon motion for nonsuit, the question is whether there is substantial evidence — direct, circumstantial or both — to support a finding that the offense charged has been committed and that the accused committed it. State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977); State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977).

On a motion to nonsuit the question is whether, when all of the evidence is considered, there is substantial evidence to support a finding both that an offense charged in the bill of indictment has been committed and that the defendant committed it. State v. Scott, 289 N.C. 712, 224 S.E.2d 185 (1976).

Upon the defendant's motion for judgment of nonsuit in a criminal action, the question for the court is whether there is substantial evidence of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense. State v. Hill, 32 N.C. App. 261, 231 S.E.2d 682 (1977).

After the evidence is considered in the light most favorable to the State, the ultimate question for the court's determination is whether there is a reasonable basis upon which the jury might find that the offenses charged in the indictments had been committed and that the defendant was the perpetrator, or one of the perpetrators of the offenses. State v. Hyatt, 32 N.C. App. 623, 233 S.E.2d 649 (1977).

Whether Competent or Incompetent. — Admitted evidence, whether competent or incompetent, must be considered in passing on defendant's motions for judgment as of nonsuit. State v. Virgil, 263 N.C. 73, 138 S.E.2d 777 (1964); State v. Walker, 266 N.C. 269, 145 S.E.2d 833 (1966); State v. Holton, 284 N.C. 391, 200 S.E.2d 612 (1973).

All of the evidence actually admitted, whether competent or incompetent, including that offered by defendant, if any, which is favorable to the State, must be taken into account and so considered by the court in ruling upon a motion for nonsuit. State v. Jones, 6 N.C. App. 712, 171 S.E.2d 17 (1969); State v. Jones, 32 N.C. App. 408, 232 S.E.2d 475 (1977).

Admitted evidence, whether competent or

incompetent must be considered in passing on defendant's motion under this section for judgment as in case of nonsuit. State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970).

Upon the consideration of a motion for judgment of nonsuit, evidence for the State, even though improperly admitted, is taken into account. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

All admitted evidence which is favorable to the State, whether competent or incompetent, must be taken into account and so considered by the court when ruling upon a motion for nonsuit. State v. Biggs, 289 N.C. 522, 223 S.E.2d 371 (1976).

All of the evidence actually admitted, whether competent or incompetent, which is favorable to the State must be taken into account and must be so considered by the court in ruling upon the motion for directed verdict or for judgment of nonsuit. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Incompetent evidence admitted is considered as if it were competent in considering a motion for nonsuit. State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

All the evidence actually admitted, whether competent or incompetent, which is favorable to the State must be considered when ruling on the motion for nonsuit. State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977); State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977); State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977).

Effect of Defendant Introducing Testimony at Trial. — By introducing testimony at the trial, a defendant waives his right to except on appeal to the denial of his motion for nonsuit at the close of the State's evidence. His later exception to the denial of his motion for nonsuit made at the close of all the evidence, however, draws into question the sufficiency of all the evidence to go to the jury. State v. McWilliams, 277 N.C. 680, 178 S.E.2d 476 (1971).

Defendant introduced evidence, and by doing so waived his right to except on appeal to the denial of his motion for nonsuit at the close of the State's evidence. State v. Rigsbee, 285 N.C. 708, 208 S.E.2d 656 (1974); State v. Logan, 25 N.C. App. 49, 212 S.E.2d 236 (1975).

Defendant's exception to the denial of his motion for nonsuit made at the close of all the evidence raises the question of the sufficiency of all the evidence to go to the jury. State v. Rigsbee, 285 N.C. 708, 208 S.E.2d 656 (1974).

Sufficiency of Evidence May Be Challenged if Motion Timely Made. — Before the 1951 amendment to this section, if the defendant, on trial for murder, wished to challenge the sufficiency of the evidence to show premeditation and deliberation beyond a reasonable doubt, motion to nonsuit under this section, on the capital charge should be lodged at the close of the State's case, exception noted, if overruled, and the motion renewed at the close of all the evidence, and exception again noted, if overruled. State v. Bittings, 206 N.C. 798, 175 S.E. 299 (1934).

A motion for judgment of nonsuit, under this section as it stood before the 1951 amendment, must be made at the close of the State's evidence in order for a motion thereunder made at the close of all the evidence to be considered. State v. Ormond, 211 N.C. 437, 191 S.E. 22 (1937).

A motion for judgment as of nonsuit, in a criminal case under this section before the 1951 amendment must be made at the close of the State's evidence and, if denied, renewed at the close of all the evidence, otherwise the benefit of the exception to the court's refusal to grant the motion would be lost. State v. Hill, 225 N.C. 74, 33 S.E.2d 470 (1945).

To present the question of the sufficiency of the evidence upon appeal, under this section before the 1951 amendment, a motion to nonsuit had to be made at the close of the State's evidence, and exception noted upon its denial, and if defendant introduced evidence the motion must be renewed at the close of all the evidence, and if again overruled another exception must be noted, in which event the assignment of error must be based upon the second exception. State v. Perry, 226 N.C. 530, 39 S.E.2d 460 (1946); State v. Weaver, 228 N.C. 39, 44 S.E.2d 360 (1947).

Motion Must Be Renewed. — A motion as of nonsuit upon the evidence will not be considered when it is not renewed after the conclusion of all the evidence as this section requires. State v. Helms, 181 N.C. 566, 107 S.E. 228 (1921). See also State v. Kiziah, 217 N.C. 399, 8 S.E.2d 474 (1940).

Same—Waiver. — Where the defendant in a criminal action moves for the dismissal or for judgment as of nonsuit after the close of the State's evidence, and thereafter elects to introduce his own evidence, his failure to renew his motion after the whole evidence has been introduced is a waiver of his right to insist upon his first motion, and it is not subject to review in the Supreme Court on appeal. State v. Hayes, 187 N.C. 490, 122 S.E. 13 (1924). See also State v. Hargett, 196 N.C. 692, 146 S.E. 801 (1929); State v. Chapman, 221 N.C. 157, 19 S.E.2d 250 (1942); State v. Epps, 223 N.C. 741, 28 S.E.2d 219 (1943); State v. Jackson, 226 N.C. 760, 40 S.E.2d 417 (1946).

The failure of a defendant to renew his motion for nonsuit at the close of all the evidence constitutes a waiver of his right to insist upon his first motion for nonsuit, and it is not subject to review in the Supreme Court. State v. Howell, 261 N.C. 657, 135 S.E.2d 625 (1964); State v. Fikes, 270 N.C. 780, 155 S.E.2d 277 (1967).

By introducing evidence after the denial of his

motion for judgment of nonsuit, made when the State had rested its case, defendant waived the motion for dismissal which he made prior to the introduction of his evidence. State v. Prince, 270 N.C. 769, 154 S.E.2d 897 (1967).

When a defendant offers evidence after his motion for judgment as of nonsuit is overruled, he thereby waives all right to urge that denial as error upon appeal. State v. McLamb, 13 N.C. App. 705, 187 S.E.2d 458 (1972).

When the defendant offers evidence, he waives a motion for nonsuit lodged, either actually or by statute, at the close of the State's evidence and only the motion lodged at the close of all the evidence is considered. State v. Paschall, 14 N.C. App. 591, 188 S.E.2d 521 (1972).

Defendant's motions for nonsuit must be considered in light of all the evidence since he introduced evidence and thereby waived the motions made at the close of the State's evidence. State v. Allen, 279 N.C. 406, 183 S.E.2d 680 (1971).

A defendant, by introducing evidence at trial, waives his right to except on appeal to the denial of his motion for nonsuit at the close of the State's evidence. State v. Lilly, 32 N.C. App. 467, 232 S.E.2d 495 (1977); State v. Lee, 33 N.C. App. 162, 234 S.E.2d 482 (1977).

Since defendant offered evidence at the trial he waived his right to urge as error on appeal the denial of his motion to dismiss interposed at the close of the State's evidence. State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977).

Where defendant offered evidence at trial, under the provisions of this section, she waived her right to except on appeal to the denial of her motion at the close of the State's evidence. State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977).

Where the motion is not limited to a single count or any one degree of the crimes charged, but is addressed to the entire bill or to both counts as a whole, it cannot be allowed in the face of testimony to support either count or any degree of either count. State v. Marsh, 234 N.C. 101, 66 S.E.2d 684 (1951).

Only incriminating evidence need be considered upon defendant's motion as of nonsuit under this section, and contradictions in the inculpatory testimony and equivocations of some of the State's witnesses, which affects the weight or credibility of the evidence but not its competency, need not be taken into account in determining whether there is any competent evidence to sustain the allegations of the indictment. State v. Satterfield, 207 N.C. 118, 176 S.E. 466 (1934). See also State v. Moses, 207 N.C. 139, 176 S.E. 267 (1934).

On a demurrer to the evidence only the State's evidence is to be considered, and the defendant's evidence is not to be taken into account, unless it tends to explain or make clear that offered by the State. State v. Oldham, 224 N.C. 415, 30 S.E.2d 318 (1944).

In considering a motion under this section, the defendant's evidence, unless favorable to the State, is not to be taken into consideration, except when not in conflict with the State's evidence, it may be used to explain or make clear that which has been offered by the State. State v. Bryant, 235 N.C. 420, 70 S.E.2d 186 (1952); State v. Sears, 235 N.C. 623, 70 S.E.2d 907 (1952).

Later Testimony of Codefendant Not Considered. — Where the defendant had not offered evidence, he was entitled to have his motion for nonsuit passed upon based on the facts in evidence when the State rested its case, and the Court of Appeals did not consider the later testimony of the codefendant. State v. Berryman, 10 N.C. App. 649, 179 S.E.2d 875 (1971).

When Motion Allowed. — When all the evidence, that of the State and that of the defendant, is to the same effect and tends only to exculpate the defendant, his motion for judgment as of nonsuit should be allowed. State v. McWilliams, 277 N.C. 680, 178 S.E.2d 476 (1971); State v. Atwood, 290 N.C. 266, 225 S.E.2d 543 (1976).

When the evidence most favorable to the State is sufficient only to raise a suspicion or conjecture that the accused was the perpetrator of the crime charged in the indictment, the motion for judgment as in case of nonsuit should be allowed. State v. Poole, 285 N.C. 108, 203 S.E.2d 786 (1974).

If, when the evidence is considered in the light most favorable to the State, it is sufficient only to raise a suspicion or conjecture as to the commission of the offense, the motion for nonsuit should be allowed. State v. Atwood, 290 N.C. 266, 225 S.E.2d 543 (1976).

If, when the evidence is considered in the light most favorable to the State, it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion for nonsuit should be allowed, and this is true even though the suspicion aroused by the evidence is strong. State v. Scott, 289 N.C. 712, 224 S.E.2d 185 (1976).

When Motion Denied. — A motion to dismiss or as of nonsuit upon the evidence in a criminal case, will be denied if the evidence is sufficient, considered in the light most favorable to the State, to prove guilt of the defendant beyond a reasonable doubt. State v. Sigmon, 190 N.C. 684, 130 S.E. 854 (1925).

Where evidence is conflicting in a criminal case and where, considering the evidence in the light most favorable to the State, the jury might find the defendant guilty, a motion as of nonsuit is properly denied. State v. Carr, 196 N.C. 129, 144 S.E. 698 (1928).

Where the evidence for the prosecution is sufficient to make out a case, nonsuit on the ground that the defendant's evidence tended to

establish a defense is properly denied. State v. Werst, 232 N.C. 330, 59 S.E.2d 835 (1950).

A motion for judgment of nonsuit must be denied, if there be any substantial evidence — more than a scintilla — to prove the allegations of the indictment. State v. Weinstein, 224 N.C. 645, 31 S.E.2d 920, cert. denied, 324 U.S. 849, 65 S. Ct. 689, 89 L. Ed. 1410 (1944).

A motion for judgment as of nonsuit addressed to the entire bill is properly overruled if there is evidence sufficient to support a conviction of the crime charged or of an included crime. State v. Virgil, 263 N.C. 73, 138 S.E.2d 777 (1964); State v. Rowland, 263 N.C. 353, 139 S.E.2d 661 (1965).

If there is any evidence which reasonably tends to show guilt of the offense charged and from which a jury might legitimately convict, a nonsuit motion should be denied. State v. McWilliams, 277 N.C. 680, 178 S.E.2d 476 (1971).

If there be substantial evidence from which a jury could find that the offense charged has been committed and that defendant committed it, regardless of whether that evidence be direct or circumstantial or some combination of both, the motion to nonsuit should be overruled. State v. Reynolds, 18 N.C. App. 10, 195 S.E.2d 581 (1973).

Contradictions and discrepancies in the State's evidence are for the jury to resolve and do not warrant the granting of the motion. State v. Holton, 284 N.C. 391, 200 S.E.2d 612 (1973).

A motion for judgment of nonsuit is properly denied if there is any competent evidence to support the allegations contained in the bill of indictment; and all the evidence which tends to sustain those allegations must be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn therefrom. State v. Bell, 285 N.C. 746, 208 S.E.2d 506 (1974).

If there is substantial evidence, whether direct, circumstantial, or both, of all material elements of the offense charged, then the motion for nonsuit must be denied and it is then for the jury to determine whether the evidence establishes guilt beyond a reasonable doubt. State v. Coble, 24 N.C. App. 79, 210 S.E.2d 118 (1974).

If there is evidence, direct, circumstantial or both, from which the jury can find that the defendant committed the offense charged, the motion should be overruled. State v. Dangerfield, 32 N.C. App. 608, 233 S.E.2d 663 (1977).

The motion for nonsuit must be denied where there is sufficient evidence that the offense charged was committed and that the defendant committed it. State v. Hales, 32 N.C. App. 729, 233 S.E.2d 601 (1977).

When there is sufficient evidence, direct or circumstantial, from which the jury could find that the charged offense has been committed and that defendant was the person who committed it, the motion should be denied. State v. Covington, 290 N.C. 313, 226 S.E.2d 629 (1976).

If, when the evidence is viewed in the light most favorable to the State, there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled. State v. McKenna, 289 N.C. 668, 224 S.E.2d 537, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

When the evidence is viewed in the light most favorable to the State, if there is any competent evidence of each essential element of the offense charged, then the trial judge must deny the motion and submit the case to the jury. State v. Yancey, 291 N.C. 656, 231 S.E.2d 637 (1977).

If there is any competent evidence tending to establish each material element of the offense charged in the bill of indictment the motion to dismiss or for nonsuit must be overruled. State v. Thomas, 292 N.C. 251, 232 S.E.2d 411 (1977).

If there is any evidence tending to prove the fact of guilt, or which reasonably leads to that conclusion as a logical and legitimate deduction, the motion must be denied. State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977).

If there is any evidence tending to prove the fact of guilt, or which reasonably leads to that conclusion as a logical and legitimate deduction, the question of guilt is for the jury. State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977).

Defendant's evidence relating to matters in defense should not be considered on motion to nonsuit. State v. Avery, 236 N.C. 276, 72 S.E.2d 670 (1952); State v. Moseley, 251 N.C. 285, 111 S.E.2d 308 (1959).

Consideration of Entire Evidence on Appeal. — Where a defendant in a criminal action desires to except to the sufficiency of the evidence to convict him, his excepting, under this section, at the close of the State's evidence, and upon the overruling of his motion to nonsuit, excepting at the close of all the evidence, brings his exception to the Supreme Court on appeal upon the sufficiency of the entire evidence to convict, and is the proper procedure for that purpose. State v. Kelly, 186 N.C. 365, 119 S.E. 755 (1923).

In State v. Pasour, 183 N.C. 793, 111 S.E. 779 (1922), the court said: "Both before and after he had introduced evidence, the defendant moved to dismiss the prosecution as in case of nonsuit, and duly excepted to the court's denial of his motion. The exceptions, therefore, require a consideration of the entire evidence."

An exception to a motion to dismiss in a criminal action taken after the close of the State's evidence, and renewed by defendant after the introduction of his own evidence, does not confine the appeal to the State's evidence alone, and a conviction will be sustained under

the second exception if there is any sufficient evidence on the whole record of the defendant's guilt. State v. Brinkley, 183 N.C. 720, 110 S.E. 783 (1922).

Upon appeal from the denial of a motion as of nonsuit in a criminal action, review of the evidence is not confined to the State's evidence alone, but all the evidence in the State's favor, taken in the light most favorable to the State and giving it every reasonable intendment therefrom, will be considered, and where there is sufficient evidence of the defendant's guilt upon the whole record, the action of the trial judge in denying the motion of nonsuit will be upheld. State v. Lawrence, 196 N.C. 562, 146 S.E. 395 (1929).

A motion as of nonsuit in a criminal case at the close of the State's evidence, renewed after all the evidence has been introduced, does not confine its sufficiency to the time of the first motion, and will be denied if there is sufficient evidence in the State's behalf viewing all the evidence in its entirety. State v. Earp, 196 N.C. 164, 145 S.E. 23 (1928).

When upon the trial of a criminal action, the State produces its evidence and rests, and the defendant preserves his exception to the refusal of his motion for judgment as of nonsuit, and, after offering evidence and the case closed, defendant renews his motion for judgment as of nonsuit, the court must act, not only in the light of the evidence of the State, but of all the evidence; and, in such case, the defendant is entitled to the benefit only of his exception to the refusal of the latter motion. State v. Norton, 222 N.C. 418, 23 S.E.2d 301 (1942).

Where defendant offers evidence, the only question on appeal is whether the court erred in the denial of the motion made by defendant at the close of all the evidence. State v. Leggett, 255 N.C. 358, 121 S.E.2d 533 (1961).

Same — Supreme Court Not to Weigh Evidence. — This section provides that if on the motion the judgment of nonsuit is allowed on appeal, "it shall, in all cases, have the force and effect of a verdict of not guilty." This is not, therefore, the case of a new trial for some error of the judge, but is a verdict by the court of not guilty, which theretofore was without precedent. But the statute certainly did not intend that the Supreme Court should weigh the evidence and render a verdict. State v. Cooke, 176 N.C. 731, 97 S.E. 171 (1918).

Where the evidence was substantially similar to that introduced at a former trial, decision of the Supreme Court on the former appeal that evidence was sufficient to be submitted to the jury is res judicata on question of nonsuit or sufficiency of evidence. State v. Stone, 226 N.C. 97, 36 S.E.2d 704 (1946).

Where the indictments contain two separate charges and the State takes a voluntary nonsuit upon the first count, defendant's contention that the nonsuit established his innocence of acts charged under that count which also constituted essential elements of the offense charged in the second count, must be presented by a plea of former jeopardy or former acquittal, and not by motion for judgment as of nonsuit, under this section, and the failure of a plea of former jeopardy amounts to a waiver of his rights in the premises. State v. Baldwin, 226 N.C. 295, 37 S.E.2d 898 (1946).

Where a complete defense is established by the State's case, on a criminal indictment, the defendant should be allowed to avail himself of a motion for nonsuit under this section. State v. Boyd, 223 N.C. 79, 25 S.E.2d 456 (1943); State v. Watts, 224 N.C. 771, 32 S.E.2d 348 (1944); State v. Jarrell, 233 N.C. 741, 65 S.E.2d 304 (1951).

Sufficiency of Evidence. — Upon a motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State and the court will not pass upon its weight or the credibility of the witnesses. State v. Rountree, 181 N.C. 535, 106 S.E. 669 (1921); State v. Atlantic Ice & Coal Co., 210 N.C. 742, 188 S.E. 412 (1936); State v. Johnson, 226 N.C. 671, 40 S.E.2d 113 (1946). See State v. Eubanks, 209 N.C. 758, 184 S.E. 839 (1936). See also State v. Mann, 219 N.C. 212, 13 S.E.2d 247 (1941); State v. Webb, 233 N.C. 382, 64 S.E.2d 268 (1951); State v. McLamb, 235 N.C. 251, 69 S.E.2d 537 (1952); State v. Robbins, 243 N.C. 161, 90 S.E.2d 322 (1955); State v. Edmundson, 244 N.C. 693, 94 S.E.2d 844 (1956); State v. Gay, 251 N.C. 78, 110 S.E.2d 458 (1959).

A demurrer to the evidence presents only the question of the sufficiency of the evidence to carry the case to the jury, the weight and credibility of the evidence being for the jury and not the court. State v. Smith, 221 N.C. 400, 20 S.E.2d 360 (1942).

Nonsuit may not be granted on the ground that the testimony of the State's witnesses was incredible and unworthy of belief, the credibility of the witnesses being for the jury and not the court. State v. Bowman, 232 N.C. 374, 61 S.E.2d 107 (1950); State v. Wood, 235 N.C. 636, 70 S.E.2d 665 (1952).

On appeal in criminal cases the Supreme Court cannot pass upon the weight of evidence but only whether there is sufficient evidence to support conviction. State v. Shoup, 226 N.C. 69, 36 S.E.2d 697 (1946).

The requirement that the evidence must be sufficient to convict beyond a reasonable doubt in criminal actions, is for the benefit of the defendant; and it requires the State to satisfy a jury to a moral certainty of the truth of the charge. State v. Sigmon, 190 N.C. 684, 130 S.E. 854 (1925).

On a motion for nonsuit in a criminal action, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment upon the

evidence, and every reasonable inference to be drawn therefrom. State v. Fleming, 194 N.C. 42, 138 S.E. 342 (1927). See also State v. Lawrence, 196 N.C. 562, 146 S.E. 395 (1929); State v. Durham, 201 N.C. 724, 161 S.E. 398 (1931); State v. Smoak, 213 N.C. 79, 195 S.E. 72 (1938); State v. Adams, 213 N.C. 243, 195 S.E. 822 (1938); State v. Hammonds, 216 N.C. 67, 3 S.E.2d 439 (1939); State v. Brown, 218 N.C. 415, 11 S.E.2d 321 (1940); State v. Block, 245 N.C. 661, 97 S.E.2d 243 (1957); State v. Avent, 253 N.C. 580, 118 S.E.2d 47 (1961), death sentence vacated, 373 U.S. 375, 83 S. Ct. 1311, 10 L. Ed. 2d 420 (1963); State v. Walker, 266 N.C. 269, 145 S.E.2d 833 (1966); State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971); State v. McKinney, 24 N.C. App. 259, 210 S.E.2d 450 (1974), rev'd on other grounds, 288 N.C. 113, 215 S.E.2d 578 (1975).

On a motion for judgment as of nonsuit in a criminal case the evidence must be considered in the light most favorable to the State. State v. Herndon, 223 N.C. 208, 25 S.E.2d 611, cert. denied, 320 U.S. 759, 64 S. Ct. 67, 88 L. Ed. 452 (1943). See State v. McMahan, 224 N.C. 476, 31 S.E.2d 357 (1944); State v. Fulk, 232 N.C. 118, 59 S.E.2d 617 (1950); State v. Hendric, 232 N.C. 447, 61 S.E.2d 349 (1950); State v. Jarrell, 233 N.C. 741, 65 S.E.2d 304 (1951); State v. Holland, 234 N.C. 354, 67 S.E.2d 272 (1951); State v. Simmons, 240 N.C. 780, 83 S.E.2d 904 (1954); State v. Neal, 248 N.C. 544, 103 S.E.2d 722 (1958); State v. Glenn, 251 N.C. 156, 110 S.E.2d 791 (1959); State v. Downey, 253 N.C. 348, 117 S.E.2d 39 (1960); State v. Bogan, 266 N.C. 99, 145 S.E.2d 374 (1965); State v. Allred, 279 N.C. 398, 183 S.E.2d 553 (1971); State v. Bolin, 281 N.C. 415, 189 S.E.2d 235 (1972); State v. White, 18 N.C. App. 31, 195 S.E.2d 576 (1973); State v. Waite, 32 N.C. App. 279, 232 S.E.2d 278 (1977); State v. Hales, 32 N.C. App. 729, 233 S.E.2d 601 (1977).

On a motion for judgment of nonsuit the evidence must be considered in the light most favorable for the State, and if there be any competent evidence to support the charge contained in the bill of indictment the case is one for the jury. State v. Scoggins, 225 N.C. 71, 33 S.E.2d 473 (1945); State v. Block, 245 N.C. 661, 97 S.E.2d 243 (1957).

"In considering a motion to dismiss the action under the statute, we are merely to ascertain whether there is any evidence to sustain the indictment; and in deciding the question we must not forget that the State is entitled to the most favorable interpretation of the circumstances and all inferences that may fairly be drawn from them. State v. Carlson, 171 N.C. 818, 89 S.E. 30 (1916); State v. Rountree, 181 N.C. 535, 106 S.E. 669 (1921)." State v. Carr, 196 N.C. 129, 144 S.E. 698 (1928).

Upon motion to dismiss under this section, it is required that the court ascertain merely whether there is any sufficient evidence to sustain the allegations of the indictment and not whether it be true nor whether the jury should believe it. State v. McLeod, 196 N.C. 542, 146 S.E. 409 (1929).

Where the evidence for the State where the defendants are charged with fornication and adultery, shows no more than that the defendants had opportunities to commit the crime, on motion of the defendants, the action should be dismissed, and a verdict of not guilty, entered under this section. State v. Woodell, 211 N.C. 635, 191 S.E. 334 (1937).

Evidence that the defendants had assisted a prisoner to escape is held insufficient in State v. Pace, 192 N.C. 780, 136 S.E. 11 (1926) and the motion for judgment of nonsuit as provided in this section should have been granted.

The court said in State v. Woodell, 211 N.C. 635, 191 S.E. 334 (1937), citing State v. Prince, 182 N.C. 788, 108 S.E. 330 (1921), that when it is said that there is no evidence to go to the jury, it does not mean that there is literally and absolutely none, for as to this there could be no room for any controversy, but there is none which ought reasonably to satisfy the jury that the fact sought to be proved is established.

On a trial for the destruction of certain pages of a book in the office of the register of deeds, wherein the defendant's interest in so doing has been shown, it is required of the State to show that the offense was committed on the day the defendant had an opportunity to commit the offense, and a margin of several weeks, in which the offense might have been committed, during which time the books were open to the public generally, is insufficient evidence to be submitted to the jury, and defendant's motion as of nonsuit should have been allowed. State v. Swinson, 196 N.C. 100, 144 S.E. 555 (1928).

Upon a motion as of nonsuit in a criminal action, made at the close of the State's evidence and renewed at the close of all of the evidence, all the evidence, whether offered by the State or elicited from defendant's witnesses, will be considered in the light most favorable to the State, and it is entitled to every reasonable intendment thereon and every reasonable inference therefrom, and only evidence favorable to the State will be considered, the weight and credibility of the evidence being for the jury. State v. Shipman, 202 N.C. 518, 163 S.E. 657 (1932); State v. Ammons, 204 N.C. 753, 169 S.E. 631 (1933); State v. Mann, 219 N.C. 212, 13 S.E.2d 247, 132 A.L.R. 1309 (1941).

Upon motion as of nonsuit in a criminal action, under this section, the evidence is to be considered in the light most favorable to the State, and if there is any evidence tending to prove the fact of guilt or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not such as merely raises a suspicion or conjecture of guilt, it is for the jury to say whether they are convinced beyond a reasonable doubt of the fact of guilt.

State v. Marion, 200 N.C. 715, 158 S.E. 406 (1931); State v. Rhodes, 252 N.C. 438, 113 S.E.2d 917 (1960); State v. Rogers, 252 N.C. 499, 114 S.E.2d 355 (1960).

A motion for nonsuit presents only the question of the sufficiency of the evidence to carry the case to the jury. State v. Green, 251 N.C. 40, 110 S.E.2d 609 (1959).

There must be legal evidence of the fact in issue and not merely such as raises a suspicion or conjecture in regard to it. State v. Bass, 253 N.C. 318, 116 S.E.2d 772 (1960).

Evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict and should not be left to a jury. State v. Glenn, 251 N.C. 156, 110 S.E.2d 791 (1959).

Upon a motion for judgment of nonsuit the evidence is to be considered in the light most favorable for the State, but evidence which merely suggests the possibility of guilt or which raises only a conjecture is insufficient to require submission to the jury. State v. Guffey, 252 N.C. 60, 112 S.E.2d 734 (1960).

On motion for nonsuit the State is entitled to have the evidence considered in its most favorable light. The reconciliation of any apparent discrepancy in the testimony, the weight of the evidence, and the credibility of the witnesses are all matters for the jury and not the court. State v. Reeves, 235 N.C. 427, 70 S.E.2d 9 (1952).

In ruling on a motion for nonsuit the court does not pass upon the credibility of the witnesses for the prosecution, or take into account any evidence contradicting them offered by the defense. The court merely considers the testimony favorable to the State, assumes it to be true, and determines its legal sufficiency to sustain the allegations of the indictment. Whether the testimony is true or false, and what it proves if it be true, are matters for the jury. State v. Wood, 235 N.C. 636, 70 S.E.2d 665 (1952).

On a motion for judgment of nonsuit, the State is entitled to have the evidence considered in its most favorable light, and defendant's evidence, unless favorable to the State, is not to be considered, except, when not in conflict with the State's evidence, it may be used to explain or make clear the State's evidence. State v. Roop, 255 N.C. 607, 122 S.E.2d 363 (1961); State v. Colson, 262 N.C. 506, 138 S.E.2d 121 (1964).

Upon a motion for judgment of nonsuit the evidence offered by the State must be taken in the light most favorable to the State and conflicts therein must be resolved in the State's favor, the credibility and effect of such evidence being a question for the jury. State v. Church, 265 N.C. 534, 144 S.E.2d 624 (1965).

Upon a motion for judgment of nonsuit, the evidence is taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable inference to be drawn therefrom. State v. Beaver, 266 N.C. 115, 145 S.E.2d 330 (1965); State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975).

On motion for judgment of nonsuit the evidence must be considered in the light most favorable to the State and contradictions and discrepancies therein do not warrant the granting of the motion. State v. Jackson, 265 N.C. 558, 144 S.E.2d 584 (1965).

On a motion to nonsuit, the evidence is to be considered in its most favorable light for the State, and the State is entitled to every inference of fact which may reasonably be deduced from the evidence, and contradictions and discrepancies in the State's evidence are for the jury to resolve and do not warrant the granting of the motion of nonsuit. State v. Carter, 265 N.C. 626, 144 S.E.2d 826 (1965).

If there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury. State v. Bogan, 266 N.C. 99, 145 S.E.2d 374 (1965).

There must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. State v. Bogan, 266 N.C. 99, 145 S.E.2d 374 (1965); State v. Rigsbee, 285 N.C. 708, 208 S.E.2d 656 (1974); State v. McKinney, 24 N.C. App. 259, 210 S.E.2d 450 (1974), rev'd on other grounds, 288 N.C. 113, 215 S.E.2d 578 (1975).

On motion to nonsuit, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment thereon and every reasonable inference therefrom. Contradictions and discrepancies, even in the State's evidence, are for the jury to resolve, and do not warrant nonsuit. Only the evidence favorable to the State will be considered, and defendant's evidence relating to matters of defense, or defendant's evidence in conflict with that of the State, will not be considered. State v. Henderson, 276 N.C. 430, 173 S.E.2d 291 (1970); State v. Coble, 24 N.C. App. 79, 210 S.E.2d 118 (1974).

In passing upon a motion for nonsuit in a criminal case, the evidence must be considered by the court in the light most favorable to the State and the State must be given the benefit of every reasonable inference to be drawn therefrom. State v. Berryman, 10 N.C. App. 649, 179 S.E.2d 875 (1971).

On motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference therefrom. State v. Moore, 279 N.C. 455, 183 S.E.2d 546 (1971); State v. Phifer, 290, N.C. 203, 225 S.E.2d 786 (1976), cert. denied, 429 U.S. 1123, 97 S. Ct. 1160,

51 L. Ed. 2d 573 (1977); State v. Covington, 290 N.C. 313, 226 S.E.2d 629 (1976); State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976), cert. denied, 429 U.S. 1093, 97 S. Ct. 1106, 51 L. Ed. 2d 539 (1977); State v. Yancey, 291 N.C. 656, 231 S.E.2d 637 (1977); State v. Warren, 292 N.C. 235, 232 S.E.2d 419 (1977); State v. Dollar, 292 N.C. 344, 233 S.E.2d 521 (1977); State v. Foust, 32 N.C. App. 301, 232 S.E.2d 276 (1977).

On motion for nonsuit in a criminal case the evidence must be considered in the light most favorable to the State, the State is entitled to every reasonable inference which may legitimately be drawn from the evidence. State v. Sallie, 13 N.C. App. 499, 186 S.E.2d 667 (1972); State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975).

Motion to nonsuit requires the trial judge to consider the evidence in the light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom. State v. McNeil, 280 N.C. 159, 185 S.E.2d 156 (1971).

In considering a motion for nonsuit in a criminal case, the evidence must be considered in the aspect most favorable to the State. State v. Jones, 280 N.C. 60, 184 S.E.2d 862 (1971).

Upon motion for nonsuit in a criminal case the evidence must be viewed in the light most favorable to the State. State v. Reynolds, 18 N.C. App. 10, 195 S.E.2d 581 (1973); State v. Atwood, 290 N.C. 266, 225 S.E.2d 543 (1976).

On motion for nonsuit, all the evidence will be taken in the light most favorable to the State. State v. Ferguson, 17 N.C. App. 367, 194 S.E.2d 217 (1973).

In considering a trial court's denial of a motion for judgment of nonsuit, the evidence for the State, considered in the light most favorable to it, is deemed to be true and inconsistencies or contradictions therein are disregarded. State v. Price, 280 N.C. 154, 184 S.E.2d 866 (1971).

Upon a motion for judgment of nonsuit, only the evidence favorable to the State is considered, and contradictions and discrepancies, even in the State's evidence, are matters for the jury and do not warrant nonsuit. State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971); State v. Rigsbee, 285 N.C. 708, 208 S.E.2d 656 (1974).

Contradictions and discrepancies, even in the State's evidence, are for the jury to resolve, and do not warrant nonsuit. State v. Allred, 279 N.C. 398, 183 S.E.2d 553 (1971); State v. Bolin, 281 N.C. 415, 189 S.E.2d 235 (1972); State v. Sallie, 13 N.C. App. 499, 186 S.E.2d 667 (1972); State v. McKinney, 24 N.C. App. 259, 210 S.E.2d 450 (1974), rev'd on other grounds, 288 N.C. 113, 215 S.E.2d 578 (1975); State v. Cox, 289 N.C. 414, 222 S.E.2d 246 (1976); State v. McCall, 289 N.C. 512, 223 S.E.2d 303, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976); State v. Dangerfield, 32 N.C. App. 608, 233 S.E.2d 663 (1977).

Ordinarily contradictions and discrepancies bear solely upon the weight to be given the testimony of a witness, a matter within the province of the jury. State v. Allred, 279 N.C. 398, 183 S.E.2d 553 (1971).

Motion for nonsuit brings in question the sufficiency of all the evidence to take the case to the jury. State v. Sallie, 13 N.C. App. 499, 186 S.E.2d 667 (1972).

When considering a motion for nonsuit the court is not concerned with the weight of the testimony but only with its sufficiency to carry the case to the jury and sustain the indictment. State v. McNeil, 280 N.C. 159, 185 S.E.2d 156 (1971).

On a motion for judgment as of nonsuit the defendant's evidence, unless favorable to the State, is not to be taken into consideration; however, when not in conflict with the State's evidence, it may be used to explain or clarify that offered by the State. State v. Jones, 280 N.C. 60, 184 S.E.2d 862 (1971); State v. Sallie, 13 N.C. App. 499, 186 S.E.2d 667 (1972).

On a motion to nonsuit, the defendant's evidence which explains or makes clear the evidence of the State may be considered. State v. Blizzard, 280 N.C. 11, 184 S.E.2d 851 (1971); State v. Atwood, 290 N.C. 266, 225 S.E.2d 543 (1976).

On a motion for nonsuit, defendant's evidence which rebuts the inference of guilt may be considered when it is not inconsistent with the State's evidence. State v. Blizzard, 280 N.C. 11, 184 S.E.2d 851 (1971); State v. Atwood, 290 N.C. 266, 225 S.E.2d 543 (1976).

In considering a motion for judgment of nonsuit, evidence of the defendant which is favorable to the State is considered, but his evidence in conflict with that of the State is not considered. State v. Price, 280 N.C. 154, 184 S.E.2d 866 (1971).

In considering a motion for nonsuit lodged at the close of all the evidence, any portion of defendant's evidence which is favorable to the State and any portion of defendant's evidence which explains or clarifies the State's evidence is to be considered; thus by omitting defendant's evidence from the record on appeal, defendant would deprive the State of the benefit of such portions of defendant's evidence, which are entitled to consideration. State v. Paschall, 14 N.C. App. 591, 188 S.E.2d 521 (1972).

Evidence given by a qualified expert that fingerprints found at the scene of a crime correspond with those of an accused, when accompanied by substantial evidence of circumstances from which the jury can find that such fingerprints could have been impressed only at the time the offense was committed, is sufficient to withstand a motion for nonsuit. State v. Reynolds, 18 N.C. App. 10, 195 S.E.2d 581 (1973).

In considering a motion under this section, the

evidence most favorable to the State must be considered as true. State v. Poole, 285 N.C. 108, 203 S.E.2d 786 (1974).

All of the evidence favorable to the State is considered, and defendant's evidence relating to matters of defense or defendant's evidence in conflict with that of the State is not considered. State v. McKinney, 24 N.C. App. 259, 210 S.E.2d 450 (1974), rev'd on other grounds, 288 N.C. 113, 215 S.E.2d 578 (1975).

A motion to nonsuit in a criminal case requires consideration of the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. State v. McKinney, 288 N.C. 113, 215 S.E.2d 578 (1975); State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976); State v. Abrams, 29 N.C. App. 144, 223 S.E.2d 516 (1976); State v. Flannery, 31 N.C. App. 617, 230 S.E.2d 603 (1976).

To withstand a motion for judgment as of nonsuit there must be substantial evidence of all material elements of the offense charged. State v. McKinney, 288 N.C. 113, 215 S.E.2d 578 (1975); State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977).

Whether the State has offered substantial evidence presents a question of law for the trial court. State v. McKinney, 24 N.C. App. 259, 210 S.E.2d 450 (1974), rev'd on other grounds, 288 N.C. 113, 215 S.E.2d 578 (1975).

In passing upon a motion for judgment as of nonsuit, the trial judge must consider all the evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence and considering so much of defendant's evidence as may be favorable to the State. State v. Hines, 286 N.C. 377, 211 S.E.2d 201 (1975); State v. Williams, 31 N.C. App. 588, 229 S.E.2d 839 (1976).

Upon a motion for judgment of nonsuit, the evidence for the State is taken to be true and the State is entitled to every reasonable inference which may be drawn therefrom, contradictions and discrepancies in the State's evidence are disregarded and the evidence of the defendant in conflict with that of the State is not taken into consideration. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216, (1976); State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

In considering a motion for nonsuit the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference therefrom. State v. Dull, 289 N.C. 55, 220 S.E.2d 344 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

Motion to nonsuit requires the trial court to consider the evidence in the light most favorable to the State, take it as true and give the State the benefit of every reasonable inference to be drawn therefrom. State v. Miller, 289 N.C. 1, 220 S.E.2d 572 (1975); State v. Biggs, 289 N.C. 522, 223 S.E.2d 371 (1976).

For the purpose of ruling upon a motion for judgment as of nonsuit, the evidence for the State is taken to be true, every reasonable inference favorable to the State is to be drawn therefrom and discrepancies therein are to be disregarded. State v. Sellers, 289 N.C. 268, 221 S.E.2d 264 (1976); State v Manuel, 291 N.C. 705, 231 S.E.2d 588 (1977).

In considering a motion for nonsuit, the evidence for the State, considered in the light most favorable to it, is deemed to be true and the State is entitled to the benefit of all inferences which may reasonably be drawn therefrom. State v. McCall, 289 N.C. 512, 223 S.E.2d 303, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

In ruling on defendant's motions for nonsuit or for directed verdict of not guilty the trial judge must consider the State's evidence in the light most favorable to the State without considering the evidence of defendant in conflict therewith. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, U.S. , 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

In considering a motion for directed verdict or for judgment of nonsuit the evidence for the State must be deemed to be true and must be considered in the light most favorable to it, the State being entitled to the benefit of all inferences in its favor which may reasonably be drawn therefrom. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Upon motion for nonsuit, in determining whether there is substantial evidence of each essential element of the crime, and whether the accused was the perpetrator of the crime, the evidence before the court must be considered in the light most favorable to the State and the State is entitled to the benefit of every reasonable inference which may be drawn from the evidence. State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Evidence which is inherently impossible or in conflict with indisputable physical facts or laws of nature is not sufficient to take the case to the jury. State v. Cox, 289 N.C. 414, 222 S.E.2d 246 (1976).

In ruling upon the motions for judgment as of nonsuit, the trial court is required to view the evidence in the light most favorable to the State and to give the State the benefit of every reasonable inference and intendment to be drawn therefrom. State v. Dangerfield, 32 N.C. App. 608, 233 S.E.2d 663 (1977).

A motion to nonsuit requires the trial judge to

consider the evidence in the light most favorable to the State and to give the State the benefit of every reasonable inference to be drawn therefrom. State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977); State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977).

The rule to be applied when considering whether the State has introduced sufficient evidence to withstand a motion for nonsuit is well settled in this jurisdiction. A motion for nonsuit is properly denied when there is any evidence, whether introduced by the State or defendant, which will support the charges contained in the bill of indictment or warrant, considering the evidence in the light most favorable to the State and drawing every reasonable inference, deducible from the evidence, in favor of the State. State v. Everhart, 291 N.C. 700, 231 S.E.2d 604 (1977).

Upon a motion for judgment of nonsuit, the evidence by the State is to be deemed true and is to be considered in the light most favorable to the State. State v. Madden, 292 N.C. 114, 232 S.E.2d 656 (1977).

In passing upon the validity of a motion to dismiss or for judgment as of nonsuit, the court considers the evidence in the light most favorable to the State, giving it the benefit of every legitimate inference arising therefrom. State v. Thomas, 292 N.C. 251, 232 S.E.2d 411 (1977).

On a motion for nonsuit, the court considers all of the evidence actually admitted, whether from the State or defendant, in the light most favorable to the State, resolves any contradictions and discrepancies therein in the State's favor, and gives the State the benefit of all reasonable inferences from the evidence. State v. Strickland, 290 N.C. 169, 225 S.E.2d 531 (1976).

When considering a motion to dismiss, the evidence for the State, considered in the light most favorable to it, is deemed to be true, and inconsistencies or contradictions therein are disregarded. Any evidence of the defendant which is favorable to the State is considered, but his evidence which is in conflict with that of the State is not considered. State v. Jacobs, 31 N.C. App. 582, 230 S.E.2d 550 (1976); State v. Banks, 31 N.C. App. 667, 230 S.E.2d 429 (1976).

When considering the sufficiency of the evidence to survive a motion to dismiss, the evidence, considered in the light most favorable to the State, is deemed to be true, and inconsistencies or contradictions therein are disregarded. State v. Hyatt, 32 N.C. App. 623, 233 S.E.2d 649 (1977).

The conclusion of the court with respect to the sufficiency of the evidence is unaffected by defendants' contention that some of the State's evidence is contradictory and casts doubt on the credibility of the witnesses. Such contradictions and discrepancies are matters for the jury and do not warrant nonsuit. State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977).

Any contradictions and inconsistencies, when in the State's evidence, are to be disregarded by the court in considering a trial court's denial of a motion for judgment as of nonsuit. State v. Williams, 31 N.C. App. 588, 229 S.E.2d 839 (1976).

The court must consider all of the evidence actually admitted in the light most favorable to the State, resolve any contradictions and discrepancies therein in the State's favor, and give the State the benefit of all reasonable inferences from the evidence. State v. Scott, 289 N.C. 712, 224 S.E.2d 185 (1976).

Same — Circumstantial Evidence. — Upon demurrer to the evidence, when the State relies upon circumstantial evidence for a conviction of a criminal offense, the rule is that the facts established or advanced on the hearing must be of such nature and so connected or related as to point unerringly to the defendant's guilt and exclude any other reasonable hypothesis. State v. Simmons, 240 N.C. 780, 83 S.E.2d 904 (1954); State v. Rhodes, 252 N.C. 438, 113 S.E.2d 917 (1960); State v. Rogers, 252 N.C. 499, 114 S.E.2d 355 (1960).

When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty. State v. Rowland, 263 N.C. 353, 139 S.E.2d 661 (1965).

Motion to nonsuit should be denied if there is substantial evidence tending to prove each essential element of the offense charged. This rule applies whether the evidence is direct or circumstantial, or a combination of both. State v. Stephens, 244 N.C. 380, 93 S.E.2d 431 (1956).

The rule for determining the sufficiency of circumstantial evidence to withstand a motion for judgment as in case of nonsuit as set forth in State v. Stephens, 244 N.C. 380, 93 S.E.2d 431 (1956), is established law in this jurisdiction. State v. Chavis, 270 N.C. 306, 154 S.E.2d 340 (1967).

When the motion questions the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972); State v. Solomon, 24 N.C. App. 527, 211 S.E.2d 478 (1975).

To warrant a conviction on circumstantial evidence, the facts and circumstances must be sufficient to constitute substantial evidence of every essential element of the crime charged. State v. Blizzard, 280 N.C. 11, 184 S.E.2d 851 (1971).

When the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt, they are insufficient to make out a case and a motion to dismiss should be allowed. State v. Blizzard, 280 N.C. 11, 184 S.E.2d 851 (1971); State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975); State v. Miller, 289 N.C. 1, 220 S.E.2d 572 (1975); State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976); State v. Manuel, 291 N.C. 705, 231 S.E.2d 588 (1977).

Regardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled. State v. McNeil, 280 N.C. 159, 185 S.E.2d 156 (1971).

When a motion is made for a judgment of nonsuit or for a directed verdict of not guilty, the trial judge must determine whether there is substantial evidence of every essential element of the offense, and it is immaterial whether the substantial evidence is circumstantial, or direct, or both. State v. Jones, 280 N.C. 60, 184 S.E.2d 862 (1971).

Where all of the evidence introduced by the State is circumstantial in nature, it is not necessary that such evidence must establish facts so connected and related as to point unerringly to defendant's guilt and exclude any other reasonable hypothesis, but only that there be substantial evidence of all elements of the crime sufficient to submit the case to the jury. State v. Griffin, 18 N.C. App. 14, 195 S.E.2d 569 (1973).

There must be substantial evidence of all material elements of the offense to withstand the motion to dismiss, and it is immaterial whether the substantial evidence is circumstantial or direct, or both. State v. Poole, 285 N.C. 108, 203 S.E.2d 786 (1974); State v. Minor, 290 N.C. 68, 224 S.E.2d 180 (1976).

Motion challenging the sufficiency of circumstantial evidence to go to the jury should be denied if there is evidence, considered in the light most favorable to the State, from which the jury could find that a crime has been committed and that defendant committed it. State v. Solomon, 24 N.C. App. 527, 211 S.E.2d 478 (1975).

Nonsuit should be denied when there is sufficient evidence, direct, circumstantial or both, from which the jury could find that the offense charged has been committed and that defendant committed it. State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975); State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976), cert. denied, 429 U.S. 1123, 97 S. Ct. 1160, 51 L. Ed. 2d 573 (1977).

Same — When State's Evidence Is Conflicting. — When the substantive evidence offered by the State is conflicting — some tending to inculpate and some tending to exculpate the defendant — it is sufficient to repel a demurrer thereto. State v. Tolbert, 240 N.C. 445, 82 S.E.2d 201 (1954); State v. Green, 251 N.C. 40, 110 S.E.2d 609 (1959); State v. Gay, 251 N.C. 78, 110 S.E.2d 458 (1959); State v. Rogers, 252 N.C. 499, 114 S.E.2d 355 (1960).

Discrepancies in the State's evidence will not justify the granting of a motion for nonsuit. State v. Moseley, 251 N.C. 285, 111 S.E.2d 308 (1959).

The introduction in evidence by the State of a statement made by defendant which may tend to exculpate him does not prevent the State from showing that the facts concerning the homicide were different from what the defendant said about them. State v. Bolin, 281 N.C. 415, 189 S.E.2d 235 (1972).

Same — When Complete Defense Is Made Out by State's Evidence. — It is axiomatic that when a complete defense is made out by the State's evidence, a defendant should be allowed to avail himself of such defense on a demurrer to the evidence under this section. This is true even when the exculpating evidence is in the form of statements of defendant offered in evidence by the State. State v. Tolbert, 240 N.C. 445, 82 S.E.2d 201 (1954).

Same — When State's Case Must Rest Entirely on Declarations of Defendant. — When the State's case must rest entirely on declarations made by defendant, and there is no evidence contra which does more than suggest a possibility of guilt or raise a conjecture, demurrer thereto should be sustained. In such case, the declarations of the defendant are presented by the State as worthy of belief, and when they are wholly exculpatory, the defendant is entitled to his acquittal. State v. Tolbert, 240 N.C. 445, 82 S.E.2d 201 (1954).

Same — When State Is Bound by Defendant's Extrajudicial Statement. — When the State introduced the defendant's extrajudicial statement, it was bound by what he said except insofar as it was contradicted and shown to be false. State v. Bolin, 281 N.C. 415, 189 S.E.2d 235 (1972).

When the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements. State v. Bolin, 281 N.C. 415, 189 S.E.2d 235 (1972).

Same — Prosecution for Homicide. — When an intentional killing with a deadly weapon has been established, the law implies malice, and the State cannot be nonsuited. State v. Brooks, 228 N.C. 68, 44 S.E.2d 482 (1947).

Defendant's motion to nonsuit is properly denied when the evidence tends to show an intentional killing with a deadly weapon, since the credibility and sufficiency of the defendant's evidence in mitigation or excuse is for the jury to consider and decide. State v. Robinson, 226 N.C. 95, 36 S.E.2d 655 (1946).

Where defendant, in a prosecution for murder, admitted that he intentionally and without provocation fired the gun which resulted in the death of deceased, a police officer, to prevent deceased from arresting him, and offered no excuse or explanation in mitigation for his act except that he did not make up his mind and determine to kill deceased, there is evidence of premeditation and deliberation and evidence sufficient to sustain a verdict of murder in the first degree, and motion for nonsuit was properly overruled. State v. Matheson, 225 N.C. 109, 33 S.E.2d 590 (1945).

In a prosecution of two persons for murder, where the State's evidence tended to show that deceased was standing near another person on a city sidewalk, when the first defendant called upon deceased to stop bothering his cousin and the deceased said he was not bothering anyone, whereupon the first defendant shot a pistol at deceased twice, and then the second defendant took the gun from the first defendant and shot at deceased twice, deceased falling to the ground at the second shot and dying on the way to the hospital, there being only one wound on deceased, a shot through the heart, there is ample evidence for the jury and the first defendant's motion for judgment as of nonsuit was properly denied. State v. Williams, 225 N.C. 182, 33 S.E.2d 880 (1945).

In a prosecution for felonious slaying evidence held sufficient to go to the jury. State v. Stone, 224 N.C. 848, 32 S.E.2d 651 (1945).

In a prosecution of defendant for murder of her husband, where the evidence for the State disclosed that deceased was shot twice, the first bullet being fired by codefendant, and the second bullet being fired by the defendant and that neither acted in concert, and the medical expert could not determine in the absence of autopsy which of the two wounds caused death, the defendant's demurrer to the evidence should have been sustained and the case dismissed. State v. Simpson, 244 N.C. 325, 93 S.E.2d 425 (1956).

When the evidence taken in the light most favorable to the State is sufficient to require submission of the case to the jury on the charge of second-degree murder and the lesser-included offense of voluntary manslaughter, the judge does not commit error in denying defendant's motion for nonsuit made at the close of all the evidence. State v. Barr, 15 N.C. App. 116, 189 S.E.2d 638 (1972).

The evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of second-degree murder of a three-year-old child where it tended to show that the child died as a result of receiving a severe blow on her abdomen, that the blow was received at a time when defendant and the child were alone together in a house trailer, that the blow causing death left a bruise mark on the child's abdomen which closely approximated the size and shape of the heel of a man's boot, that defendant was wearing boots, that there were other bruises and cuts on the head and body which occurred close to or at the time of death, that the child had been horribly abused over a period of time prior to her death and that such abuse did not commence until defendant started living in the trailer with the child's mother. State v. Sallie, 13 N.C. App. 499, 186 S.E.2d 667 (1972).

Where the State's evidence established a brutal murder, showed that defendant had the opportunity to commit it and raised suspicion in imaginative minds, it did not suffice to sustain a conviction. State v. Jones, 280 N.C. 60, 184 S.E.2d 862 (1971).

Although the evidence raises suspicions as to defendant's involvement and possible guilt in respect of the death of the deceased, the State failed to offer substantial evidence that the bullet which caused death was from a pistol fired by defendant. On account of the inadequacy of the evidence in respect of this essential element of the crime charged, the circumstantial evidence was held insufficient for submission to the jury. State v. Allred, 279 N.C. 398, 183 S.E.2d 553 (1971).

Evidence was sufficient in a murder case to withstand nonsuit where it tended to show that defendant and her deceased husband were driving along a rural road at the time of the homicide, that five gunshots sounded in rapid succession as the car came to a halt, that five bullet holes were observed on the right side of deceased's head, that a .22-caliber six-shot revolver was on the seat beside deceased when an officer arrived, that a search of defendant's purse revealed five spent .22-caliber cartridge casings, that deceased had changed his life-insurance beneficiary to his wife's name two months before his death, and that defendant had previously threatened to kill her husband. State v. Griffin, 18 N.C. App. 14, 195 S.E.2d 569 (1973).

The evidence was sufficient to be submitted to the jury in a second-degree murder prosecution where it tended to show that the defendant and the deceased were imprisoned in the same prison unit; that a prison guard saw them arguing and broke them up; that later the guard saw defendant approach deceased who was lying on his bunk and make a striking movement toward the deceased's body; that although the guard saw no knife or other weapon in defendant's hand, a small knife was later discovered in a heater and deceased had died from a stab wound in the chest. State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975).

In a prosecution for first-degree murder, the evidence was sufficient to withstand a motion for nonsuit where it tended to show that deceased died as a result of gunshot wounds inflicted by a shot fired from a trailer,

defendant, a short time before the shooting, had test fired a 12 gauge shotgun, 12 gauge shotgun wadding was found in a straight line between the trailer and the bodies after the shooting, a freshly fired 12 gauge shotgun was later found in defendant's house hidden between the quilts and mattress of a bed and defendant was the only person in the trailer when the fatal shots were fired. State v. McCall, 289 N.C. 512, 223 S.E.2d 303, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

In a prosecution for first-degree murder, where defendant stole an automobile and drove it into a ditch in the vicinity of the home occupied by deceased, defendant then went to the home of deceased, and thereafter defendant fatally attacked him with a knife, and defendant then robbed the body of deceased, ransacked the dwelling and left deceased lying in a pool of his own blood, there was sufficient substantial evidence to permit the jury to find that after premeditation and deliberation defendant formed a fixed purpose to kill and did kill the deceased. State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

In a prosecution for first-degree murder, where defendant drove a stolen automobile into a ditch in the vicinity of the home of deceased, killed deceased and then robbed deceased's body, the evidence was sufficient to permit a jury to find that defendant killed deceased while in the perpetration of a robbery. State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

In a prosecution for first-degree murder, where defendant admitted to State's witness that he and his brother had a blunt instrument and a knife when they decided to rob decedent, and evidence showed that decedent died of injuries inflicted by both blunt and sharp objects, the evidence was sufficient to withstand a motion for nonsuit even though defendant's admissions did not include the actual use of the weapons against decedent. State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976).

In a prosecution for first-degree murder and armed robbery where the jury could find that (1) defendant borrowed the murder weapon on a date previous to the commission of the crimes; (2) defendant had possession of the murder weapon and the victim's weapon on the afternoon the crimes were committed; (3) defendant sent his girl friend to retrieve the murder weapon from its hiding place in order to sell it to a man who, upon cleaning the pistol, found that it had been fired twice; (4) defendant had asked another individual a few days before the shooting to help him rob two stores but was refused; (5) defendant and an accomplice were in possession of several hundred dollars on the afternoon of the crimes and several payroll checks that had already been endorsed, at least two of which were identified as having been cashed at the store at which the crime was committed the night before the shooting; and (6) defendant admitted telling his girl friend that he and an accomplice had killed and robbed the victim, the evidence presented by the State was sufficient to carry the case to the jury on the murder charge contained in the bill of indictment. State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

In a prosecution for first-degree murder by poison, the evidence was sufficient to withstand motions for directed verdict and for judgment of nonsuit, where defendant purchased rat poison with intent to kill deceased and, pursuant to a preconceived plan to do so, defendant poured it into tea prepared specially for deceased's consumption, deceased drank the tea and almost immediately became ill and died. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

The motion for nonsuit was properly denied where the evidence was sufficient to support a finding that the offense of murder in the first degree was committed; that defendants were familiar with the operation and layout of the motel; that they planned and carried out a robbery there on that night and in the course of the robbery the victims were shot and killed; and that defendants fled the State to avoid apprehension. State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977).

Same — Accident Rather than Homicide. — Evidence tending only to show, upon a trial for wife murder, that the prisoner unintentionally in his sleep, as a result of a bad dream, inflicted upon his wife a wound too slight to have caused her death, except that from its neglect of treatment it may have been possible for blood poisoning to have set in therefrom that caused her death, is insufficient in law to sustain a conviction of manslaughter, and defendant's motion as of nonsuit should have been sustained, under this section. State v. Everett, 194 N.C. 442, 140 S.E. 22 (1927). See also State v. Tankersley, 172 N.C. 955, 90 S.E. 781 (1916).

Same — Murder in Perpetration of Robbery. — Where two witnesses saw two of defendants enter a store, hold up the proprietor with pistols, shoot and kill him and flee, and two other witnesses saw both of these defendants run out of the store and drive away in a car with third defendant, all four of these witnesses picking out defendants from a number of prisoners in a city jail about 30 days after the homicide and positively identifying them and their car, without denial on the part of the prisoners, and other persons identifying same defendants as the perpetrators of another hold-up just before their arrest, there was sufficient identification,

and evidence of murder for the jury and motion for nonsuit was properly denied. State v. Biggs, 224 N.C. 722, 32 S.E.2d 352 (1944).

Same — Rape. — Evidence tending to show that the deceased was ravished by a person suffering from gonorrhea, and that she died from the assault and choking, with further evidence that the defendant had the disease and that his shoes fitted the tracks made at the time of the crime around the house of the deceased and at the place of the crime, is sufficient, taken with other evidence of guilt, to be submitted to the jury and to sustain their verdict thereon of murder in the first degree. State v. McLeod, 196 N.C. 542, 146 S.E. 409 (1929).

Positive testimony of rape by prosecutrix is sufficient to carry the case to the jury, even when her evidence is denied by defendant and nonsuit under this section was held properly denied. State v. Vicks, 223 N.C. 384, 26 S.E.2d 873 (1943).

Evidence of defendant's guilt of rape held sufficient to overrule his motion to nonsuit. State v. Speller, 230 N.C. 345, 53 S.E.2d 294 (1949).

Where the prosecuting witness testified that she did not consent to any one of the defendants having sexual relations with her and that each of the acts of intercourse was against her will, because, she stated, that their strength was greater than hers and that she feared for her life, there was substantial evidence of all material elements of the crime of rape as to each defendant, and the trial judge properly overruled the motions for nonsuit. State v. Hines, 286 N.C. 377, 211 S.E.2d 201 (1975).

In a prosecution for first-degree rape and kidnapping where the defendant told the prosecutrix she would not live to be 19 if she did not cooperate with him, and she had every reason to believe that he would carry out his threat to kill her, and the defendant had exhibited a knife and threatened the life of the prosecutrix with it, and the knife continued in use as long as it was accessible to him, there was ample evidence to submit this case to the jury on first-degree rape and kidnapping. State v. Dull, 289 N.C. 55, 220 S.E.2d 344 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

There was plenary evidence to show that fear for her own safety and life and for the safety and life of her infant daughter overcame the prosecuting witness' resistance and caused her to submit to the desires of her assailants. The trial judge properly overruled defendant's motion for judgment as of nonsuit. State v. Yancey, 291 N.C. 656, 231 S.E.2d 637 (1977).

The evidence was sufficient to withstand the defendant's motions for nonsuit for second-degree rape where the evidence clearly indicated that defendant had carnal knowledge of the prosecutrix by force and against her will, the defendant had attempted to choke prosecutrix, told her how easy it would be to kill her and held an open knife against her stomach prior to the commission of the rape. State v. Williams, 31 N.C. App. 588, 229 S.E.2d 839 (1976).

Considering the evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference to be drawn therefrom, there was sufficient evidence of the commission of an armed robbery and a first-degree rape and of defendant's role as perpetrator to withstand a motion for nonsuit. State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977).

Same — Tending Only to Exculpate. — Where the State's evidence and that of the defendant are substantially to the same effect in an action for an assault, and tend only to exculpate the defendant, his motion as of nonsuit after all the evidence has been introduced, considering it as a whole, should be sustained. State v. Fulcher, 184 N.C. 663, 113 S.E. 769 (1922).

Same — Father Shielding Child. — The father may shield his child from assault of another to the extent necessary for the purpose without himself being guilty of an assault; and where he has done so, without the use of excessive force, as appears from all the evidence in the case, his motion as of nonsuit at the close of his evidence should be granted. State v. Fulcher, 184 N.C. 663, 113 S.E. 769 (1922).

Same — Personal Presence of Defendant. — In a criminal prosecution for felonious breaking and entering, larceny and receiving against several defendants, resulting in conviction of one of them of larceny only, a motion for nonsuit under this section was properly denied where the State's evidence tended to show that this defendant and one of the other defendants planned the theft and this defendant advised, aided and abetted his codefendant therein, though not personally present when the theft occurred. State v. King, 222 N.C. 239, 22 S.E.2d 445 (1942).

When two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty without regard to which one actually commits the offense. State v. Wright, 18 N.C. App. 76, 195 S.E.2d 801 (1973).

In a prosecution charging defendant with larceny of $15 from the victim, evidence was sufficient to be submitted to the jury where it tended to show that defendant was present when the purse snatcher snatched the victim's purse, that he immediately ran away with the purse snatcher, that he accompanied the purse snatcher on foot down the street some several minutes later, that he entered a department store with the purse snatcher for the purpose of making a purchase, and that he fled when

accosted by police officers. State v. Rankin, 18 N.C. App. 252, 196 S.E.2d 621, aff'd, 284 N.C. 219, 200 S.E.2d 182 (1973).

Same — Armed Robbery. — Where the State's evidence showed that the defendant held a dangerous weapon in his hand at the time he assaulted the victim, that he still had the weapon hanging from his arm at the time he went into the kitchen to take food from the refrigerator, and that it was no longer necessary for him to use or threaten to use the weapon at the time of the robbery since he had already injured and subdued the victim, viewing this evidence in the light most favorable to the State, there was sufficient evidence to submit the charge of armed robbery to the jury, and the trial court properly denied the defendant's motion for nonsuit as to that charge. State v. Lilly, 32 N.C. App. 467, 232 S.E.2d 495 (1977).

Same — Breaking and Entering and Larceny. — Where the evidence tended to show that fingerprints on vending machines in the refreshment area of a manufacturing company matched those of defendant, that the fingerprints could have been impressed only at the time the offenses charged were committed, that the refreshment area was not open to the public in general or to defendant in particular and that defendant had never lawfully been in or around the place of business before, evidence was sufficient to withstand nonsuit in a felonious breaking and entering and felonious larceny case. State v. Reynolds, 18 N.C. App. 10, 195 S.E.2d 581 (1973).

The court properly denied the motion for nonsuit where the State, introduced substantial evidence of each element of the offense of breaking or entering the building as charged in the indictment and that defendant was one of the persons who committed the offense, therefore the question of his guilt or innocence was properly submitted to the jury. State v. Burch, 24 N.C. App. 514, 211 S.E.2d 511 (1975).

If the evidence offered at trial fails to show the ownership as alleged in the indictment of the premises entered and the property taken, a motion for judgment of nonsuit should be allowed, both to a charge of breaking or entering and to a charge of felonious larceny. State v. Crawford, 29 N.C. App. 117, 223 S.E.2d 534 (1976).

In a prosecution for breaking and entering a motor vehicle and larceny, evidence that defendant was present in the vehicle containing stolen items and with individuals who had attempted to negotiate stolen traveler's checks, without any evidence that any of the stolen items were under the actual control of defendant, is insufficient to carry the question of defendant's guilt to the jury. State v. Millsaps, 29 N.C. App. 176, 223 S.E.2d 559 (1976).

In prosecution for breaking and entering, testimony by a qualified expert that fingerprints found at the scene of the crime correspond with the fingerprints of the accused, when accompanied by substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed, is sufficient to withstand motion for nonsuit and carry the case to the jury. State v. Miller, 289 N.C. 1, 220 S.E.2d 572 (1975).

Nonsuit is correctly denied in a larceny case where the State relies on the doctrine of possession of recently stolen goods and presents evidence of possession of the stolen goods by defendant soon after the theft. State v. Hales, 32 N.C. App. 729, 233 S.E.2d 601 (1977).

Same — Flight of Defendant from Scene of Crime. — In a prosecution for breaking and entering an industrial plant with intent to steal, evidence tended to show that upon the arrival of police officers at the scene of a break-in in response to a telephone call, they saw the three defendants running up the street, that defendants got into a car and drove quickly away and were not stopped by the officers until after a 10-mile chase, and that appealing defendant denied any knowledge of the break-in. It was held that the evidence was insufficient to be submitted to the jury, and judgment of nonsuit was allowed in the Supreme Court on appeal. State v. Cranford, 231 N.C. 211, 56 S.E.2d 423 (1949).

Same — Recent Possession of Stolen Goods. — Evidence that a cotton mill had been broken into and that goods taken therefrom had been found in defendant's possession within an hour or two thereafter, with further evidence of his unlawful possession, was sufficient for conviction, under the provisions of § 14-54, and defendant's demurrer to the State's evidence, or motion for dismissal, was properly overruled. State v. Williams, 187 N.C. 492, 122 S.E. 13 (1924).

Evidence from which the jury might infer that stolen goods were thereafter in the constructive possession of defendant will not justify an inference that at such time defendant knew the goods to have been stolen, and where the evidence is sufficient to support only the first inference, the defendant's motion as of nonsuit should be allowed under this section. State v. Anthony, 206 N.C. 120, 173 S.E. 47 (1934).

In a criminal prosecution for larceny and receiving a bicycle, where the evidence tended to show that the bicycle was taken in the night from a parked truck and was found near the same place about eight months thereafter in the possession of defendants, who made contradictory and false statements about how they came by it, there is not sufficient evidence to convict and a motion for nonsuit should have been granted. State v. Cameron, 223 N.C. 449, 27 S.E.2d 81 (1943).

Same — Knowledge That Goods Were Stolen. — In a prosecution for larceny and receiving, where the State's evidence tended to show that strangers to defendants stole a barrel of molasses, hid it among some trees in a pasture, offered to sell it to defendants, who agreed to buy at a price considerably below the market price and went in the nighttime to inspect and remove their purchase and were in the act of having it rolled out to their truck when the officer arrived, there is sufficient evidence to convict of an attempt to feloniously receive stolen property, knowing it to have been stolen, and motion of nonsuit was properly refused. State v. Parker, 224 N.C. 524, 31 S.E.2d 531 (1944).

Where three defendants bought goods, paying full value, at about 2:00 A.M. from two strangers who represented that they must dispose promptly of the merchandise from their business because both had been called to the armed forces, and one defendant promptly admitted all the facts to the officers while the other two first denied and then admitted the purchase, the State's witness who accompanied the thieves saying on cross-examination that the accused persons had no knowledge of the theft, the element of scienter is wanting and demurrer should have been sustained. State v. Oxendine, 223 N.C. 659, 27 S.E.2d 814 (1943).

Same — Evidence Raising Suspicion Only. — Evidence that does no more than raise a suspicion, somewhat strong perhaps, of a homicide and the defendant's guilt, is not enough on a prosecution for murder, and demurrer to the evidence will be sustained. State v. Carter, 204 N.C. 304, 168 S.E. 204 (1933).

Upon a motion for nonsuit under this section, if there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, the case should be submitted to the jury. But where there is merely a suspicion or conjecture in regard to the charge in the bill of indictment, the motion should be allowed. State v. Boyd, 223 N.C. 79, 25 S.E.2d 456 (1943); State v. Kirkman, 224 N.C. 778, 32 S.E.2d 328 (1944); State v. Murphy, 225 N.C. 115, 33 S.E.2d 588 (1945).

Where the evidence, taken in the light most favorable to the State, on motion by defendants for judgment as of nonsuit in a criminal prosecution, raises no more than a suspicion as to the guilt of defendants, the same is insufficient to support a verdict of guilty and the motion must be allowed. State v. Heglar, 225 N.C. 220, 34 S.E.2d 76 (1945).

On the trial of several defendants, upon an indictment for robbery, where the evidence against one of the defendants raises no more than a suspicion of his guilt, a motion to dismiss as to such defendant should be allowed. State v. Ham, 224 N.C. 128, 29 S.E.2d 449 (1944).

Same — Evidence of Accomplice. — The evidence of accomplices is sufficient to carry the case to the jury and to justify a refusal of motion to nonsuit. State v. Rising, 223 N.C. 747, 28 S.E.2d 221 (1943).

Same — Malicious Castration. — The direct evidence of the guilt of one of the defendants in a prosecution for malicious castration, and the circumstantial evidence as to the other's participation and guilt, is held sufficient to overrule their motions as of nonsuit. State v. Ammons, 204 N.C. 753, 169 S.E. 631 (1933).

Same — Identity. — In a prosecution for homicide the evidence of the defendant's identity as the perpetrator of the crime is sufficient to be submitted to the jury, the weight and credibility of the wife's identification of the defendant being for their determination, and defendant's motion as of nonsuit on the ground that her testimony was based upon imagination and auto-suggestion was properly refused. State v. Fogleman, 204 N.C. 401, 168 S.E. 536 (1933).

Same — Conspiracy. — Where the direct circumstantial evidence in this case tends to show that defendant had quarreled with deceased and had entered into a conspiracy to kill him, that deceased was murdered and that all the conspirators, including the appealing defendant, were present, aiding and abetting in the commission of the crime, the evidence is sufficient to be submitted to the jury and motion for nonsuit was properly overruled. State v. Brown, 204 N.C. 392, 168 S.E. 532 (1933).

For evidence held sufficient to overrule nonsuit as to each of several defendants in a prosecution for conspiracy, see State v. Walker, 251 N.C. 465, 112 S.E.2d 61 (1960).

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of conspiracy to commit murder where there was evidence that defendant had discussed with another the murder and the means by which it might be accomplished; that defendant sent the coconspirator a picture of the victim for identification purposes; that defendant sent sums of money to the coconspirator; and that after an unsuccessful attempt was made upon the victim's life, defendant had stated to a friend who had introduced her to the coconspirator that the coconspirator knew somebody who would "finish the job." State v. Graham, 24 N.C. App. 591, 211 S.E.2d 805 (1975).

Same — Manslaughter. — In a prosecution for manslaughter, defendant's motion for nonsuit was properly denied where there was ample evidence that defendant operated his vehicle at the time in question at a speed in excess of the posted speed limit in a careless and reckless manner while under the influence of intoxicating beverages and that the death of the victim was proximately caused by the culpable negligence of defendant. State v. Alexander, 16 N.C. App. 95, 191 S.E.2d 395 (1972).

The evidence showed that both defendant and

deceased had been out drinking; that they were arguing; that defendant asked deceased to go to bed with him and she replied that "she won't never going to bed with him no more"; that witnesses heard a shot; that defendant told them "come see what I did to Chris"; and that she died as a result of the gunshot wound. This evidence, when viewed in the light most favorable to the State, was amply sufficient to require submission of the case to the jury, and defendant's motion for nonsuit to the charge of involuntary manslaughter was properly denied. State v. Hill, 32 N.C. App. 261, 231 S.E.2d 682 (1977).

Same — Assault with Intent to Kill. — In a prosecution for a secret assault and battery with a deadly weapon with malice and intent to kill, evidence that there had been ill-feeling between the prosecuting witness and the defendant, that the prosecuting witness had seen and recognized the defendant standing outside a window in the witness's home, that the defendant appeared there suddenly at night and shot the prosecuting witness before he could do anything, and seriously wounded him, is sufficient to overrule defendant's motion as of nonsuit, and to show that the assault was done in a secret manner. State v. McLamb, 203 N.C. 442, 166 S.E. 507 (1932).

In a prosecution for assault with a deadly weapon with intent to kill, resulting in injury, it was held that there was ample evidence to sustain conviction and motion to dismiss under this section was properly denied. State v. Cody, 225 N.C. 38, 33 S.E.2d 71 (1945).

In a criminal prosecution for a felonious assault with intent to kill, where the State's evidence tended to show that defendant, while the prosecuting witness was having a row in her place of business with one of her servants, left the room and returned almost immediately with a shotgun and shot the prosecuting witness at close range, inflicting serious injury, there was sufficient evidence for the jury, and motion for judgment as of nonsuit was properly denied. State v. Murdock, 225 N.C. 224, 34 S.E.2d 69 (1945).

On trial upon an indictment for assault with a deadly weapon with intent to kill, motion for judgment of nonsuit was properly denied. State v. Oxendine, 224 N.C. 825, 32 S.E.2d 648 (1945).

Same — Assault with Intent to Rape. — Upon an indictment charging an assault with intent to commit rape, defendant may be convicted of an assault upon a female as though separately charged, and motion to dismiss under this section was properly refused where there was sufficient evidence to convict of an assault. State v. Jones, 222 N.C. 37, 21 S.E.2d 812 (1942); State v. Gay, 224 N.C. 141, 29 S.E.2d 458 (1944); State v. Johnson, 227 N.C. 587, 42 S.E.2d 685 (1947).

Same — Injury by Means of Dynamite. — In a prosecution for willful and malicious injury to person and property by means of dynamite, and conspiracy to injure a person by means of dynamite, where defendant knew the victim was an undercover narcotics agent, an informer saw defendant and his coconspirators in possession of dynamite while they were beside the victim's car with its hood raised, defendant stated in coming away from the car that "it would happen in the morning," and the victim was injured the next morning by an explosion when he attempted to start his car, the evidence for the State was sufficient to withstand defendant's motion for nonsuit. State v. Sellers, 289 N.C. 268, 221 S.E.2d 264 (1976).

Same — Operation of Prohibited Mechanical Device. — Evidence tending to show that defendant was the owner of an automobile, and had been seen in same prior to its capture, and that when the automobile was subsequently captured it was being driven by others and had attached thereto a mechanical device for the emission of excessive smoke or gas, is insufficient to resist defendant's motion as of nonsuit under this section, in a prosecution under § 4506(b) [now G.S. § 20-136]. State v. Yates, 208 N.C. 194, 179 S.E. 756 (1935).

Same — Gaming. — In a criminal prosecution, under §§ 14-290, 14-291, and 14-291.1, the court erred in the refusal of defendants' motion of nonsuit. State v. Heglar, 225 N.C. 220, 34 S.E.2d 76 (1945).

Same — Seduction. — In a prosecution for seduction it was held that where facts and circumstances tended to support prosecutrix's statements, a motion for nonsuit should be denied. State v. Smith, 223 N.C. 199, 25 S.E.2d 619 (1943).

Same — Refusal to Support Child. — In proceeding on indictment instituted more than 13 years after the birth of an illegitimate child, charging defendant with willful neglect and refusal to support the child, whose paternity had been established in bastardy proceeding, the action was held barred under § 49-4 and motion for judgment of nonsuit was sustained. State v. Dill, 224 N.C. 57, 29 S.E.2d 145 (1944).

Same — Unlawful Sale of Intoxicating Liquors. — In a criminal prosecution for the unlawful possession of intoxicating liquors for the purpose of sale, where all the evidence tended to show that accused had concealed in the apartment occupied as a residence by himself and family, above a store operated by him, five pints of tax-paid liquor the seals on which had not been broken, and a sixth pint was found by officers at the back door of the store, where an unknown person was seen to "set something down," and some empty bottles, apparently wine bottles, were also found in the store, motion of defendant for judgment of nonsuit should have been sustained. State v. Suddreth, 223 N.C. 610, 27 S.E.2d 623 (1943).

In a prosecution for possession of intoxicating liquor for purpose of sale, where the evidence tended to show only that there was found in the yard of defendant's house an automobile containing 42 gallons of liquor upon which no tax had been paid, defendant testifying that the car was not his, but was driven by a stranger, got out of order and defendant helped push it onto his premises, where it remained several days while he was away from home, and was subsequently driven away by someone unknown to him, the refusal of defendant's motion for judgment of nonsuit was error. State v. Kirkman, 224 N.C. 778, 32 S.E.2d 328 (1944).

Where defendant at time of arrest said illicit whiskey belonged to him but at trial denied any knowledge of the liquor or its ownership, an issue of fact was presented for jury and motion to dismiss under this section was properly overruled. State v. Stutts, 225 N.C. 647, 35 S.E.2d 881 (1945).

Evidence tending to show that nontaxpaid liquor was found near a hog pen which was maintained by the defendant, with further evidence that the hog pen was near a public alley as well as several public footpaths, is insufficient to be submitted to the jury on the question of defendant's constructive possession of the liquor, and motion for nonsuit should be sustained. State v. Glenn, 251 N.C. 156, 110 S.E.2d 791 (1959).

Same — Public Drunkenness and Resisting Arrest. — In a prosecution for public drunkenness and resisting arrest, evidence was sufficient to withstand nonsuit where it tended to show that defendant was a passenger in a car whose driver was arrested for drunken driving, that defendant, who appeared to be drunk himself, got out of the car and cursed at police, that defendant was then arrested for public drunkenness but refused to get into the police car, and that he could not be controlled and spat in policeman's face. State v. Foust, 18 N.C. App. 138, 196 S.E.2d 375 (1973).

Same — Operation of Motor Vehicle after License Suspended. — In a criminal prosecution for the operation of a motor vehicle after the operator's license had been revoked, where the State's evidence tended to show that defendant was tried and convicted in recorder's court for operating a motor vehicle while under the influence of intoxicants, as James Stewart had his license revoked for one year, that the records show no license issued to James Stewart but show one to James Tyree Stewart of the same county as defendant, who admitted that his name was James Tyree Stewart when the highway patrolman went to take up his license, and that defendant was seen operating a motor vehicle upon the public highway within one year of such conviction and there had been no reinstatement of the revocation, there is sufficient evidence to sustain a conviction, and motion for nonsuit was properly refused. State v. Stewart, 224 N.C. 528, 31 S.E.2d 534 (1944).

Same — Violation of Hit and Run Drivers' Law. — In a prosecution under § 20-166, the State introduced testimony of a statement by defendant that he had just driven on the road in question but that he had no knowledge or notice that he had struck any vehicle or injured any person during the trip. This statement was not contradicted or shown to be false by any other fact or circumstance in evidence. The statement was held binding upon the State, and defendant's motion for judgment of nonsuit was sustained in the Supreme Court for want of evidence that defendant knew he had been involved in an accident resulting in injury to a person. State v. Ray, 229 N.C. 40, 47 S.E.2d 494 (1948).

Conflicting Evidence. — Where the prosecutor's goods have been stolen two days before and they are found in the defendant's possession, with conflicting evidence upon the question of his having stolen them, the case can only be determined by the jury, and the defendant's motion under this section to dismiss must be denied. State v. Jenkins, 182 N.C. 818, 108 S.E. 767 (1921).

When the defendant is on trial under a criminal indictment for recklessly driving his car and colliding with another car in which deceased was riding, on a public highway, causing her death, and there is both direct and circumstantial evidence that the defendant was driving the car at the time, which his own testimony and evidence of his witnesses contradicts, his motion for judgment as in case of nonsuit, made at the close of the State's evidence and renewed after all the evidence, is properly denied. State v. Leonard, 195 N.C. 242, 141 S.E. 736 (1928).

Contradictions and discrepancies even in the State's evidence are matters for the jury and do not warrant nonsuit. State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976); State v. Dangerfield, 32 N.C. App. 608, 233 S.E.2d 663 (1977).

Any contradictions and discrepancies in the evidence are resolved in favor of the State for the purpose of considering a motion for nonsuit. State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Testimony by State witness that defendant made a declaration of innocence does not entitle defendant to judgment as of nonsuit, since such self-serving declaration does not rebut any proof by the State. State v. Baldwin, 226 N.C. 295, 37 S.E.2d 898 (1946).

Section 15-173.1 Does Not Change Waiver Rule in This Section. — The provisions of § 15-173.1, allowing review on appeal of the sufficiency of the State's evidence in a criminal case without regard to whether motion for

nonsuit has been made or not, does not change the rule in this section which provides that if the defendant introduces evidence, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal. State v. Paschall, 14 N.C. App. 591, 188 S.E.2d 521 (1972).

Variance. — The defendant in a criminal action may raise the question of a variance between the indictment and the proof by a motion to dismiss the prosecution as in case of nonsuit. This is clearly set forth in State v. Gibson, 170 N.C. 697, 86 S.E. 774 (1915); State v. Harbert, 185 N.C. 760, 118 S.E. 6 (1923); State v. Harris, 195 N.C. 306, 141 S.E. 883 (1928); State v. Grace, 196 N.C. 280, 145 S.E. 399 (1928).

Where there is a fatal variance between the indictment and the proof, it is proper to sustain the demurrer to the evidence, or to dismiss the action as in case of nonsuit. State v. Franklin, 204 N.C. 157, 167 S.E. 569 (1933). See also State v. Martin, 199 N.C. 636, 155 S.E. 447 (1930).

Where it was alleged that defendant committed larceny of money and valuable papers, and the evidence tended to show, at most, an attempt to commit larceny of two suitcases or baggage, it was held that there was a fatal variance between the allegata and the probata, of which defect defendant could take advantage under his exception to the disallowance of his motion for judgment as of nonsuit. State v. Nunley, 224 N.C. 96, 29 S.E.2d 17 (1944).

The question of variance in a criminal action may be raised by motion for judgment as of nonsuit, or by demurrer to the evidence. State v. Hicks, 233 N.C. 511, 64 S.E.2d 871, cert. denied, 342 U.S. 831, 72 S. Ct. 56, 96 L. Ed. 629 (1951).

The defendant in a criminal action may raise the question of variance between the indictment and proof by a motion for nonsuit. State v. Bell, 270 N.C. 25, 153 S.E.2d 741 (1967); State v. Overman, 257 N.C. 464, 125 S.E.2d 920 (1962).

A fatal variance results in larceny cases where title to the property is laid in one person by the indictment and proof shows it in another. State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972).

In a prosecution on indictment charging the larceny of personal property of a named person, where evidence tended to show that the only property missing was that belonging to another person, the motion for judgment as of nonsuit on the ground of fatal variance should have been granted. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

Effect of Reversal of Judgment of Guilty. — Under the provisions of this section the reversal of a judgment of guilty has the force and effect of a verdict of "not guilty." State v. Corey, 199 N.C. 209, 153 S.E. 923 (1930).

Motion will not lie for failure of the State to offer evidence of a nonessential averment in the indictment, when each essential element of the offense is supported by competent evidence. State v. Atkinson, 210 N.C. 661, 188 S.E. 73 (1936).

Demurrer to the Evidence Properly Sustained. — See State v. Sims, 208 N.C. 459, 181 S.E. 269 (1935), and State v. White, 208 N.C. 537, 181 S.E. 558 (1935) (wherein defendant's identity was not established); State v. Landin, 209 N.C. 20, 182 S.E. 689 (1935) (wherein defendant's negligence was held harmless); State v. Creech, 210 N.C. 700, 188 S.E. 316 (1936) (wherein owner of car did not know driver was intoxicated); State v. Harvey, 228 N.C. 62, 44 S.E.2d 472 (1947) (wherein the identity of the accused was not established); State v. Coffey, 228 N.C. 119, 44 S.E.2d 886 (1947) (wherein it was held that taking all the State's evidence to be true did not exclude a reasonable hypothesis of defendant's innocence).

Demurrer to the Evidence Properly Denied. — See State v. Webber, 210 N.C. 137, 185 S.E. 659 (1936) (wherein evidence showed defendant was driving at 50 miles an hour before collision); State v. Smith, 211 N.C. 93, 189 S.E. 175 (1937) (wherein evidence showed felonious intent to commit rape); State v. Vincent, 222 N.C. 543, 23 S.E.2d 832 (1943) (evidence showing identity in rape); State v. Reynolds, 222 N.C. 40, 21 S.E.2d 813 (1942) (evidence showing felonious breaking and entry and showing identity); State v. Dilliard, 223 N.C. 446, 27 S.E.2d 85 (1943) (evidence showing guilt in abortion); State v. Gordon, 224 N.C. 304, 30 S.E.2d 43 (1944) (wherein evidence showed possession of liquor with intent to sell same unlawfully); State v. King, 224 N.C. 329, 30 S.E.2d 230 (1944) (wherein evidence sustained conviction of operating a lottery); State v. Rivers, 224 N.C. 419, 30 S.E.2d 322 (1944) (wherein evidence tended to show that prisoner killed deceased while the two were quarreling over some trivial matters, defendant admitting the killing but alleging that he shot deceased to repel an assault); State v. Peterson, 225 N.C. 540, 35 S.E.2d 645 (1945) (wherein evidence offered held sufficient to repel the motion to dismiss under this section); State v. Goins, 233 N.C. 460, 64 S.E.2d 289 (1951) (prosecution for involuntary manslaughter); State v. Hicks, 233 N.C. 511, 64 S.E.2d 871, cert. denied, 342 U.S. 831, 72 S. Ct. 56, 96 L. Ed. 629 (1951) (prosecution for conspiracy); State v. Fuqua, 234 N.C. 168, 66 S.E.2d 667 (1951) (prosecution for illegal possession of intoxicating liquor); State v. Holland, 234 N.C. 354, 67 S.E.2d 272 (1951) (charge of felonious assault); State v. Minton, 234 N.C. 716, 68 S.E.2d 844 (1951) (prosecution for murder); State v. McLamb, 235 N.C. 251, 69 S.E.2d 537 (1952) (prosecution for possession of articles for use in manufacturing intoxicating liquor); State v.

Birchfield, 235 N.C. 410, 70 S.E.2d 5 (1952) (prosecution for felonious assault with a deadly weapon with intent to kill); State v. Bryant, 235 N.C. 420, 70 S.E.2d 186 (1952) (prosecution for larceny of chickens); State v. Reeves, 235 N.C. 427, 70 S.E.2d 9 (1952) (prosecution for rape); State v. Murphy, 235 N.C. 503, 70 S.E.2d 498 (1952) (prosecution for possession and sale of intoxicating liquor); State v. Sears, 235 N.C. 623, 70 S.E.2d 907 (1952) (prosecution for rape); State v. Wood, 235 N.C. 636, 70 S.E.2d 665 (1952) (prosecution for incest); State v. Griffin, 236 N.C. 219, 72 S.E.2d 427 (1952) (prosecution for second-degree murder); State v. Bryant, 236 N.C. 745, 73 S.E.2d 791 (1953) (prosecution for breaking and entering with felonious intent and larceny); State v. Myers, 240 N.C. 462, 82 S.E.2d 213 (1954) (prosecution for receiving stolen goods); State v. Hill, 266 N.C. 103, 145 S.E.2d 346 (1965) (prosecution for assault with a brick); State v. Burgess, 266 N.C. 363, 145 S.E.2d 905 (1966) (prosecution for larceny); State v. Manuel, 291 N.C. 705, 231 S.E.2d 588 (1977) (prosecution for first-degree murder); State v. Tilley, 292 N.C. 132, 232 S.E.2d 433 (1977) (prosecution for first-degree murder and conspiracy to commit an assault with a firearm); State v. McKenzie, 292 N.C. 170, 232 S.E.2d 424 (1977) (prosecution for involuntary manslaughter by automobile); State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977) (prosecution for first-degree murder wherein the issue was whether evidence sufficient as to deliberation and premeditation); State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977) (prosecution for armed robbery and aggravated kidnapping); State v. Warren, 292 N.C. 235, 232 S.E.2d 419 (1977) (prosecution for first-degree murder).

Assignment of Error Where Defendant Has Offered Evidence in His Own Behalf. — Where defendant offers evidence in his own behalf, his assignment of error must be directed to the court's refusal to grant his motion for compulsory nonsuit at the close of all the evidence. State v. Jones, 6 N.C. App. 712, 171 S.E.2d 17 (1969).

Supreme Court Will Consider Only Denial of Motion Made at Close of All the Evidence. — Where defendant offered evidence after his motion for judgment as of nonsuit at the close of the State's evidence, the Supreme Court on appeal will consider only the denial of the motion made at the close of all the evidence, and the court must act in light of all the evidence. State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969).

Denial of Motion for Nonsuit Held Error. — See State v. Holland, 234 N.C. 354, 67 S.E.2d 272 (1951) (charge of robbery); State v. Needham, 235 N.C. 555, 71 S.E.2d 29 (1952) (prosecution for arson and murder).

Judgment of Nonsuit Has Effect of Verdict of "Not Guilty". — Whether correct or erroneous, a judgment of nonsuit has the force and effect of a verdict of "not guilty." State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972).

The motion for judgment of nonsuit and the motion for a directed verdict of not guilty have the same legal effect. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Arrest of Judgment and Judgment of Nonsuit. — An order for arrest of judgment is based upon the insufficiency of the indictment or other defect appearing on the face of the record and it is appealable by the State; a judgment of nonsuit, on the other hand, has the force and effect of verdict of not guilty, and the State may not appeal. State v. Pinkney, 25 N.C. App. 316, 212 S.E.2d 907 (1975).

Effect of Judgment of Nonsuit on Subsequent Prosecution. — The granting of a motion under this section for judgment of nonsuit, or verdict of not guilty in a criminal prosecution charging defendant with willful neglect or refusal to support and maintain his illegitimate child, does not constitute an adjudication on the issue of paternity, and will not support a plea of former acquittal in a subsequent prosecution under § 49-2. State v. Robinson, 236 N.C. 408, 72 S.E.2d 857 (1952).

Tantamount to Verdict of Not Guilty. — Where defendant's motion to nonsuit was allowed in the Supreme Court, this ruling was tantamount to a verdict of not guilty. State v. Smith, 236 N.C. 748, 73 S.E.2d 901 (1953); State v. Wooten, 239 N.C. 117, 79 S.E.2d 254 (1953).

A judgment of nonsuit has the force and effect of a verdict of not guilty of the charge contained in the indictment. State v. Stinson, 263 N.C. 283, 139 S.E.2d 558 (1965).

An instruction that the court grants a nonsuit on the offense charged in the indictment, followed by submission of the case on the question of defendants' guilt of a lesser degree of the offense charged, does not amount to a nonsuit on the indictment. State v. Matthews, 231 N.C. 617, 58 S.E.2d 625, cert. denied, 340 U.S. 838, 71 S. Ct. 24, 95 L. Ed. 615 (1950).

Under § 15-173.1 the sufficiency of the evidence of the State in a criminal case is reviewable upon an appeal without regard to whether a motion has been made pursuant to this section. State v. Rigsbee, 285 N.C. 708, 208 S.E.2d 656 (1974).

Applied in State v. Callett, 211 N.C. 563, 191 S.E. 27 (1937); State v. McDonald, 211 N.C. 672, 191 S.E. 733 (1937); State v. Brewington, 212 N.C. 244, 193 S.E. 24 (1937); State v. Delk, 212 N.C. 631, 194 S.E. 94 (1937); State v. Lockey, 214 N.C. 525, 199 S.E. 715 (1938); State v. Myers, 214 N.C. 652, 200 S.E. 443 (1939); State v. Goodman, 220 N.C. 250, 17 S.E.2d 8 (1941); State v. Johnson, 220 N.C. 252, 17 S.E.2d 7 (1941); State v. Todd, 222 N.C. 346, 23 S.E.2d 47 (1942); State v. Forte, 222 N.C. 537, 23 S.E.2d 842 (1943); State v. Edwards, 224 N.C. 577, 31 S.E.2d 762 (1944);

State v. Malpass, 226 N.C. 403, 38 S.E.2d 156 (1946); State v. Little, 228 N.C. 417, 45 S.E.2d 542 (1947); State v. Minton, 228 N.C. 518, 46 S.E.2d 296 (1948); State v. Wooten, 228 N.C. 628, 46 S.E.2d 868 (1948); State v. Palmer, 230 N.C. 205, 52 S.E.2d 908 (1949); State v. Baker, 231 N.C. 136, 56 S.E.2d 424 (1949); State v. Hill, 233 N.C. 61, 62 S.E.2d 532 (1950); State v. Ham, 238 N.C. 94, 76 S.E.2d 346 (1953); State v. Cranfield, 238 N.C. 110, 76 S.E.2d 353 (1953); State v. Bass, 249 N.C. 209, 105 S.E.2d 645 (1958); State v. Paschal, 253 N.C. 795, 117 S.E.2d 749 (1961); State v. Bailey, 261 N.C. 783, 136 S.E.2d 37 (1964); State v. Duncan, 264 N.C. 123, 141 S.E.2d 23 (1965); State v. Frazier, 268 N.C. 249, 150 S.E.2d 431 (1966); State v. Canady, 8 N.C. App. 320, 174 S.E.2d 140 (1970); State v. Stevens, 9 N.C. App. 665, 177 S.E.2d 339 (1970); State v. Pitts, 10 N.C. App. 355, 178 S.E.2d 632 (1971); State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972); State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972); State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972); State v. Wallace, 25 N.C. App. 360, 213 S.E.2d 420 (1975); State v. Atwood, 290 N.C. 266, 225 S.E.2d 543 (1976); State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976).

Cited in State v. Eubanks, 194 N.C. 319, 139 S.E. 451 (1927); State v. Pridgen, 194 N.C. 795, 139 S.E. 601 (1927); State v. Mickle, 194 N.C. 808, 140 S.E. 150 (1927); State v. Dowell, 195 N.C. 523, 143 S.E. 13 (1928); State v. Golden, 196 N.C. 246, 145 S.E. 236 (1928); State v. Weston, 197 N.C. 25, 147 S.E. 618 (1929); State v. McKinnon, 197 N.C. 576, 150 S.E. 25 (1929); State v. Hickey, 198 N.C. 45, 150 S.E. 615 (1929); State v. Burleson, 198 N.C. 61, 150 S.E. 628 (1929); State v. Wrenn, 198 N.C. 260, 151 S.E. 261 (1930); State v. McLeod, 198 N.C. 649, 152 S.E. 895 (1930); State v. Spivey, 198 N.C. 655, 153 S.E. 255 (1930); State v. Ritter, 199 N.C. 116, 154 S.E. 62 (1930); State v. Beal, 199 N.C. 278, 154 S.E. 604 (1930); State v. Johnson, 199 N.C. 429, 154 S.E. 730 (1930); State v. Baker, 199 N.C. 578, 155 S.E. 249 (1930); State v. Sizemore, 199 N.C. 687, 155 S.E. 724 (1930); State v. Fletcher, 199 N.C. 815, 155 S.E. 927 (1930); State v. Wilson, 205 N.C. 376, 171 S.E. 338 (1933); State v. Davidson, 205 N.C. 735, 172 S.E. 489 (1934); State v. Mansfield, 207 N.C. 233, 176 S.E. 761 (1934); State v. Mozingo, 207 N.C. 247, 176 S.E. 582 (1934); State v. Newton, 207 N.C. 323, 177 S.E. 184 (1934); State v. Anderson, 208 N.C. 771, 182 S.E. 643 (1935); State v. Jones, 209 N.C. 49, 182 S.E. 699 (1935); State v. Camby, 209 N.C. 50, 182 S.E. 715 (1935); State v. Langley, 209 N.C. 178, 183 S.E. 526 (1936); State v. Hinson, 209 N.C. 187, 183 S.E. 397 (1936); State v. Lewis, 209 N.C. 191, 183 S.E. 357 (1936); State v. Oakley, 210 N.C. 206, 186 S.E. 244 (1936); State v. Gallman, 210 N.C. 288, 186 S.E. 236 (1936); State v. Evans, 211 N.C. 458, 190 S.E. 724 (1937); State v. Caldwell, 212 N.C. 484, 193 S.E. 716 (1937); State v. Perry, 212 N.C. 533, 193 S.E. 727 (1937); State v. Hanford, 212 N.C. 746, 194 S.E. 481 (1938); State v. Libby, 213 N.C. 662, 197 S.E. 154 (1938); State v. Epps, 213 N.C. 709, 197 S.E. 580 (1938); State v. Stiers, 214 N.C. 126, 198 S.E. 601 (1938); State v. Bowser, 214 N.C. 249, 199 S.E. 31 (1938); State v. Hawkins, 214 N.C. 326, 199 S.E. 284 (1938); State v. Jones, 215 N.C. 660, 2 S.E.2d 867 (1939); State v. Hudson, 218 N.C. 219, 10 S.E.2d 730 (1940); State v. Wilson, 218 N.C. 769, 12 S.E.2d 654 (1941); State v. Hunt, 223 N.C. 173, 25 S.E.2d 598 (1943); State v. Graham, 224 N.C. 351, 30 S.E.2d 154 (1944); State v. Ogle, 224 N.C. 468, 31 S.E.2d 444 (1944); State v. Curling, 225 N.C. 769, 35 S.E.2d 179 (1945); State v. Williams, 229 N.C. 348, 49 S.E.2d 617 (1948); State v. Tilley, 231 N.C. 734, 58 S.E.2d 720 (1950); State v. Lamm, 232 N.C. 402, 61 S.E.2d 188 (1950); State v. Lambe, 232 N.C. 570, 61 S.E.2d 608 (1950); State v. Buchanan, 233 N.C. 477, 64 S.E.2d 549 (1951); State v. Wilson, 234 N.C. 552, 67 S.E.2d 748 (1951); State v. Dunn, 245 N.C. 102, 95 S.E.2d 274 (1956); State v. Revis, 253 N.C. 50, 116 S.E.2d 171 (1960); State v. Faust, 254 N.C. 101, 118 S.E.2d 769 (1961); State v. Aldridge, 254 N.C. 297, 118 S.E.2d 766 (1961); State v. Carter, 254 N.C. 475, 119 S.E.2d 461 (1961); State v. Gough, 257 N.C. 348, 126 S.E.2d 118 (1962); State v. Thompson, 257 N.C. 452, 126 S.E.2d 58 (1962); State v. Jones, 264 N.C. 134, 141 S.E.2d 27 (1965); State v. Meadows, 272 N.C. 327, 158 S.E.2d 638 (1968); State v. Howard, 274 N.C. 186, 162 S.E.2d 495 (1968); State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969); State v. Collins, 5 N.C. App. 516, 168 S.E.2d 514 (1969); State v. Parker, 279 N.C. 168, 181 S.E.2d 432 (1971); State v. Williams, 13 N.C. App. 233, 185 S.E.2d 27 (1971); State v. Black, 14 N.C. App. 373, 188 S.E.2d 634 (1972); State v. Wiggins, 16 N.C. App. 527, 192 S.E.2d 680 (1972); State v. Luther, 285 N.C. 570, 206 S.E.2d 238 (1974); State v. Womble, 292 N.C. 455, 233 S.E.2d 534 (1977).

§ 15-173.1: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. — Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

Session Laws 1977, c. 711, s. 39, provides:

"This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

§ 15-174: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Cross Reference. — For provisions as to post-trial relief in criminal cases, see §§ 15A-1411 through 15A-1422.

Editor's Note. — Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

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§ 15-175: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to speedy trial, see §§ 15A-701 through 15A-706.

§ 15-176. Prisoner not to be tried in prison uniform. — It shall be unlawful for any sheriff, jailer or other officer to require any person imprisoned in jail to appear in any court for trial dressed in the uniform or dress of a prisoner or convict, or in any uniform or apparel other than ordinary civilian's dress, or with shaven or clipped head. And no person charged with a criminal offense shall be tried in any court while dressed in the uniform or dress of a prisoner or convict, or in any uniform or apparel other than ordinary civilian's dress, or with head shaven or clipped by or under the direction and requirement of any sheriff, jailer or other officer, unless the head was shaven or clipped while such person was serving a term of imprisonment for the commission of a crime.

Any sheriff, jailer or other officer who violates the provisions of this section shall be guilty of a misdemeanor. (1915, c. 124; C. S., s. 4646.)

This section does not explicitly make it unlawful for a defendant to be tried in prison clothes. State v. Westry, 15 N.C. App. 1, 189 S.E.2d 618 (1972).

Where Defendants Refuse to Wear Other than Prison Clothing. — Defendants who are tried in a gray shirt and gray trousers entirely as the result of their own refusal to wear the other clothing offered or to obtain other attire suffer prejudice, if any, entirely as a result of their own making. State v. Westry, 15 N.C. App. 1, 189 S.E.2d 618 (1972).

§ 15-176.1. District attorney may argue for death penalty. — In the trial of capital cases, the district attorney or other counsel appearing for the State may argue to the jury that a sentence of death should be imposed and that the jury should not recommend life imprisonment. (1961, c. 890; 1973, c. 47, s. 2.)

Policy of State. — It is the policy of this State, as declared in N.C. Const., Art. XI, § 1, and by the General Assembly in § 14-17, that one convicted of murder in the first degree, after a fair trial in accordance with the law, shall be put to death if the jury does not, in its discretion, recommend punishment by imprisonment for life. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

The State is entitled to ask the jury not only to find the defendant guilty of murder in the first degree, but also to impose the death penalty, and it follows, necessarily, that it may introduce evidence, otherwise competent, to support such a verdict. State v. Westbrook, 279

N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Prosecuting Attorney Need Not Be Neutral. — In the discharge of his duties the prosecuting attorney is not required to be, and should not be, neutral. He is not the judge, but the advocate of the State's interest in the matter at hand. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

The argument of counsel must be left largely to the control and discretion of the presiding judge. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

And counsel must be allowed wide latitude in the argument of hotly contested cases. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Scope of Proper Argument. — The prosecuting attorney may not, by argument, insinuating questions, or other means, place before the jury incompetent and prejudicial matters not legally admissible in evidence, and may not travel outside of the record or inject into his argument facts of his own knowledge or other facts not included in the evidence. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

The prosecuting attorney may use appropriate epithets which are warranted by the evidence. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

And he may vigorously urge the jury to convict and to impose the death penalty in the light of the evidence. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

The grand jury, an agency of the State, after investigation according to law, indicted the defendant for murder in the first degree, and the solicitor (now district attorney), an officer of the State, after investigation, determined, on behalf of the State, that the defendant should be tried for this offense and that the death penalty should be sought. These determinations having been made on behalf of the State, it was the right and duty of the prosecuting attorney, vigorously but fairly and in accordance with law, both in the presentation of evidence and in his argument, to seek that result. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Vigorous Denunciation of Defendant. — If the prosecuting attorney passed over the boundary of his right and duty in his argument to the jury by his vigorous denunciation of the defendant and thereby denied him a fair trial, the defendant is entitled to a new trial. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Characterization of Defendant in Uncomplimentary Terms. — When the prosecuting attorney does not go outside of the record and his characterizations of the defendant are supported by evidence, the defendant is not entitled to a new trial by reason of being characterized in uncomplimentary terms in the argument. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

The Supreme Court must determine whether the solicitor (now district attorney) violated the right of the defendant to a fair trial by the nature of his argument to the jury, from the record, irrespective of its view as to the policy of the State with regard to the punishment of the offense in question and without regard to the sufficiency of the evidence to support the verdict and sentence. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Arguments by Solicitor (Now District Attorney) Held Proper in Light of This Section. — See State v. Christopher, 258 N.C. 249, 128 S.E.2d 667 (1962).

In a first-degree murder prosecution, it was permissible for the solicitor (now district attorney) to argue that in view of the brutality of defendant's conduct in the killing of his victim, the jury should find the defendant guilty of murder in the first degree without any recommendation that punishment be life imprisonment. State v. Williams, 276 N.C. 703, 174 S.E.2d 503, rev'd, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1970).

Where the prosecuting attorney, while making a vigorous plea for the imposition of the death penalty, did not depart from or distort the record, and there was nothing in his argument which would tend to mislead the jury or deprive the defendant of a fair trial, the argument was proper. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

A judgment imposing the death penalty was affirmed, although the solicitor (now district attorney), reviewed the evidence and argued with great zeal and fervor that in the light of the defendant's conduct in connection with the killing of the victim, the punishment therefor should be death and the jury should bring a verdict of guilty of murder in the first degree without a recommendation that the punishment should be life imprisonment. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death

sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Arguments Held Improper. — Where the prosecuting attorney, in his argument, traveled outside the record, used language offensive in its nature, and, in support of his plea for the death penalty, injected into his argument his own account of his record as a solicitor (now district attorney) in other cases for the purpose of persuading the jury that he did not ask the death penalty where it was not deserved, the argument was improper. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

§ 15-176.2: Repealed by Session Laws 1973, c. 44, s. 1.

Cross Reference. — As to credits against the service of sentences and for attainment of prison privileges, see §§ 15-196.1 through 15-196.4.

ARTICLE 17A.

Informing Jury in Case Involving Death Penalty.

§ 15-176.3. Informing and questioning potential jurors on consequences of guilty verdict. — When a jury is being selected for a case in which the defendant is indicted for a crime for which the penalty is a sentence of death, the court, the defense, or the State may inform any person called to serve as a potential juror that the death penalty will be imposed upon the return of a verdict of guilty of that crime and may inquire of any person called to serve as a potential juror whether that person understands the consequences of a verdict of guilty of that crime. (1973, c. 1286, s. 12.)

Applied in State v. Boyd, 287 N.C. 131, 214 S.E.2d 14 (1975); State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976).

Quoted in State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976).

Stated in State v. Bell, 287 N.C. 248, 214 S.E.2d 53 (1975).

Cited in State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976); State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

§ 15-176.4. Instruction to jury on consequences of guilty verdict. — When a defendant is indicted for a crime for which the penalty is a sentence of death, the court, upon request by either party, shall instruct the jury that the death penalty will be imposed upon the return of a verdict of guilty of that crime. (1973, c. 1286, s. 12.)

Instruction Mandatory. — This section makes it mandatory that the trial judge give the instruction upon the request of either party. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Instruction in Absence of Request. — It is not error to give an instruction as to the death penalty even in the absence of a request. State v. Boyd, 287 N.C. 131, 214 S.E.2d 14 (1975).

Prejudice Must Be Shown. — Trial judge erred when he refused to give the instruction mandated by this section, but there was no prejudice to the defendant since the jury knew the sentence of death would be imposed upon the return of a verdict of guilty of the crime of rape. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Applied in State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595 (1976).

Quoted in State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976).

Stated in State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

Cited in State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

§ 15-176.5. Argument to jury on consequences of guilty verdict. — When a case will be submitted to a jury on a charge for which the penalty is a sentence of death, either party in its argument to the jury may indicate the consequences of a verdict of guilty of that charge. (1973, c. 1286, s. 12.)

Applied in State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595 (1976).

Quoted in State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976).

Stated in State v. Bell, 287 N.C. 248, 214 S.E.2d 53 (1975); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

Cited in State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

§§ 15-176.6 to 15-176.8: Reserved for future codification purposes.

ARTICLE 17B.

Informing Jury of Possible Punishment upon Conviction.

§ 15-176.9. Loss of motor vehicle driver's license. — When a case will be submitted to a jury on a charge for which the penalty involves the possibility of the loss of a motor vehicle driver's license, either party in its argument to the jury may indicate the consequences of a verdict of guilty of that charge. (1973, c. 1286, s. 25.)

Quoted in State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976).

ARTICLE 18.

Appeal.

§§ 15-177 to 15-178: Repealed by Session Laws 1973, c. 1141, s. 17.

Cross Reference. — For provisions as to appeals in criminal cases, effective July 1, 1978, see §§ 15A-1441 through 15A-1453.

§§ 15-179 to 15-186: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. — Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

§ 15-186.1: Repealed by Session Laws 1973, c. 44, s. 1.

Cross Reference. — As to credits against the service of sentences and for attainment of prison privileges, see §§ 15-196.1 through 15-196.4.

ARTICLE 19.

Execution.

§ 15-187. Death by administration of lethal gas. — Death by electrocution under sentence of law is hereby abolished and death by the administration of

lethal gas substituted therefor. (1909, c. 443, s. 1; C. S., s. 4657; 1935, c. 294, s. 1.)

Cross Reference. — As to punishment for capital crimes committed before July 1, 1935, see § 15-191.

Discretionary Death Penalty Held Unconstitutional. — The imposition and carrying out of the death penalty, under statutes making the penalty discretionary with the judge or jury, was found to constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

This section applies only to crimes committed after the effective date of the statute, July 1, 1935, and it will not support a sentence of death by lethal gas imposed for a capital crime committed prior to the effective date of the statute although defendant was tried and convicted after the effective date thereof. State v. Hester, 209 N.C. 99, 182 S.E. 738 (1935). See also State v. Dingle, 209 N.C. 293, 183 S.E. 376 (1936); State v. McNeill, 211 N.C. 286, 189 S.E. 872 (1937).

Cited in State v. Jackson, 199 N.C. 321, 154 S.E. 402 (1930); State v. Ferrell, 205 N.C. 640, 172 S.E. 186 (1934); State v. Wall, 205 N.C. 659, 172 S.E. 216 (1934); State v. Baxter, 208 N.C. 90, 179 S.E. 450 (1935); State v. Horne, 209 N.C. 725, 184 S.E. 470 (1936); State v. Brice, 214 N.C. 34, 197 S.E. 690 (1938); State v. Hawley, 229 N.C. 167, 48 S.E.2d 35 (1948); State v. Gibson, 229 N.C. 497, 50 S.E.2d 520 (1948); State v. Hall, 233 N.C. 310, 63 S.E.2d 636 (1951).

§ 15-188. Manner and place of execution. — The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this Article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this Article. (1909, c. 443, s. 2; C. S., s. 4658; 1935, c. 294, s. 2.)

Cited in State v. Brooks, 206 N.C. 113, 172 S.E. 879 (1934); State v. Exum, 213 N.C. 16, 195 S.E. 7 (1938); State v. Montgomery, 227 N.C. 100, 40 S.E.2d 614 (1946).

§ 15-189. Sentence of death; prisoner taken to penitentiary. — Upon the sentence of death being pronounced against any person in the State of North Carolina convicted of a crime punishable by death, it shall be the duty of the judge pronouncing such death sentence to make the same in writing, which shall be filed in the papers in the case against such convicted person. The clerk of the superior court in which such death sentence is pronounced shall prepare a certified copy of said judgment or sentence of death, including therewith a copy of any notice or entries of appeal made in such case; if no entries or notice of appeal have been made or given in such case, a statement to the effect shall be included in the certificate of the clerk; it shall also be the duty of the district attorney, assistant district attorney, or attorney prosecuting in behalf of the State in the absence of the district attorney, to prepare and sign a certificate stating in substance that he prosecuted said case in behalf of the State and that notice or entries of appeal have or have not been made or given in said case, and further that he has examined a copy of said judgment or sentence of death certified by the clerk, including the copy of the notice or entries of appeal or statement to the effect that no appeal has been given, and to the best of his

knowledge the same is correct; the certificate of said district attorney, or other prosecuting officer above named, shall be attached to the certified copy of said sentence of death, as prepared and certified by the clerk, and both certificates shall be transmitted by the clerk of the superior court in which said sentence of death is pronounced to the warden of the State penitentiary at Raleigh, North Carolina; at the same time and in the same manner, a duplicate original of said certificates shall be prepared by the clerk of the superior court and the district attorney, or other prosecuting officer above named, and the said duplicate original or said certificates shall be transmitted to the Attorney General of North Carolina. If notice of appeal is given or entries of appeal are made after the expiration of the term of superior court in which said sentence of death is pronounced, said certificates shall be prepared by the clerk of the superior court in which said sentence is pronounced and by the district attorney, or other prosecuting officer above named, prosecuting in behalf of the State, in the same manner and shall be transmitted as soon as possible to the warden of the State penitentiary at Raleigh, North Carolina, and to the Attorney General of North Carolina. The above certificates so prepared by the clerk of the superior court in which such sentence of death is pronounced and by the district attorney, or other prosecuting officer above named, shall be transmitted by the clerk of the superior court in which such sentence is pronounced to the warden of the State penitentiary at Raleigh, North Carolina, and to the Attorney General of North Carolina, not more than 20 or less than 10 days before the time fixed in the judgment of the court for the execution of the sentence; and in all cases where there is no appeal, said sentence of death shall not be carried out by the warden of the State penitentiary or by any of his deputies or agents until said certificates so prepared and transmitted by the clerk of the superior court in which said sentence of death is pronounced, and by the district attorney, or the prosecuting officer above named, have been received in the office of the warden of the State penitentiary at Raleigh, North Carolina. In all cases where there is no appeal from the sentence of death and in all cases where the sentence is pronounced against a prisoner convicted of the crime of rape it shall be the duty of the sheriff, together with at least one deputy, to convey to the penitentiary, at Raleigh, North Carolina, such condemned felon or convict forthwith upon the adjournment of the court in which the felon was tried, and deliver the convict or felon to the warden of the penitentiary. (1909, c. 443, s. 3; C. S., s. 4659; 1951, c. 899, s. 1; 1973, c. 47, s. 2.)

No Distinction between Conviction by Plea or by Verdict. — Since an accused may be convicted by his plea as well as by a verdict, there is no reason to read into this section a legislative attempt to distinguish between conviction by plea and by verdict. State v. Watkins, 283 N.C. 17, 194 S.E.2d 800, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (1973).

Judgment Must Be Written and Signed by Trial Judge. — The entry of judgment of the court on the verdict of guilty of a capital felony by the clerk of the court on its minutes and signed by the judge is not a sufficient compliance with the provisions of this section, its mandatory provisions requiring the judgment to be written and signed by the judge, and where it appears of record that he has failed so to do the case will be remanded. State v. Jackson, 199 N.C. 321, 154 S.E. 402 (1930).

Death Sentence without Reference to Crime. — A judgment sentencing defendant to death for the commission of a capital felony, though making no reference to the trial or the crime of which the defendant was convicted, while not commended is held sufficient. State v. Taylor, 194 N.C. 738, 140 S.E. 728 (1927).

Judgment Must Show Degree of Murder. — Where the judgment upon a verdict of guilty of murder in the first degree states that the defendant had been convicted of murder, the cause must be remanded in order that it appear on the face of the judgment that the conviction was for murder in the first degree, since the judgment alone is certified to the warden of the State penitentiary. State v. Montgomery, 227 N.C. 100, 40 S.E.2d 614 (1946).

Where in a prosecution for murder the jury returns a verdict of guilty of murder in the first degree, the judgment of the court, which alone is certified to the warden of the State prison, under this section and §§ 15-188, 15-190, must recite that the defendant had been convicted of murder in the first degree, and where it recites

that the prisoner had been convicted of murder, and sentences the prisoner to death by electrocution, the case will be remanded. State v. Langley, 204 N.C. 687, 169 S.E. 705 (1933).

When No Reference to Trial or Crime Is Made. — A judgment, while somewhat informal, because it made no reference to the trial or the crime of which the prisoner was convicted, is, nevertheless, sufficient to meet the requirements of this section. State v. Edney, 202 N.C. 706, 164 S.E. 23 (1932).

Applied in State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973).

§ 15-190. Person or persons to be designated by warden to execute sentence; supervision of execution; who shall be present. — Some guard or guards or other reliable person or persons to be named and designated by the warden from time to time shall cause the person, convict or felon against whom the death sentence has been so pronounced to be asphyxiated as provided by this Article and all amendments thereto. The asphyxiation shall be under the general supervision and control of the warden of the penitentiary, who shall from time to time, in writing, name and designate the guard or guards or other reliable person or persons who shall cause the person, convict or felon against whom the death sentence has been pronounced to be asphyxiated as provided by this Article and all amendments thereto. At such execution there shall be present the warden or deputy warden or some person designated by the warden in his stead; the surgeon or physician of the penitentiary and six respectable citizens, the counsel and any relatives of such person, convict or felon and a minister or ministers of the gospel may be present if they so desire, and the board of directors of the penitentiary may provide for and pay the fee for each execution not to exceed thirty-five dollars ($35.00). (1909, c. 443, s. 4; C. S., s. 4660; 1925, c. 123; 1935, c. 294, s. 3.)

Cited in State v. Montgomery, 227 N.C. 100, 40 S.E.2d 614 (1946).

§ 15-191. Pending sentences unaffected. — Nothing in G.S. 15-187, 15-188, and 15-190 shall be construed to alter in any manner the execution of the sentence of death imposed on account of any crime or crimes committed before July 1, 1935. (1935, c. 294, s. 4.)

Editor's Note. — The act from which this section was codified changed the mode of executing a death sentence from electrocution to the administration of lethal gas.

§ 15-192. Certificate filed with clerk. — The warden, together with the surgeon or physician of the penitentiary, shall certify the fact of the execution of the condemned person, convict or felon to the clerk of the superior court in which such sentence was pronounced, and the clerk shall file such certificate with the papers of the case and enter the same upon the records thereof. (1909, c. 443, s. 5; C. S., s. 4661.)

§ 15-193. Notice of reprieve or new trial. — Should the condemned person, convict or felon be granted a reprieve by the Governor or obtain a writ of error, or a new trial be granted by the Supreme Court of the State of North Carolina, or should the execution of the sentence be stayed by any competent judicial tribunal or proceeding, notice of such reprieve, new trial, appeal, writ of error or stay of execution shall be served upon the warden or deputy warden of the penitentiary by the sheriff of Wake County, in case such condemned person is confined in the penitentiary, or upon any sheriff having the custody of any such condemned person, also upon the condemned person himself. (1909, c. 443, s. 6; C. S., s. 4662.)

§ 15-194. Time for execution. — In case of an appeal, should the Supreme Court find no error in the trial, or should the stay of execution granted by any competent judicial tribunal or proceeding, or reprieve by the Governor, have expired or terminated, or in case the certificates of the clerk of the superior court and of the district attorney, or other prosecuting officer as set forth in G.S. 15-189, showing that no appeal has been entered, have not been transmitted to the warden of the State penitentiary at Raleigh, North Carolina, in time to carry out the sentence of death on the date fixed by the court in said judgment or sentence of death, such condemned person, convict or felon shall be executed, in the manner heretofore provided in this Article, upon the third Friday after the filing of the opinion or order of the Supreme Court or other competent judicial tribunal as aforesaid, or, in case of a reprieve by the Governor, such condemned person, convict or felon shall be executed in the manner heretofore provided in this Article upon the third Friday after the expiration or termination of such reprieve; or in case certificates of the clerk of the superior court and of the district attorney, or other prosecuting officer provided for in G.S. 15-189, showing that no notice of appeal has been given, are not received in the office of the warden of the State penitentiary at Raleigh, North Carolina, in time to carry out sentence of death upon the date provided for in said judgment or sentence of death, then said convict or felon shall be executed in the manner heretofore provided in this Article upon the third Friday after the date of the receipt of said certificates of the clerk and district attorney, or other prosecuting officer, showing that no notice of appeal has been given or entered; and it shall be the duty of the clerk of the Supreme Court, and of any other competent tribunal, as aforesaid, or the clerk thereof, to notify the warden of the penitentiary of the date of the filing of the opinion or order of such court or other judicial tribunal, and in case of a reprieve by the Governor, it shall be the duty of the Governor to give notice to the warden of the State penitentiary of the date of the expiration of such reprieve. (1909, c. 443, s. 6; C. S., s. 4663; 1925, c. 55; 1951, c. 244, ss. 1, 2; 1973, c. 47, s. 2.)

Upon appeal from sentence of death, it is necessary that the Supreme Court find that there was no error in the trial before the sentence can be carried out. State v. Hawley, 229 N.C. 167, 48 S.E.2d 35 (1948).

Applied in Miller v. State, 237 N.C. 29, 74 S.E.2d 513 (1953).

Cited in State v. Calcutt, 219 N.C. 545, 15 S.E.2d 9 (1941).

§ 15-195. Prisoner taken to place of trial when new trial granted. — Should a new trial be granted the condemned person, convict or felon against whom sentence of death has been pronounced, after he has been conveyed to the penitentiary, he shall be conveyed back to the place of trial by such guard or guards as the warden of the penitentiary shall direct, their expenses to be paid as is now provided by law for the conveyance of convicts to the penitentiary. (1909, c. 443, s. 7; C. S., s. 4664.)

§ 15-196. Disposition of body. — Upon application, written or verbal, of any relative as near as the degree of fourth cousin of the person executed, made at any time prior to the execution or on the morning thereof, the body, after execution, shall be prepared for burial under the supervision of the warden or deputy warden and shall be returned to the nearest railroad station of the relative or relatives asking for such body. In the event that no relative asks for the body of such executed person, convict or felon, the same shall be disposed of as other bodies of convicts dying in the penitentiary. (1909, c. 443, s. 9; C. S., s. 4665; 1925, c. 275, s. 6.)

ARTICLE 19A.

Credits against the Service of Sentences and for Attainment of Prison Privileges.

§ 15-196.1. Credits allowed. — The term of a determinate sentence or the minimum and maximum term of an indeterminate sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole and probation revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject. (1973, c. 44, s. 1.)

This section repealed former §§ 15-176.2 and 15-186.1 and was made applicable to all prisoners, including those convicted prior to its enactment, who are entitled to, but who have not heretofore received all such allowable credit. State v. Lewis, 18 N.C. App. 681, 198 S.E.2d 57 (1973).

The constitutional guarantee against double jeopardy absolutely requires that punishment already exacted must be fully credited in imposing sentence upon a new conviction for the same offense. Wilson v. North Carolina, 438 F.2d 284 (4th Cir. 1971), decided under § 15-184 before the enactment of this Article.

Denial of credit to a prisoner for the time he spent in jail from the date of his first conviction until the affirmance of his second appeal is multiple punishment. Such time must be fully credited insofar as possible as "punishment already exacted." Although it cannot be credited against his life sentence, which by its very nature is indefinite, it can be credited toward the 10 years he must wait to be considered for parole. Wilson v. North Carolina, 438 F.2d 284 (4th Cir. 1971), decided under § 15-184 before the enactment of this Article.

Life Sentence Not Reduced by Credits. — Because a life sentence lasts for the prisoner's natural life, no reduction in sentence by credits of any kind is possible. Wilson v. North Carolina, 438 F.2d 284 (4th Cir. 1971), decided under § 15-184 before the enactment of this Article.

Time spent on parole is not to be credited on an active sentence. State v. Davis, 19 N.C. App. 459, 199 S.E.2d 37 (1973).

Credit withheld for inability to make bail discriminatory. — Denial of credit for pretrial custody necessitated by financial inability to make bail is discrimination based on financial status. Steele v. North Carolina, 348 F. Supp. 1023 (W.D.N.C. 1972), decided under former § 15-176.2.

The trial court committed no error in failing to credit time already credited to the previously imposed sentence for secret assault. State v. Lewis, 18 N.C. App. 681, 198 S.E.2d 57 (1973).

Cited in State v. Roberts, 286 N.C. 265, 210 S.E.2d 396 (1974).

§ 15-196.2. Allowance in cases of multiple sentences. — In the event time creditable under this section shall have been spent in custody as the result of more than one pending charge, resulting in imprisonment for more than one offense, credit shall be allowed as herein provided. Consecutive sentences shall be considered as one sentence for the purpose of providing credit, and the creditable time shall not be multiplied by the number of consecutive offenses for which a defendant is imprisoned. Each concurrent sentence shall be credited with so much of the time as was spent in custody due to the offense resulting in the sentence. When both concurrent and consecutive sentences are imposed, both of the above rules shall obtain to the applicable extent. (1973, c. 44, s. 1.)

§ 15-196.3. Effect of credit. — Time creditable under this section shall reduce the minimum and maximum term of a sentence; and, irrespective of sentence, shall reduce the time required to attain privileges made available to inmates in

the custody of the State Department of Correction which are dependent, in whole or in part, upon the passage of a specific length of time in custody, including parole consideration by the State Board of Paroles. However, nothing in this section shall be construed as requiring an automatic award of privileges by virtue of the passage of time. (1973, c. 44, s. 1; 1977, c. 711, s. 17.)

Editor's Note. — The 1977 amendment substituted "the minimum and maximum term of a" for "the determinate term or the minimum and maximum term of an indeterminate" near the beginning of the first sentence.

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

§ 15-196.4. Procedures for judicial award. — Upon sentencing or activating a sentence, the judge presiding shall determine the credits to which the defendant is entitled and shall cause the clerk to transmit to the custodian of the defendant a statement of allowable credits. Upon committing a defendant upon the conclusion of an appeal, or a parole or probation revocation, the committing authority shall determine any credits allowable on account of these proceedings and shall cause to be transmitted, as in all other cases, a statement of the allowable credit to the custodian of the defendant. Upon reviewing a petition seeking credit not previously allowed, the court shall determine the credits due and forward an order setting forth the allowable credit to the custodian of the petitioner. (1973, c. 44, s. 1.)

ARTICLE 20.

Suspension of Sentence and Probation.

§§ 15-197 to 15-200.1: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Cross References. — For provisions as to post-trial relief, effective July 1, 1978, see §§ 15A-1411 through 15A-1422.

Editor's Note. — Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

§§ 15-201, 15-202: Repealed by Session Laws 1973, c. 1262, s. 10.

Cross Reference. — As to transfer of the functions of the State Probation Commission to the Department of Correction, see § 143B-262.

State Government Reorganization. — The Probation Commission was transferred to the Department of Social Rehabilitation and Control by § 143A-167 (now repealed), enacted by Session Laws 1971, c. 864.

§ 15-203. Duties of the Secretary of Correction; appointment of probation officers; reports; requests for extradition. — The Secretary of Correction shall direct the work of the probation officers appointed under this Article. He shall consult and cooperate with the courts and institutions in the development of

methods and procedure in the administration of probation, and shall arrange conferences of probation officers and judges. He shall make an annual written report with statistical and other information to the Department of Correction and the Governor. He is authorized to present to the Governor written applications for requisitions for the return of probationers who have broken the terms of their probation, and are believed to be in another state, and he shall follow the procedure outlined for requests for extradition as set forth in G.S. 15-77. (1937, c. 132, s. 7; 1959, c. 127; 1963, c. 914, s. 2; 1973, c. 1262, s. 10.)

Editor's Note. — Section 15-77, referred to in this section, was transferred to § 15A-743 by Session Laws 1973, c. 1286, s. 16, effective July 1, 1975.

§ 15-203.1: Repealed by Session Laws 1963, c. 914, s. 6.

Editor's Note. — See now § 15-203.

§ 15-204. Assignment, compensation and oath of probation officers. — Probation officers appointed under this Article shall be assigned to serve in such courts or districts or otherwise as the Secretary of Correction may determine. They shall be paid annual salaries to be fixed by the Department of Correction, and shall also be paid traveling and other necessary expenses incurred in the performance of their official duties as probation officers when such expense accounts have been authorized and approved by the Secretary of Correction.

Each person appointed as a probation officer shall take an oath of office before the judge of the court or courts in which he is to serve, which oath shall be as follows:

"I, ..., do solemnly and sincerely swear that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain, and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability; so help me God,"

and shall be noted of record by the clerk of the court. (1937, c. 132, s. 8; 1973, c. 1262, s. 10.)

§ 15-205. Duties and powers of the probation officers. — A probation officer shall investigate all cases referred to him for investigation by the judges of the courts or by the Secretary of Correction. Such officer shall keep informed concerning the conduct and condition of each person on probation under his supervision by visiting, requiring reports, and in other ways, and shall report thereon in writing as often as the court or the Secretary of Correction may require. Such officer shall use all practicable and suitable methods, not inconsistent with the conditions imposed by the court or the Secretary of Correction, to aid and encourage persons on probation to bring about improvement in their conduct and condition, and shall within the first 30 days of a person's probation take such person to a prison unit maintained by the Department of Correction for a tour thereof so that he may better appreciate the consequences of probation revocation. Such officer shall keep detailed records of his work; shall make such reports in writing to the Secretary of Correction as he may require; and shall perform such other duties as the Secretary of Correction may require. A probation officer shall have, in the execution of his duties, the powers of arrest and, to the extent necessary for the performance of his duties, the same right to execute process as is now given, or that may hereafter be given by law, to the sheriffs of this State. (1937, c. 132, s. 9; 1973, c. 1262, s. 10; 1975, c. 229, s. 1.)

Editor's Note. — The 1975 amendment added the language following "condition" at the end of the fourth sentence.

Session Laws 1975, c. 229, s. 3, provides that the act shall become effective 60 days after ratification. The act was ratified May 6, 1975.

The 1977 amendment, effective July 1, 1978, deleted "and shall report in writing thereon" at then end of the first sentence and deleted the second sentence of this section.

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

§ 15-205.1: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Cross Reference. — For provisions as to post-trial relief, effective July 1, 1978, see §§ 15A-1411 through 15A-1422.

Editor's Note. — Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

§ 15-206. Cooperation with Department of Correction and officials of local units. — It shall be the duty of the Secretary of Correction and the Department of Correction to cooperate with each other to the end that the purposes of probation and parole may be more effectively carried out. When requested, each shall make available to the other case records in his possession, and in cases of emergency, where time and expense can be saved, shall provide investigation service.

It is hereby made the duty of every city, county, or State official or department to render all assistance and cooperation within his or its fundamental power which may further the objects of this Article. The State Department of Correction, the Secretary of Correction, and the probation officers are authorized to seek the cooperation of such officials and departments, and especially of the county superintendents of social services and of the Department of Human Resources. (1937, c. 132, s. 10; 1961, c. 139, s. 2; 1969, c. 982; 1973, c. 476, s. 138; c. 1262, s. 10.)

§ 15-207. Records treated as privileged information. — All information and data obtained in the discharge of official duty by any probation officer shall be privileged information, shall not be receivable as evidence in any court, and shall not be disclosed directly or indirectly to any other than the judge or to others entitled under this Article to receive reports, unless and until otherwise ordered by a judge of the court or the Secretary of Correction. (1937, c. 132, s. 11; 1973, c. 1262, s. 10.)

Quoted in State v. Craft, 32 N.C. App. 357, 232 S.E.2d 282 (1977).

§ 15-208: Repealed by Session Laws 1975, c. 138.

§ 15-209. Accommodations for probation officers. — The county commissioners in each county in which a probation officer serves shall provide, in or near the courthouse, suitable office space for such officer. (1937, c. 132, s. 13.)

ARTICLE 21.

Segregation of Youthful Offenders.

§§ 15-210 to 15-216: Repealed by Session Laws 1967, c. 996, s. 17.

ARTICLE 22.

Review of Criminal Trials.

§ 15-217: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Cross References. — For provisions as to probation effective July 1, 1978, see §§ 15A-1341 through 15A-1347.

For provisions as to post-trial relief in criminal cases, effective July 1, 1978, see §§ 15A-1411 through 15A-1422.

Editor's Note. — Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

§ 15-217.1. Filing petition with clerk; delivery of copy to district attorney; review of petition by judge. — The proceeding shall be commenced by filing with the clerk of superior court of the county in which the conviction took place a petition, with two copies thereof, verified by affidavit. One copy shall be delivered by the clerk to the district attorney of the judicial district who prosecutes the criminal docket of the superior court of the county in which said petition is filed, either in person or by ordinary mail, and the clerk shall enter upon his docket the date and manner of delivery of such copy.

The clerk shall place the petition upon the criminal docket upon his receipt thereof. The clerk shall promptly after delivery of copy to the district attorney bring the petition, or a copy thereof, to the attention of the resident judge or any judge holding the courts of the district or any judge holding court in the county. Such judge shall review the petition and make such order as he deems appropriate with respect to permitting the petitioner to prosecute such action without providing for the payment of costs, with respect to the appointment of counsel, and with respect to the time and place of hearing upon the petition. If it appears to the judge that substantial injustice may be done by any delay in hearing upon the matters alleged in the petition, he may issue such order as may be appropriate to bring the petitioner before the court without delay, and may direct the district attorney to answer the petition at a time specified in the order, and the court shall thereupon inquire into the matters alleged as directed by the reviewing judge, as in the case of a writ of habeas corpus. If upon review of the petition it does not appear to the judge that an order advancing the hearing or other order is appropriate, he shall return the petition to the clerk with a notation to that effect. (1965, c. 352, s. 1; 1973, c. 47, s. 2.)

In the county of conviction are to be found the records of the trial which the prisoner attacks, as well as the court officials and other persons likely to have any knowledge of the truth or falsity of the prisoner's allegations that he suffered a substantial denial of his constitutional rights. If entries in the minutes are to be corrected or judgments vacated, manifestly this should be done in the county where they are required to be kept. State v. Merritt, 264 N.C. 716, 142 S.E.2d 687 (1965).

§§ 15-218 to 15-222: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Cross Reference. — For provisions as to probation effective July 1, 1978, see §§ 15A-1341 through 15A-1347.

Editor's Note. — Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

ARTICLE 23.

Expunction of Records of Youthful Offenders.

§ 15-223. Expunction of records for first offenders under the age of 18 at the time of conviction of misdemeanor. — (a) Whenever any person who has not yet attained the age of 18 years and has not previously been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States, the laws of this State or any other state, pleads guilty to or is guilty of a misdemeanor other than a traffic violation, he may file a petition in the court where he was convicted for expunction of the misdemeanor from his criminal record. The petition cannot be filed earlier than two years after the date of the conviction or any period of probation, whichever occurs later, and the petition shall contain, but not be limited to, the following:

(1) An affidavit by the petitioner that he has been of good behavior for the two-year period since the date of conviction of the misdemeanor in question and has not been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States or the laws of this State or any other state.

(2) Verified affidavits of two persons who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives and that his character and reputation are good.

(3) A statement that the petition is a motion in the cause in the case wherein the petitioner was convicted.

(4) Affidavits of the clerk of superior court, chief of police, where appropriate, sheriff of the county wherein the petitioner was convicted, and official records of the Federal Bureau of Investigation and the State Bureau of Investigation, all showing that the petitioner has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of the United States or the laws of this State or any other state at any time prior to the conviction for the misdemeanor in question or during the two-year period following the conviction for the misdemeanor in question.

The petition shall be served upon the district attorney of the court wherein the case was tried resulting in conviction. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing of the petition.

(b) If the court, after hearing, finds that the petitioner had remained of good behavior and been free of conviction of any felony or misdemeanor, other than a traffic violation, for two years from the date of conviction of the misdemeanor in question, and petitioner was not 18 years old at the time of the conviction in question, it shall order that such person be restored, in the contemplation of the

law, to the status he occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any laws to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest, or indictment, information, or trial, or response to any inquiry made of him for any purpose.

(c) The court shall also order that the said misdemeanor conviction be expunged from the records of the court, and direct all law-enforcement agencies bearing record of the same to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency. The sheriff, chief or head of such other arresting agency shall then transmit the copy of the order with a form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation. The cost of expunging such records shall be taxed against the petitioner.

(d) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts, the names of those persons granted a discharge under the provisions of this section, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted conditional discharges. The information contained in such file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted a discharge. (1973, c. 47, s. 2; c. 748; 1975, c. 650, s. 5; 1977, c. 642, s. 1; c. 699, ss. 1, 2.)

Editor's Note. — The 1975 amendment substituted "Administrative Office of the Courts" for "North Carolina Department of Justice" in two places in the first sentence of subsection (d).

The first 1977 amendment divided the former provisions of subsection (c) into the present first and second sentences by deleting "and," inserted "the" preceding "said misdemeanor conviction" in the present first sentence, substituted "the sheriff, chief of police, or other arresting agency" for "all law-enforcement agencies concerned and to the F.B.I. and S.B.I. with the cost thereof to be taxed against the petitioner" at the end of the present second sentence, and added the third and fourth sentences.

The second 1977 amendment, in subsection (a), inserted "other than a traffic violation" in the first sentence in the introductory language and near the middle of subdivision (4).

Section Applicable to Offenses Which Occurred at Any Time and Were Committed by Individual under 18 Years of Age. — See opinion of Attorney General to Mr. Ray H. Garland, Deputy Director, State Bureau of Investigation, 43 N.C.A.G. 1 (1973).

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15A-1381 to 15A-1390. [Reserved.]

Article 87.

15A-1391 to 15A-1400. [Reserved.]

SUBCHAPTER XIV. CORRECTION OF ERRORS AND APPEAL.

Article 88.

Post-Trial Motions and Appeal.

15A-1401. Post-trial motions and appeal.
15A-1402 to 15A-1410. [Reserved.]

Article 89.

Motion for Appropriate Relief and Other Post-Trial Relief.

Sec.
15A-1411. Motion for appropriate relief.
15A-1412. Provisions of Article procedural.
15A-1413. Trial judges empowered to act.
15A-1414. Motion by defendant for appropriate relief made within 10 days after verdict.
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15A-1417. Relief available.
15A-1418. Motion for appropriate relief in the appellate division.
15A-1419. When motion for appropriate relief denied.
15A-1420. Motion for appropriate relief; procedure.
15A-1421. Indigent defendants.
15A-1422. Review upon appeal.
15A-1423 to 15A-1430. [Reserved.]

Article 90.

Appeals from Magistrates and District Court Judges.

15A-1431. Appeals by defendants from magistrate and district court judge; trial de novo.
15A-1432. Appeals by State from district court judge.
15A-1433 to 15A-1440. [Reserved.]

Article 91.

Appeal to Appellate Division.

15A-1441. Correction of errors by appellate division.
15A-1442. Grounds for correction of error by appellate division.
15A-1443. Existence and showing of prejudice.
15A-1444. When defendant may appeal; certiorari.
15A-1445. Appeal by the State.
15A-1446. Requisites for preserving the right to appellate review.
15A-1447. Relief available upon appeal.
15A-1448. Procedures for appeal.
15A-1449. Security for costs not required.
15A-1450. Withdrawal of appeal.
15A-1451. Stay of sentence; bail; no stay when State appeals.
15A-1452. Execution of sentence upon determination of appeal; compliance with directive of appellate court.
15A-1453. Ancillary actions during appeal.

Articles 92 to 99.

Sec.
15A-1454 to 15A-1999. [Reserved.]

SUBCHAPTER XV. CAPITAL PUNISHMENT.

Article 100.

Capital Punishment.

Sec.
15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.
15A-2001. Capital offenses; plea of guilty.
15A-2002. Capital offenses; jury verdict and sentence.
15A-2003. Disability of trial judge.

OFFICIAL COMMENTARY

This commentary is based upon the commentary included in the January 1973 report of the Criminal Code Commission with its proposed code of pretrial procedure. The consultant-draftsmen of the Commission have revised the commentary to reflect changes that were made by the General Assembly in the course of passage.

The Commission's commentary was drafted by the consultant-draftsmen in an effort to explain the rationale behind policy decisions, to enlighten practitioners as to the aims and intent of the Commission, and in some cases to draw attention to pertinent cases or factual situations which either made the inclusion of a provision desirable or necessary.

The Commission's debates and debates in committees of the legislature and on the floor are the source of much of this commentary but neither the Commission nor any legislative official has reviewed and approved this commentary on a line-by-line basis.

Editor's Note. — Session Laws 1973, c. 1286, repealed many, but not all, of the sections of Chapter 15, Criminal Procedure, and a number of sections elsewhere in the General Statutes, and enacted in their place a new Chapter 15A, Criminal Procedure Act, effective July 1, 1975. Certain sections in Chapter 15 and in other chapters of the General Statutes were transferred and renumbered as sections in new Chapter 15A. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Chapter 15A.

Session Laws 1973, c. 1286, ss. 27, 28 and 31, provide:

"Sec. 27. All statutes which refer to sections repealed or amended by this act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose.

"Sec. 28. None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law.

"Sec. 31. This act becomes effective on July 1, 1975, and is applicable to all criminal proceedings begun on and after that date and each provision is applicable to criminal proceedings pending on that date to the extent practicable, except § 12 [§§ 15-176.3 through 15-176.5] of this act which becomes effective on July 1, 1974."

Session Laws 1975, c. 573, amends Session Laws 1973, c. 1286, s. 31, so as to make the 1973 act effective Sept. 1, 1975, rather than July 1, 1975.

Session Laws 1975, c. 166, ss. 27 and 28, provide:

"Sec. 27. Chapter 15A of the General Statutes is hereby amended by striking out the words 'district solicitor' wherever the words appear throughout Chapter 15A, and inserting in lieu thereof the words 'district attorney,' and by striking out the word 'solicitor,' wherever the word appears throughout Chapter 15A and inserting in lieu thereof the word 'prosecutor.' The Michie Company, publishers of the General Statutes of North Carolina, is authorized and directed to make the changes directed above wherever they might appear appropriate in the text of Chapter 15A of the General Statutes.

"Sec. 28. This act shall become effective on the date that Chapter 1286 of the 1973 Session Laws becomes effective."

The "Official Commentary" under Articles 1 to 34, 36 to 61 of this chapter appear as originally drafted by the Criminal Code Commission and do not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

Many of the cases cited in the annotations under the various sections of this Chapter were decided under similar provisions of Chapter 15 and earlier statutes.

SUBCHAPTER I. GENERAL.

ARTICLE 1.

Definitions and General Provisions.

OFFICIAL COMMENTARY

This Article includes definitions of those words or terms which are used in more than one article of Chapter 15A and which have attached to them a significance beyond or different from that which one would ordinarily associate with the word or phrase defined.

§§ 15A-1 to 15A-100: Reserved for future codification purposes.

§ 15A-101. Definitions. — Unless the context clearly requires otherwise, the following words have the listed meanings:

(0.1) Appeal. — When used in a general context, the term "appeal" also includes appellate review upon writ of certiorari.

(1) Attorney of Record. — An attorney who, under Article 4 of this Chapter, Entry and Withdrawal of Attorney in Criminal Case, has entered a criminal proceeding and has not withdrawn.

(2) Clerk. — Any clerk of superior court, acting clerk, or assistant or deputy clerk.

(3) District Court. — The District Court Division of the General Court of Justice.

(4) District Attorney. — The person elected and currently serving as district attorney in his prosecutorial district.

(4a) Entry of Judgment. — Judgment is entered when sentence is pronounced. Prayer for judgment continued upon payment of costs, without more, does not constitute the entry of judgment.

(5) Judicial Official. — A magistrate, clerk, judge, or justice of the General Court of Justice.

(6) Officer. — Law-enforcement officer.

(7) Prosecutor. — The district attorney, any assistant district attorney or any other attorney designated by the district attorney to act for the State or on behalf of the district attorney.

(8) State. — The State of North Carolina, all land or water in respect to which the State of North Carolina has either exclusive or concurrent jurisdiction, and the airspace above that land or water. "Other state" means any state or territory of the United States, the District of Columbia or the Commonwealth of Puerto Rico.

(9) Superior Court. — The Superior Court Division of the General Court of Justice.

(10) Superior Court Judge. — Any judge assigned to preside over a session of superior court in the judicial district, any resident superior court judge of the judicial district, or any special judge of superior court residing in the judicial district.

(11) Vehicle. — Aircraft, watercraft, or landcraft or other conveyance. (1973, c. 1286, s. 1; 1975, c. 166, s. 2; 1977, c. 711, s. 19.)

OFFICIAL COMMENTARY

(1) Attorney of record is defined to draw attention to the new provisions of Article 4 of this Chapter, Entry and Withdrawal of Attorney in Criminal Case, and the obligations which that designation carries with it.

(2) Clerk, (3) district court, (6) officer, and (9) superior court are defined here because these "shorthand" terms are used throughout the Chapter for convenience and ease of expression and consistently are intended to carry the definition listed here.

(4) District solicitor and (7) solicitor are defined to distinguish the general but less controversial authority given the persons

representing the State including assistant solicitors and even temporary "per diem" prosecutors acting for the district solicitor from the authority granted only to the elected district solicitor to whose personal attention certain critical decisions in prosecution of cases and selecting extraordinary investigative techniques are reserved. For example, only the elected district solicitor (and not an assistant solicitor) may make decisions in the area of granting immunity.

(5) Judicial official is defined to distinguish the broader group, i.e., judges, clerks and magistrates (without having to enumerate the categories on each occasion), from any one classification of persons exercising judicial functions, i.e., district court judge.

(10) Superior court judge is intended to encompass all those superior court judges, regular or special, resident or presiding in a district, without having to recite the extended definition. Where a more restricted classification such as the senior resident superior court judge is intended, the less broad term is spelled out in the statute.

(8) State is patterned after the Illinois statute's definition. (Ill. Rev. Stat. Ch. 38, § 2-21.)

(11) Vehicle is intended to be more broad than the Chapter 20 of the General Statutes (Motor Vehicles Law) definition for purposes of the search sections. Because of the wide acceptance of the Chapter 20 definition of a vehicle, the more broad definition was inserted.

The Commission resisted the tendency to define words or terms unnecessarily. Only when the Commission intended a distinction which it found might not be recognized in the text of the statute or where a "shorthand" term was employed for ease of drafting and economy of words were definitions included here. Terms which have a special meaning in one Article only are defined in the text of the Article without needless repetition here.

Editor's Note. — The 1975 amendment rewrote subdivision (2), substituted "attorney" for "solicitor" and "prosecutorial" for "solicitorial" in subdivision (4) and substituted "Prosecutor" for "Solicitor" in one place, and "attorney" for "solicitor" in four places, in subdivision (7).

The 1977 amendment, effective July 1, 1978, added subdivisions (0.1) and (4a).

The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

ARTICLE 2.

Jurisdiction.

§§ 15A-102 to 15A-130: Reserved for future codification purposes.

ARTICLE 3.

Venue.

OFFICIAL COMMENTARY

The Criminal Code Commission in its 1973 proposal has left an Article vacant for later dealing with the question of jurisdiction. For now, jurisdiction of courts is still primarily covered in Chapter 7A of the General Statutes. See, e.g., § 7A-271 and § 7A-273.

With respect to venue, this Article gathers together various provisions concerning venue. The Article contains or refers to most of the provisions on venue set out in proposed Chapter 15A, though it is not fully inclusive. For example, the special waiver of venue described in § 15A-1011(c) is neither covered nor cross-referenced in this Article.

In general, venue in a criminal case remains in the county in which the crime was committed. A new provision is the placing of venue in the judicial district rather than the county for certain pretrial proceedings in cases in the original jurisdiction of the superior court.

Editor's Note. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-131. Venue generally. — (a) Venue for pretrial and trial proceedings in district court of cases within the original jurisdiction of the district court lies in the county where the charged offense occurred.

(b) Except for the probable cause hearing, venue for pretrial proceedings in cases within the original jurisdiction of the superior court lies in the judicial district embracing the county where venue for trial proceedings lies.

(c) Venue for probable cause hearings and trial proceedings in cases within the original jurisdiction of the superior court lies in the county where the charged offense occurred.

(d) Venue for misdemeanors appealed for trial de novo in superior court lies in the county where the misdemeanor was first tried.

(e) An offense occurs in a county if any act or omission constituting part of the offense occurs within the territorial limits of the county.

(f) For the purposes of this Article, pretrial proceedings are proceedings occurring after the initial appearance before the magistrate and prior to arraignment. (1973, c. 1286, s. 1; 1975, 2nd Sess., c. 983, s. 134.)

OFFICIAL COMMENTARY

Subsection (a) states the rule of venue applicable in district court. This subsection is not intended to effect any change of existing law, but does by implication clarify that trial in one county rather than the other in district court is a matter of venue rather than jurisdiction.

Subsections (b), (c), and (d) state the rules of venue applicable in superior court or to cases in the original jurisdiction of the superior court. The purpose of placing pretrial venue of superior court cases in the judicial district is to facilitate discovery procedures and pretrial motions practice, including the motion to suppress. This will be particularly important in rural areas with infrequent sessions of court. The venue for the probable cause hearing remains in the county in which the crime occurred. The Commission thought that witnesses should not be ordinarily required to leave the county to testify, and this district court proceeding should be easier to schedule than motions and hearings in the superior court.

Cross References. — As to venue in trial of an accessory, see §§ 14-5 and 14-7. As to venue in indictment for receiving stolen goods, see § 14-71. As to venue in cases of bigamy, see § 14-183. As to venue in case of bribery of players in athletic contests, see § 14-378. As to assault in one county, death in another, see § 15-130. As to assault in this State, death in another, see § 15-131. As to person in this State injuring one in another, see § 15-132. As to offenses that may be prosecuted in county where death occurs, see § 15-133. As to sale and delivery of intoxicating liquors, see § 18A-11. As to venue in cases of bastardy, see § 49-5. As to offenses by officers of State institutions, see § 143-116.

Editor's Note.—The 1975, 2nd Sess., amendment substituted "are proceedings occurring after the initial appearance before the magistrate and" for "include all proceedings" in subsection (f).

Power of Legislature. — Venue is under the control of the legislature. State v. Woodard, 123 N.C. 710, 31 S.E. 219 (1898).

Averment of Venue in Indictment. — In an indictment for murder, the offense must be charged in the body of the bill, to have been committed within the district over which the court has jurisdiction; it is not sufficient that the caption names the district. State v. Adams, 1 N.C. 21 (1793).

But the want of an averment of a proper and perfect venue is not fatal to a bill of indictment. State v. Williamson, 81 N.C. 540 (1879).

The crime of offering a bribe to a juror is committed in the county where the offer is communicated to the juror, and the proper venue is the county in which the juror was serving and in which the defendant's offer was communicated to him by his wife, although defendant communicated with the juror's

kinsmen and wife in the county of their residence. State v. Noland, 204 N.C. 329, 168 S.E. 412 (1933).

§ 15A-132. Concurrent venue. — (a) If acts or omissions constituting part of the commission of the charged offense occurred in more than one county, each county has concurrent venue.

(b) If charged offenses which may be joined in a single criminal pleading under G.S. 15A-926 occurred in more than one county, each county has concurrent venue as to all charged offenses.

(c) When counties have concurrent venue, the first county in which a criminal process is issued in the case becomes the county with exclusive venue. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section on concurrent venue essentially states the prior practice. With its cross reference to the joinder provisions in § 15A-926, it clarifies the rules of venue in multi-county situations. In this connection it is also important to note the rule as to when an offense occurs in a county set out in § 15A-131(e). This subsection, in conjunction with § 15A-134, should solve many of the problems treated in § 15-130 through § 15-133, but as a matter of caution the Commission recommends leaving these statutes unrepealed until after the jurisdictional provisions in Article 2 of Chapter 15A have been drafted.

§ 15A-133. Waiver of venue; motion for change of venue; indictment may be returned in other county. — (a) Except for a waiver of venue made as required in Article 35 of this Chapter, Speedy Trial, a waiver of venue must be in writing and signed by the defendant and the prosecutor indicating the consent of all parties to the waiver. The waiver must specify what stages of the proceedings are affected by the waiver, and the county to which venue is changed. If the venue is to be laid in a county in another judicial district, the consent in writing of the prosecutor in that district must be filed with the clerks of both counties.

(b) If a waiver of venue is made by the defendant as provided in Article 35 of this Chapter, Speedy Trial, the prosecutor in his discretion may elect the county in the district in which to proceed. He may also elect not to proceed in another county, but the State is subject to the sanctions provided in Article 35.

(c) Motions for change of venue by the defendant are made under G.S. 15A-957. If venue is laid in a county in another judicial district by order of the judge ruling on the motion, no consent of any prosecutor is required.

(d) If venue is changed to a county in another judicial district, whether upon waiver of venue or by order of a judge, the prosecutor of the district where the case originated must prosecute the case unless the prosecutor of the district to which venue has been changed consents to conduct the prosecution.

(e) If venue is changed, whether upon waiver of venue or by order of a judge, the grand jury in the county to which venue has been transferred has the power to return an indictment in the case. If an indictment has already been returned before the change of venue, no new indictment is necessary and prosecution may be had in the new county under the original indictment. (1921, c. 12, ss. 1, 2; C. S., ss. 4606(a), 4606(b); 1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

Subsection (a) sets out the procedure to be followed when there is a voluntary change of venue with the consent of all parties. The subsection makes clear that the waiver may be as to only a particular proceeding or stage of the proceedings rather than the more usual change of venue for all subsequent stages of a proceeding.

Subsection (b) ties in with the speedy trial provisions of Article 35.

Subsection (c) refers to the situation in which the defendant makes a motion for a change of venue because he cannot obtain a fair trial in the county in which venue is laid. If the judge orders the change of venue in accordance with § 15A-957, the judge may shift venue to another county in the judicial district or to another county in an adjoining judicial district.

In the past it has not always been clear, upon a change of venue to another district, which solicitor was responsible for prosecution of the case. Subsection (d) states the Commission's opinion that the solicitor who first had the case should remain primarily responsible for prosecuting it.

Subsection (e) is intended to carry forward the provisions of § 15-135 and § 15-136.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" wherever it appeared in this section.

§ 15A-134. Offense occurring in part outside North Carolina. — If a charged offense occurred in part in North Carolina and in part outside North Carolina, a person charged with that offense may be tried in this State if he has not been placed in jeopardy for the identical offense in another state. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section is new. It states the constitutional rule. Cf. Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970); Waller v. Florida, 397 U.S. 387, 90 S. Ct. 1184, 25 L. Ed. 2d 435 (1970).

Cross Reference. — See also §§ 15-131 through 15-133.

§ 15A-135. Allegation of venue conclusive in absence of timely motion. — Allegations of venue in any criminal pleading become conclusive in the absence of a timely motion to dismiss for improper venue under G.S. 15A-952. A defendant may move to dismiss for improper venue upon trial de novo in superior court, provided he did not in the district court with benefit of counsel stipulate venue or expressly waive his right to contest venue. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section carries forward the provisions contained in § 15-134 in modified form. The plea in abatement is replaced by the motion to dismiss for improper venue, and the requirement that the defendant allege the county in which venue should properly be laid is omitted.

The Commission's proposal would have made allegation of venue conclusive in misdemeanor cases tried in the district court absent timely motion to contest venue in that court. The purpose was to prevent use of the venue objection in superior court upon trial de novo, and accounts in part for the wording in §§ 15A-952(e) and 15A-953. This provision was in line with the thrust of § 15-134, and was sufficiently strong to cause the Commission to recommend repeal of § 15-129, which is being repealed upon the effective date of the new code. In the General Assembly, however, this section was rewritten to preserve the right to raise venue objections for the first time in superior court upon trial de novo; if the motion is not timely made there, of course, the allegation as to venue would become conclusive.

Former Statute. — Former § 15-134 was intended to provide relief in difficulties originating in doubt entertained in good faith as to the county in which the offense was committed, and would not be construed to modify the common law beyond the reasonable scope of its manifest purpose. State v. Mitchell, 202 N.C. 439, 163 S.E. 581 (1932).

The mischief intended to be remedied by former § 15-134 was the difficulty encountered by the court in effecting the conviction of persons who had violated the criminal law of the state where the offense was committed near the boundaries of counties which were undetermined or unknown. And it often happened that, where the boundaries were established and known, it was uncertain from the proof whether the offense was committed on the one or the other side of the line, and, in consequence of the uncertainty and the doubt arising from it, offenders went "unwhipped of justice." This was the evil intended to be remedied. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967).

Objection to Venue Waived. — Objection to venue is waived unless objection is taken in apt time by plea in abatement (now motion to dismiss). State v. Lytle, 117 N.C. 799, 23 S.E. 476 (1895); State v. Woodard, 123 N.C. 710, 31 S.E. 219 (1898); State v. Holder, 133 N.C. 709, 45 S.E. 862 (1903).

Thus where a prisoner is charged with killing the deceased in the county in which the indictment is found, the State need not prove that the offense was committed in that county. Such allegation is to be taken as true unless the prisoner denies the same by plea in abatement (now motion to dismiss). State v. Outerbridge, 82 N.C. 617 (1880).

Crime Deemed to Have Taken Place Where Alleged. — A criminal offense is deemed to have taken place in the county in which the indictment charges it occurred, unless the defendant deny the same by the plea in abatement (now motion to dismiss). State v. Allen, 107 N.C. 805, 11 S.E. 1016 (1890); State v. Oliver, 186 N.C. 329, 119 S.E. 370 (1923).

Where there is no challenge to the indictment prior to a plea of guilty, the offense is deemed to have been committed in the county alleged in the indictment. State v. McKeon, 223 N.C. 404, 26 S.E.2d 914 (1943).

An offense is deemed to have been committed in the county in which it is laid in the indictment unless the defendant shall deny the same by plea in abatement (now motion to dismiss). State v. Dozier, 277 N.C. 615, 178 S.E.2d 412 (1971).

Offenses Committed outside State. — The offenses referred to in former § 15-134 were those committed within the borders of the State, in violation of the laws of the State, for courts cannot take cognizance of the violation of the criminal laws of other states, and would have no right to recognize offenders to appear before their judicial tribunals. State v. Mitchell, 83 N.C. 674 (1880).

Demurrer to Evidence Improper Remedy. — An objection to venue must be taken by plea in abatement (now motion to dismiss), and a demurrer to the evidence on this ground was properly overruled. State v. Burton, 138 N.C. 575, 50 S.E. 214 (1905).

Burden of Proof. — Former § 15-134 did not state which party had the burden of proof if a plea in abatement was filed. At common law, the burden of proof was upon the State to prove that the offense occurred in the county named in the bill of indictment. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967).

Applied in State v. Morrow, 31 N.C. App. 654, 230 S.E.2d 568 (1976).

§§ 15A-136 to 15A-140: Reserved for future codification purposes.

ARTICLE 4.

Entry and Withdrawal of Attorney in Criminal Case.

OFFICIAL COMMENTARY

Several provisions of Chapter 15A add requirements that notice be given a defendant's attorney during pretrial stages of criminal proceedings. It became obvious from discussions within the Commission that in many instances the State will not know who is representing a defendant. The Commission therefore requested that a draft be prepared requiring counsel entering a case to file a notice of entry in the case.

Another problem reported by a number of members of the Commission was that caused by the defendant who said he would employ his own attorney but who shows up at a subsequent stage of the proceedings without counsel. Getting counsel, or continuing the case until he

can retain counsel, causes a number of delays. The defendant in some instances has conferred with an attorney but has not yet been able to obtain the money for the fee and actually retain the attorney; in other cases, the defendant has never gotten around to employing a lawyer. In a few situations an attorney may have appeared for the defendant in a limited capacity, for example at a bail hearing or at a preliminary hearing, but has declined to accept the case — either unconditionally or without the payment of additional remuneration. The Commission asked one of its committees to investigate this problem, and that committee studied a draft which would have placed fairly stringent conditions upon attorneys taking any part in a criminal case. The draft required filing with the clerk whenever entry in the case was made; it defined entry as acting on the defendant's behalf in any manner or accepting any compensation, including part payment or installment payments; and it required leave of the court for an attorney to withdraw from the case.

After reviewing a toned-down version of the original draft, the Commission made additional modifications. It realized the problems which uncounseled defendants cause the courts, but it felt that defense lawyers earning their livelihood from the practice of criminal law should not be boxed in with restrictions which might drastically affect their relations with clients and their modes of arranging for payment of fees. The resulting proposal is contained in this Article, as further liberalized by the General Assembly in the course of passage. Though relatively mild, it should still lead to substantial improvement over the former situation.

Editor's Note. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-141. When entry of attorney in criminal proceeding occurs. — An attorney enters a criminal proceeding when he:

(1) Files a written notice of entry with the clerk indicating an intent to represent a defendant in a specified criminal proceeding; or

(2) Appears in a criminal proceeding without limiting the extent of his representation; or

(3) Appears in a criminal proceeding for a limited purpose and indicates the extent of his representation by filing written notice thereof with the clerk; or

(4) Accepts assignment to represent an indigent defendant under the terms of Article 36 of Chapter 7A of the General Statutes; or

(5) Files a written waiver of arraignment, except that representation in this instance may not be limited pursuant to subdivision (3). (1973, c. 1286, s. 1; 1975, 2nd Sess., c. 983, s. 135.)

OFFICIAL COMMENTARY

This section lists the ways in which an attorney enters a criminal case. Two of them involve filing written documents with the clerk. Filing is not required in two instances, but they are situations in which the clerk would either be involved in the entry (assignment of counsel) or would be able to observe the entry (appearance in a proceeding). The fifth situation concerns the attorney who limits the scope of his representation; he may either state the limitation orally in open court at his initial appearance or file a written notice as to what the limits are. It seems implicit that the written notice would be filed prior to or at the time of the initial appearance, for otherwise there would be a general appearance under subdivision (2).

There is no restriction on the attorney's right to enter the case for a limited purpose, if he files written notice of the limitation or orally notes it in open court, except as provided in subdivision (5).

Editor's Note. — The 1975, 2nd Sess. amendment deleted "or entering oral notice thereof in open court at the time of his initial appearance" following "the clerk" in subdivision (3).

§ 15A-142. Requirement that clerk record entry. — The clerk must note each entry by an attorney in the records of the proceeding. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

As indicated in the commentary to the preceding section, the clerk should be able to determine when an entry is made under the terms of this Article in order to perform his duty of noting this in the records. In district court the only effective record of the proceedings is the case record, and entry should be made there. In superior court, if entry is made for the first time, entry would have to be noted in the minutes of the proceeding, but the clerk should also note entry in the case records.

It may be of interest to compare the provisions of Rule 303(a) of the Pennsylvania Rules of Criminal Procedure:

"(a) Counsel for defendant shall enter his appearance in writing with the clerk of courts promptly after being retained or appointed and serve a copy thereof on the attorney for the Commonwealth. If a firm name is entered, the name of an individual lawyer shall be designated as being responsible for the conduct of the case.

"Counsel shall not be permitted to represent a defendant following a preliminary hearing unless his appearance is entered."

§ 15A-143. Attorney making general entry obligated to represent defendant at all subsequent stages. — An attorney who enters a criminal proceeding without limiting the extent of his representation pursuant to G.S. 15A-141(3) undertakes to represent the defendant for whom the entry is made at all subsequent stages of the case until entry of final judgment, at the trial stage. An attorney who appears for a limited purpose under the provisions of G.S. 15A-141(3) undertakes to represent the defendant only for that purpose and is deemed to have withdrawn from the proceedings, without the need for permission of the court, when that purpose is fulfilled. (1973, c. 1286, s. 1; 1977, c. 1117.)

OFFICIAL COMMENTARY

The purpose of this section is self-evident in the light of the general commentary for this Article. This section was modified after introduction to bind the lawyer's freedom to withdraw only in the particular division of the court in which he is appearing. Also added after introduction was the clarifying sentence concerning automatic withdrawal in the case of a limited appearance.

If circumstances do arise which make it necessary or desirable for an attorney to withdraw from a case, there should be no difficulty in obtaining permission from the court. Compare Rule 303(b) of the Pennsylvania Rules of Criminal Procedure:

"(b) Counsel for a defendant may not withdraw his appearance except by leave of court. Such leave shall be granted only upon application made and served on the attorney for the Commonwealth and the client, unless the interests of justice otherwise require."

Editor's Note. — The 1977 amendment substituted "at all subsequent stages of the case until entry of final judgment, at the trial stage" for "at all stages of the case in that division of the court — district, superior or appellate" at the end of the first sentence.

§ 15A-144. Withdrawal of attorney with permission of court. — The court may allow an attorney to withdraw from a criminal proceeding upon a showing of good cause. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

The court in this instance would be the judge presiding over the court having jurisdiction of the case. The statute does not specifically direct it, but it is assumed the clerk would note withdrawals of attorneys in the records of the case.

ARTICLE 5.

§§ 15A-145 to 15A-172: Reserved for future codification purposes.

ARTICLE 6.

§§ 15A-173 to 15A-200: Reserved for future codification purposes.

SUBCHAPTER II. LAW-ENFORCEMENT AND INVESTIGATIVE PROCEDURES.

ARTICLE 7.

§§ 15A-201 to 15A-210: Reserved for future codification purposes.

ARTICLE 8.

§§ 15A-211 to 15A-220: Reserved for future codification purposes.

ARTICLE 9.

Search and Seizure by Consent.

OFFICIAL COMMENTARY

This Article expresses the common-law authority to make searches upon consent. It requires no warnings to the person from whom consent is sought, thus making it necessary only that the consent be voluntary, under the decision in Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

§ 15A-221. General authorization; definition of "consent". — (a) Authority to Search and Seize Pursuant to Consent. — Subject to the limitations in the other provisions of this Article, a law-enforcement officer may conduct a search and make seizures, without a search warrant or other authorization, if consent to the search is given.

(b) Definition of "Consent". — As used in this Article, "consent" means a statement to the officer, made voluntarily and in accordance with the requirements of G.S. 15A-222, giving the officer permission to make a search. (1973, c. 1286, s. 1.)

The owner of premises may consent to a search thereof and thus waive the necessity of a valid search warrant so as to render the evidence obtained in the search competent, but to have such effect, the consent of the owner must be freely and intelligently given, without coercion, duress or fraud, and the burden is upon the State to prove that it was so, the presumption being against the waiver of fundamental constitutional rights. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971); State v. Lindquist, 14 N.C. App. 361, 188 S.E.2d 686 (1972).

One may submit or consent to a warrantless search or seizure. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

And Miranda Warnings Are Not Required. — The warnings required by Miranda v.

Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966), in order to make competent a confession made in custody, need not be given by officers before obtaining the consent of the owner to a search of his premises. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971); State v. Lindquist, 14 N.C. App. 361, 188 S.E.2d 686 (1972).

§ 15A-222. Person from whom effective consent may be obtained. — The consent needed to justify a search and seizure under G.S. 15A-221 must be given:

(1) By the person to be searched;

(2) By the registered owner of a vehicle to be searched or by the person in apparent control of its operation and contents at the time the consent is given;

(3) By a person who by ownership or otherwise is reasonably apparently entitled to give or withhold consent to a search of premises. (1973, c. 1286, s. 1.)

Standing of Person "in Charge" of Premises. — Defendant, as agent of the lessee of the premises, and as a joint venturer with him in operating a gambling establishment thereon, was the person in charge of the premises at the time the search was made, and had sufficient standing to invoke protection against an unlawful search of the premises. State v. Miller, 16 N.C. App. 1, 190 S.E.2d 888 (1972), modified, 282 N.C. 633, 194 S.E.2d 353 (1973).

Consent by Person in Possession of Automobile. — Evidence obtained pursuant to the search of an automobile with the permission of the one in possession is competent against him and the occupants. State v. Faison, 17 N.C. App. 200, 193 S.E.2d 334 (1972).

§ 15A-223. Permissible scope of consent search and seizure. — (a) Search Limited by Scope of Consent. — A search conducted pursuant to the provisions of this Article may not exceed, in duration or physical scope, the limits of the consent given.

(b) Items Seizable as Result of Consent Search. — The things subject to seizure in the course of a search pursuant to this Article are the same as those specified in G.S. 15A-242. Upon completion of the search, the officer must make a list of the things seized, and must deliver a receipt embodying the list to the person who consented to the search and, if known, to the owner of the vehicle or premises searched. (1973, c. 1286, s. 1.)

§§ 15A-224 to 15A-230: Reserved for future codification purposes.

ARTICLE 10.

Other Searches and Seizures.

§ 15A-231. Other searches and seizures. — Constitutionally permissible searches and seizures which are not regulated by the General Statutes of North Carolina are not prohibited. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This Article makes clear that common-law search powers not regulated by the General Statutes are not thereby prohibited. Among the search powers not regulated are searches incident to arrest, frisks incident to lawful confrontation, and emergency searches.

Whether a search is unreasonable is determined by the court upon the facts of each individual case. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971).

The reasonableness of a search is a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the criteria laid down by the Fourth Amendment and opinions which

apply that amendment. State v. Turnbull, 16 N.C. App. 542, 192 S.E.2d 689 (1972).

Burden of Justifying Search without Warrant. — One who seeks to justify a warrantless search has the burden of showing that the exigencies of the situation made search without a warrant imperative. State v. McCloud, 276 N.C. 518, 173 S.E.2d 753 (1970).

Exclusionary Rule Applies Only Where Evidence Is Obtained in Course of Illegal Search. — Evidence is not rendered incompetent under the exclusionary rule unless it is obtained in the course of an illegal search. State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754 (1971).

Seizure and Introduction of Evidence Not Prohibited Where No Search Is Required. — The constitutional and statutory guaranty against unreasonable search and seizure does not prohibit seizure of evidence and its introduction into evidence on a subsequent prosecution where no search is required. State v. Simmons, 278 N.C. 468, 180 S.E.2d 97 (1971).

The constitutional guaranty against unreasonable searches and seizures does not prohibit a seizure of evidence without a warrant where no search is required. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971).

Before the reasonableness or legality of an alleged search may be questioned it is necessary to first determine whether there has actually been a search. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971).

Where a petitioner's privacy was not invaded, and where there was no inspection or examination of his household, there was no search either in an actual or legal sense. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971).

When the evidence is delivered to a police officer upon request and without compulsion or coercion, there is no search within the constitutional prohibition against unreasonable searches and seizures. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971).

In a prosecution for first-degree murder, where a State trooper had stopped defendants' car for reckless driving and had subsequently observed the butt of a revolver protruding from under the center armrest, the revolver was properly admissible in evidence as the fruit of a lawful warrantless "plain view" seizure under circumstances requiring no search. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976), aff'd, 291 N.C. 505, 231 S.E.2d 663 (1977).

Where the circumstances require no search the constitutional immunity never arises, and the guarantee against unreasonable searches and seizures does not prohibit a warrantless seizure where the contraband subject matter is fully disclosed and open to the eye and hand. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976), aff'd, 291 N.C. 505, 231 S.E.2d 663 (1977).

As to what constitutes a "search," see also note to § 15A-241.

Warrant Not Required Where Article Seized Is in Plain View. — The law does not prohibit a seizure without a warrant by an officer in the discharge of his official duties where the article seized is in plain view. State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969); State v. Parks, 14 N.C. App. 97, 187 S.E.2d 462 (1972); State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976), aff'd, 291 N.C. 505, 231 S.E.2d 663 (1977).

Seizure of contraband, such as burglary tools, does not require a warrant when its presence is fully disclosed without necessity of search. State v. Simmons, 278 N.C. 468, 180 S.E.2d 97 (1971).

The incriminating heroin in this case was not obtained in the course of an illegal search, since it was obtained when the defendant, in an apparent attempt to voluntarily dispose of it, unintentionally exposed it to the view of the officers. State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754 (1971).

It is lawful and proper for an officer to seize an article in the discharge of his official duties without a warrant where the article is in plain view. State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754 (1971).

The constitutional guaranty against unreasonable searches and seizures does not apply where a search is not necessary, and where the contraband subject matter is fully disclosed and open to the eye and the hand. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

A search ordinarily involves prying into hidden places, and a seizure contemplates forcible dispossession. However, a police officer may seize and use what he sees in plain sight if he is at a place where he is lawfully entitled to be. State v. Fry, 13 N.C. App. 39, 185 S.E.2d 256 (1971).

The failure of an officer to actually arrest a defendant for a traffic violation did not render inadmissible the evidence of possession of marijuana which was in plain view while the officer was investigating, before arrest, a crime that he had probable cause to believe had been committed in his presence. State v. Fry, 13 N.C. App. 39, 185 S.E.2d 256 (1971).

Evidence obtained by officers without a search warrant is admissible in evidence where the articles are seized in plain view without necessity of search. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

When officers are conducting a valid search for one type of contraband and find other types of contraband, the law is not so unreasonable as to require them to turn their heads. State v. Oldfield, 29 N.C. App. 131, 223 S.E.2d 569, cert. denied, 290 N.C. 96, 225 S.E.2d 325 (1976).

By being lawfully on the premises officers are entitled to seize such evidentiary objects connected with defendants as are in plain view. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, U.S. , 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

The plain view doctrine is firmly established and consistently supported by both State and federal courts. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976), aff'd, 291 N.C. 505, 231 S.E.2d 663 (1977).

Seizure Invalid Where Officers Acted under Invalid Search Warrant. — Fact that officers could observe gambling after passing through two doors of a house and opening a third door did not give them authority to enter and seize the gambling apparatus in use where they arrived at the position to observe the gambling while purporting to act under an invalid search warrant and under circumstances in which a valid warrant was required. State v. Miller, 16 N.C. App. 1, 190 S.E.2d 888 (1972), modified, 282 N.C. 633, 194 S.E.2d 353 (1973).

Reasonable Cause for Seizure of Contraband without Warrant. — When officers saw liquid in containers generally used to contain and transport nontaxpaid liquor, under the circumstances then existing, they had sufficient reasonable cause to believe that the jars contained nontaxpaid liquor to justify the seizure of the contraband without a search warrant. State v. Simmons, 278 N.C. 468, 180 S.E.2d 97 (1971).

The existence of "probable cause," justifying a search without a warrant is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

One does not have probable cause unless he has information of facts which, if submitted to a magistrate, would require the issuance of an arrest warrant. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

Constitutional Guaranties Do Not Apply to Open Fields. — There was no merit in defendant's contention that a search warrant was invalid on the ground that the affidavit for the warrant revealed that the affiant had illegally searched a cornfield in which marijuana was growing some distance behind defendant's residence prior to issuance of the warrant, since the constitutional guaranties against unreasonable search and seizure do not apply to open fields or other lands not an immediate part of the dwelling site. State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972).

Automobiles and other conveyances may be searched without a warrant under circumstances that would not justify the search of a house, and a police officer in the exercise of his duties may search an automobile or other conveyance without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile or other conveyance carries contraband materials. State v. Simmons, 278 N.C. 468, 180 S.E.2d 97 (1971); State v. Faison, 17 N.C. App. 200, 193 S.E.2d 334 (1972).

Automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office; however, the officers conducting the search must have reasonable or probable cause to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search. State v. Ratliff, 281 N.C. 397, 189 S.E.2d 179 (1972).

In recognition of the mobility of automobiles, a search of an automobile without a warrant is constitutionally permissible if there is probable cause to make the search. State v. Ratliff, 281 N.C. 397, 189 S.E.2d 179 (1972).

If there is probable cause to search an automobile, the officer may either seize and hold the vehicle before presenting the probable-cause issue to a magistrate, or he may carry out an immediate search without a warrant. State v. Ratliff, 281 N.C. 397, 189 S.E.2d 179 (1972).

The search of an automobile on probable cause proceeds on a theory entirely different from that justifying the search incident to an arrest. State v. Ratliff, 281 N.C. 397, 189 S.E.2d 179 (1972).

The right to search an automobile on probable cause and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. State v. Ratliff, 281 N.C. 397, 189 S.E.2d 179 (1972).

A warrantless search of a vehicle capable of movement may be made by officers when they have probable cause to search, and exigent circumstances make it impracticable to secure a search warrant. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

But persons stopped pursuant to § 20-183 may not be indiscriminately searched or arrested without probable cause in contravention of recognized constitutional principles. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

The absence of a stop-and-frisk statute is not fatal to the authority of law-enforcement officers in North Carolina to stop suspicious persons for questioning and to search those persons for dangerous weapons, since those

practices are valid under the common law. State v. Streeter, 283 N.C. 203, 195 S.E.2d 502 (1973).

Officers May Conduct Limited Protective Search. — When law officers stopped to learn defendant's identity and his reason for being on deserted street near business establishments at 2:45 A.M., and the officers saw a bulge protruding from beneath defendant's shirt which appeared to be a gun, it was reasonable for the officers to conduct a limited protective search for weapons immediately, even if the officers had no probable cause to arrest defendant, and burglary tools necessarily exposed by the limited weapons search were lawfully obtained and not excluded by either the Fourth Amendment or the State statute. State v. Streeter, 283 N.C. 203, 195 S.E.2d 502 (1973).

When an officer temporarily detains a person because of suspicious circumstances and has reason to believe that the suspect is armed, he may conduct a weapons search which is limited to the protective purpose. State v. Streeter, 17 N.C. App. 48, 193 S.E.2d 347 (1972), aff'd, 283 N.C. 203, 195 S.E.2d 502 (1973).

Exposure of Evidence through Limited Weapons Search. — If, in the conduct of the limited weapons search, contraband or evidence of a crime is of necessity exposed, the officer is not required by the Fourth Amendment to disregard such contraband or evidence of crime. State v. Streeter, 17 N.C. App. 48, 193 S.E.2d 347 (1972), aff'd, 283 N.C. 203, 195 S.E.2d 502 (1973).

A police officer may search the person of one whom he has lawfully arrested as an incident of such arrest. State v. Parker, 11 N.C. App. 648, 182 S.E.2d 264 (1971); State v. Jackson, 11 N.C. App. 682, 182 S.E.2d 271, aff'd, 280 N.C. 122, 185 S.E.2d 202 (1971); State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Gibson, 15 N.C. App. 445, 190 S.E.2d 315 (1972); State v. Hughes, 27 N.C. App. 164, 218 S.E.2d 211 (1975).

A warrantless search and seizure may be made when it is incident to a valid arrest. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

Once prison escapees are apprehended, it is entirely reasonable for the police to search them, and the fruits of that search are admissible in evidence in the case. State v. White, 21 N.C. App. 173, 203 S.E.2d 644 (1974).

Where the arrest is lawful, the police have the right, without a search warrant, to conduct a contemporaneous search of the person and area within the immediate control for weapons or for fruits of the crime or weapons used in its commission. State v. Young, 27 N.C. App. 308, 219 S.E.2d 261 (1975), cert. denied, 289 N.C. 455, 223 S.E.2d 164 (1976).

Property Which May Be Taken in Course of Search Incident to Lawful Arrest. — In the course of a search incident to an arrest, an officer may lawfully take from the person arrested any property which such person has about him and which is connected with the crime charged or which may be required as evidence thereof; if such article is otherwise competent, it may properly be introduced in evidence by the State. State v. Parker, 11 N.C. App. 648, 182 S.E.2d 264 (1971); State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Jackson, 280 N.C. 122, 185 S.E.2d 202 (1971).

When a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Jackson, 280 N.C. 122, 185 S.E.2d 202 (1971); State v. Streeter, 283 N.C. 203, 195 S.E.2d 502 (1973).

A police officer may lawfully take from a prisoner lawfully arrested any property which he has about him which is connected with the crime charged or which may be required as evidence, and, if otherwise competent, such property may be introduced as evidence by the State. State v. Jackson, 11 N.C. App. 682, 182 S.E.2d 271, aff'd, 280 N.C. 122, 185 S.E.2d 202 (1971).

An arresting officer has the authority to seize and hold articles which he sees the accused trying to hide. State v. Fry, 13 N.C. App. 39, 185 S.E.2d 256 (1971).

Where a police officer lawfully entered defendant's home to serve a valid arrest warrant, the officer did not need a search warrant to seize marijuana seeds lying in plain view on the top of a freezer some three or four feet from the officer or to seize marijuana which the officer saw inside a plastic jar that he picked up to use as a container for the seized marijuana seeds, no warrant being necessary for the seizure of articles in plain view, and the marijuana in the plastic jar not being discovered by a general exploratory search or an unreasonable search. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

Having every reason to believe that a defendant was an armed robber, fleeing from the scene of a crime just perpetrated, it is lawful for the officer, as an incident of the arrest, to search a defendant then and there for weapons and for the fruits of the robbery. State v. Woody, 277 N.C. 646, 178 S.E.2d 407 (1971).

The search of the defendant's person was incidental to arrest and, consequently, the four shotgun shells found tucked in the tops of his boots were properly admitted in evidence. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Arrest Held Complete for Purposes of Search Incident Thereto. — Where it was not clear whether the arresting officers stated to the defendant that he was under arrest when they took him into custody, but where it was clear that defendant was deprived of his liberty when he was detained and later taken to jail, then his arrest was complete for purposes of making a

search incident to the arrest. State v. Jackson, 280 N.C. 122, 185 S.E.2d 202 (1971).

Search and Seizure Must Be Substantially Contemporaneous with Arrest. — For a search and seizure incident to a lawful arrest to be constitutionally permissible, it must be substantially contemporaneous with the arrest. State v. Jackson, 280 N.C. 122, 185 S.E.2d 202 (1971).

Officer May Continue Search after Interruption by Hostile Crowd. — Where the officers cut short that initial search because of a growing and hostile crowd, and the danger from possible concealed weapons was not entirely eliminated by the initial quick search, it was reasonable to continue the search at the police station. State v. Gibson, 15 N.C. App. 445, 190 S.E.2d 315 (1972).

Search Held Not Remote in Time or Place. — Neither the removal of a female defendant to the jail nor the delay of 30 to 45 minutes waiting for the matron to search her made a search too remote in time or place to be invalid as a search incident to a lawful arrest. State v. Jackson, 280 N.C. 122, 185 S.E.2d 202 (1971).

Where the arresting officers had information that defendant had narcotic drugs concealed inside her brassiere when they took her into custody, this was probable cause for her arrest and the officers could have searched her immediately but instead, the officers took her to jail where she could be searched in privacy by a police matron, police officers acted lawfully and the search was valid as an incident to a lawful arrest, and the heroin found on the defendant's person was properly introduced in evidence. State v. Jackson, 280 N.C. 122, 185 S.E.2d 202 (1971).

Search Made after Defendant in Custody Not Justified as Search Incident to Arrest. — A search yielding burglary tools cannot be justified as a search incident to defendant's arrest where the search was made after defendant was under arrest and in custody at the police station. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

Search Incident to Warrantless Arrest Held Proper. — Where facts fully support the conclusion that the arresting officers had reasonable grounds to believe that defendant had committed a felony and unless defendant was apprehended, he might escape and destroy any narcotic drugs he had on his person, the arrest without a warrant was justified, and a search incident to the arrest was proper. State v. Jackson, 280 N.C. 122, 185 S.E.2d 202 (1971).

Arrest without Warrant Must Be Made with Probable Cause. — Although a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, the arrest must be made with probable cause. State v. Harris, 9 N.C. App. 649, 177 S.E.2d 445 (1970), aff'd, 279 N.C. 307, 182 S.E.2d 364 (1971).

Evidence Obtained Following Illegal Warrantless Arrest. — Nothing in State law requires the exclusion of evidence obtained following an arrest which is constitutionally valid but illegal for failure to first obtain an arrest warrant. Defendant may, if so advised, redress his grievance for the warrantless arrest by a civil action for damages. State v. Eubanks, 283 N.C. 556, 196 S.E.2d 706 (1973).

§§ 15A-232 to 15A-240: Reserved for future codification purposes.

ARTICLE 11.

Search Warrants.

OFFICIAL COMMENTARY

The goal of the Commission in drafting the search warrant Article was to provide a set of search warrant application and execution procedures that would make the search warrant an effective and efficient investigative device while insuring that the Fourth Amendment "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures," would continue to be respected in North Carolina.

Section 15A-242 replaces and expands upon the list of items subject to seizure under former § 15-25(a). The old North Carolina statute provided that a warrant may be issued "to search for any *contraband, evidence, or instrumentality of crime* . . ." (Emphasis added.) The new provision expands upon "contraband" by making subject to seizure items which are contraband or unlawfully possessed, stolen or embezzled. The word "instrumentality" is expanded to encompass any item which "has been used or is possessed for the purpose of being used to commit or conceal the commission of a crime." The new proposed statute makes it clear that items may be seized if they constitute evidence either of an offense or of the identity of a person participating in an offense.

Section 15A-244, setting forth contents of a

search warrant, is essentially a codification of present law and practice. Section 15A-245 provides that the official who issued the search warrant may consider information other than that contained in the warrant in determining the existence of probable cause. Information other than that contained in the affidavit, however, may not be considered unless it is either "recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official." This last provision is necessary in order to comply with one of the central functions of the warrant process: the maintaining of a factual record of the basis for the search recorded before the search occurs. Section 15A-245 also introduces a new provision requiring the issuing official to make a copy of the warrant and application and file it with the clerk soon after issuance of the warrant.

Section 15A-246 and § 15A-247, dealing with the form and content of the search warrant and identifying who may execute search warrants, codify existing law and practice.

Section 15A-248 provides that search warrants must be executed within 48 hours after issuance and that warrants not executed within this time must be returned to the issuing court. Formerly, North Carolina law provided no time limit for the execution of search warrants and did not require that unexecuted warrants be returned to the court. The Commission was informed that as a result of the absence of such provisions, there were a number of "stale" but facially valid warrants "floating around." If a search warrant is not promptly executed, there is a serious question whether the probable cause that existed at the time of issuance is still present. If a search warrant is not executed within 48 hours as this section provides, it does not mean that the search may not take place; the only effect of the provision is that the invalid warrant must be returned. A new warrant may then be obtained if the grounds for it can be demonstrated.

Section 15A-249 and § 15A-251 deal with an issue to which the most serious and close attention was given: whether search warrants may be executed without giving notice of the officer's identity and purpose. Section 15A-249 simply states the general rule: An officer executing a search warrant must, before entering the premises, give notice of his identity and purpose. The only exception is contained in § 15A-251(2). There was general agreement that an officer should have the authority to execute a warrant without notice and with the use of force whenever he had probable cause, either at the time of applying for or at the time of executing the warrant, to believe that notice would endanger the life or safety of any person. Under the terms of § 15A-251(1) the officer can also use force to enter, if after announcing his identity and purpose, he reasonably believes admittance is being denied or delayed.

Section 15A-253 deals with the question of whether an officer executing a search warrant may seize items not named in the warrant. In Marron v. United States, 275 U.S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927), the Supreme Court indicated that only items named in the warrant could be seized. The weight of recent court decisions, however, appears to permit such seizures. The Commission provided that both contraband and noncontraband items not named in the warrant may be seized if inadvertently discovered in the course of a lawful search. The word "inadvertently" is incorporated to comply with the requirements of Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). This is the same rule as that which obtains when a search is incident to an arrest: "When an article subject to lawful seizure properly comes into an officer's possession in the course of a lawful search it would be entirely unreasonable to say that he must return it because it was not one of the things it was his business to look for." Abel v. United States, 362 U.S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668 (1960). Of course, as the first sentence of § 15A-253 states, the scope of any search under a warrant must be limited to that which is reasonably necessary to discover the items specified in the warrant. Under a search warrant describing a refrigerator as the sole item sought, it would not be reasonable to look in small boxes and drawers. Any items discovered while searching outside the reasonable scope of the warrant could not be lawfully seized under this provision.

Section 15A-255 and § 15A-256 deal with the officer's authority with respect to persons present in the place to be searched. Under § 15A-255, a police officer may frisk any person present in the place designated in the warrant if he reasonably believes that his safety or that of others requires the frisk. And, of course, the officer may fully search any person who is designated in the warrant as an object of the search. But should persons not named in the warrant be subject to a full personal search if they happen to be present in a place that is the object of a search warrant? To forbid such searches would allow the search to be frustrated by quick transferring of small objects to persons present. To allow such searches, however, is arguably an undue infringement on the privacy of a person who happens to be in a particular place. The Commission sought to resolve these conflicting concerns by allowing searches of persons not named in the warrant only when two conditions are satisfied. First, the officers must have unsuccessfully searched the premises and persons designated in the warrant before searching those present who were not named in the warrant. And second, the authority to detain and search persons present who were not named in the warrant applies only to those present in private premises or vehicles. This second

limitation is based upon the Commission's conclusion that it would be unreasonable to subject all those present in a public department store or on a common carrier to detention and searching. This concern is not sufficient, however, to immunize those who are present in a nonpublic place, such as a friend's residence where there is probable cause to believe that items subject to seizure are located. Section 15A-256 also denies the admissibility of evidence found in such a search of bystanders if the evidence is not of the "type" described in the warrant (but permitting its use of evidence the same type even though not specifically referred to in the warrant). Controlled substances (in Chapter 90, Article 5) are singled out as a class of things all of which are of the same type.

The search warrant Article also contains several miscellaneous provisions. Section 15A-252 provides that a copy of the warrant must be given to the person in control of the premises searched, or a copy left affixed to the premises. Section 15A-254 provides that the officers must leave a signed receipt of items taken with the person in control or leave one affixed to the premises. Section 15A-258 provides for the disposition of seized property. Section 15A-259 provides that the Article applies to all search warrants except those issued under the previously enacted statutes dealing with inspection warrants and warrants to inspect vehicles in certain riots or emergencies.

§ 15A-241. Definition of search warrant. — A search warrant is a court order and process directing a law-enforcement officer to search designated premises, vehicles, or persons for the purpose of seizing designated items and accounting for any items so obtained to the court which issued the warrant. (1868-9, c. 178, subch. 3, s. 38; Code, s. 1171; Rev., s. 3163; C. S., s. 4529; 1941, c. 53; 1949, c. 1179; 1955, c. 7; 1965, c. 377; 1969, c. 869, s. 8; 1973, c. 1286, s. 1.)

Editor's Note. — For article discussing limits to search and seizure, see 15 N.C.L. Rev. 229. See also 15 N.C.L. Rev. 101. For note on requisites for a valid warrant to search for unlawfully possessed liquor, see 35 N.C.L. Rev. 424 (1957). For case law survey as to searches and seizures, see 45 N.C.L. Rev. 931 (1967). For article on "An Inquiry into Mapp v. Ohio in North Carolina," see 45 N.C.L. Rev. 119 (1966).

No Variance between State Law and Fourth Amendment Requirements. — With regard to search warrants, there is no variance between the law of this State as declared by the decisions of the Supreme Court, and the requirements of the Fourth Amendment as interpreted by the Supreme Court of the United States. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971); State v. Miller, 282 N.C. 633, 194 S.E.2d 353 (1973).

The same probable-cause standards under the Fourth and Fourteenth Amendments apply to both federal and State warrants. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

Evidence unconstitutionally obtained is excluded in State courts as an essential of due process under the Fourteenth Amendment of the United States Constitution. State v. Miller, 282 N.C. 633, 194 S.E.2d 353 (1973).

It is well settled, in both federal and State courts, that evidence obtained by unreasonable search and seizure is inadmissible. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971); State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973); State v. Wooten, 18 N.C. App. 269, 196 S.E.2d 603 (1973).

Evidence obtained by an illegal search without a search warrant is inadmissible. State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969).

Evidence obtained by unreasonable search is inadmissible in both federal and State courts. State v. Johnson, 29 N.C. App. 534, 225 S.E.2d 113 (1976).

However, this constitutional protection does not extend to all searches and seizures. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971); State v. Turnbull, 16 N.C. App. 542, 192 S.E.2d 689 (1972).

But extends only to those which are unreasonable. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971); State v. Turnbull, 16 N.C. App. 542, 192 S.E.2d 689 (1972).

The constitutional rights of a defendant are not violated by a warrantless search unless the search is unreasonable and the reasonableness of the search must be determined by the court from the facts and circumstances of each individual case. State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969).

The Constitution does not prohibit all searches and seizures but only those which are unreasonable. State v. Ratliff, 281 N.C. 397, 189 S.E.2d 179 (1972).

Constitutional rights of a defendant are not violated by a warrantless search unless the search is unreasonable. State v. Faison, 17 N.C. App. 200, 193 S.E.2d 334 (1972).

"Search". — The term "search," as applied to searches and seizures, is an examination of a man's house or other buildings or premises, or

of his person, with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971); State v. Wooten, 18 N.C. App. 269, 196 S.E.2d 603 (1973).

The term "search" implies some exploratory investigation, or an invasion and quest, a looking for or seeking out. The quest may be secret, intrusive, or accomplished by force. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971).

It has been held that a search implies some sort of force, either actual or constructive, much or little. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971).

A "search" implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971).

While it has been said that ordinarily searching is a function of sight, it is generally held that the mere looking at that which is open to view is not a "search." State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971).

A "search" ordinarily implies a quest by an officer of the law, a prying into hidden places for that which is concealed. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971).

A "search" implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action and implies exploratory investigation or quest. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971).

It is not a "search" when a police officer, investigating a violation of the traffic laws, opens the door of the vehicle involved when necessary to see the occupants thereof. State v. Fry, 13 N.C. App. 39, 185 S.E.2d 256 (1971).

There was no "search" of defendant within the purview of constitutional provisions forbidding unreasonable searches when a nurse undressed the unconscious defendant at a physician's direction in a hospital emergency room and discovered heroin on defendant's person. State v. Wooten, 18 N.C. App. 269, 196 S.E.2d 603 (1973).

"Illegal Search". — An illegal search is one made without a proper search warrant under conditions which require a search warrant. State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754 (1971).

"Unreasonable Search". — An unreasonable search has been defined as an examination or inspection without authority of law of one's premises or person, with a view to the discovery of some evidence of guilt, to be used in the prosecution of a criminal action. State v. Ratliff, 281 N.C. 397, 189 S.E.2d 179 (1972).

The limits of reasonableness which are placed upon searches are equally applicable to seizures, and whether a search or seizure is reasonable is to be determined on the facts of the individual case. State v. Parks, 14 N.C. App. 97, 187 S.E.2d 462 (1972).

"Seizure". — A seizure contemplates forcible dispossession of the owner. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971).

Evidence of Crimes Directed against Officers Making Illegal Entry Not Excluded. — The exclusionary rule does not require the exclusion of evidence obtained after an illegal entry when that evidence is offered to prove the murder of one of the officers making the entry. State v. Miller, 282 N.C. 633, 194 S.E.2d 353 (1973).

§ 15A-242. Items subject to seizure under a search warrant. — An item is subject to seizure pursuant to a search warrant if there is probable cause to believe that it:

(1) Is stolen or embezzled; or
(2) Is contraband or otherwise unlawfully possessed; or
(3) Has been used or is possessed for the purpose of being used to commit or conceal the commission of a crime; or
(4) Constitutes evidence of an offense or the identity of a person participating in an offense. (1868-9, c. 178, subch. 3, s. 38; Code, s. 1171; Rev., s. 3163; C. S., s. 4529; 1941, c. 53; 1949, c. 1179; 1955, c. 7; 1965, c. 377; 1969, c. 869, s. 8; 1973, c. 1286, s. 1.)

§ 15A-243. Who may issue a search warrant. — (a) A search warrant valid throughout the State may be issued by:

(1) A Justice of the Supreme Court.

(2) A judge of the Court of Appeals.
(3) A judge of the superior court.

(b) Other search warrants may be issued by:
(1) A judge of the district court as provided in G.S. 7A-291.
(2) A clerk as provided in G.S. 7A-180 and 7A-181.
(3) A magistrate as provided in G.S. 7A-273. (1868-9, c. 178, subch. 3, s. 38; Code, s. 1171; Rev., s. 3163; C. S., s. 4529; 1941, c. 53; 1949, c. 1179; 1955, c. 7; 1965, c. 377; 1969, c. 869, s. 8; 1973, c. 1286, s. 1.)

Cited in State v. Riddick, 291 N.C. 399, 230 S.E.2d 506 (1976).

§ 15A-244. Contents of the application for a search warrant. — Each application for a search warrant must be made in writing upon oath or affirmation. All applications must contain:
(1) The name and title of the applicant; and
(2) A statement that there is probable cause to believe that items subject to seizure under G.S. 15A-242 may be found in or upon a designated or described place, vehicle, or person; and
(3) Allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched; and
(4) A request that the court issue a search warrant directing a search for and the seizure of the items in question. (1973, c. 1286, s. 1.)

Sufficiency of Affidavit Generally. — The affidavit is sufficient if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971); State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972); State v. English, 27 N.C. App. 545, 219 S.E.2d 549 (1975); State v. Riddick, 291 N.C. 399, 230 S.E.2d 506 (1976); State v. Armstrong, 33 N.C. App. 52, 234 S.E.2d 197 (1977).

Insufficient Affidavit Invalidates Warrant. — The failure of the affidavit to establish reasonable grounds to believe that the crime was occurring on the premises to be searched invalidates the warrant issued thereon. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972).

"Probable Cause". — Probable cause for a search can be defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

"Probable cause" and "reasonable ground to believe" are substantially equivalent terms. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

Probable cause is a pragmatic question to be determined in each case in the light of the particular circumstances and the particular offense involved. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

Probable cause means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972); State v. Riddick, 291 N.C. 399, 230 S.E.2d 506 (1976); State v. Gibson, 32 N.C. App. 584, 233 S.E.2d 84 (1977).

Probable cause to search means a reasonable ground to believe that a search of the place named will uncover the objects sought, and that the objects sought will aid in the apprehension or conviction of an offender. State v. Guffey, 31 N.C. App. 515, 229 S.E.2d 837 (1976).

It is not necessary that the affidavit contain all the evidence properly presented to the issuing official. State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972); State v. Bandy, 15 N.C. App. 175, 189 S.E.2d 771 (1972); State v. Hayes, 291 N.C. 293, 230 S.E.2d 146 (1976).

But It Should Contain Material and Essential Facts. — Better practice would be for the issuing official to require that the affidavit contain the material and essential facts (but not all the evidentiary details) necessary to support the finding of probable cause before issuing a search warrant. State v. Flowers, 12 N.C. App. 487, 183 S.E.2d 820 (1971).

Probable cause cannot be shown by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the "underlying circumstances" upon which that belief is based. Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972); State v. Guffey, 31 N.C. App. 515, 229 S.E.2d 837 (1976).

Probable cause cannot be shown by affidavits which are purely conclusory and do not set forth any of the underlying circumstances upon which that conclusion is based. State v. English, 27 N.C. App. 545, 219 S.E.2d 549 (1975).

The issuing officer must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion. State v. Guffey, 31 N.C. App. 515, 229 S.E.2d 837 (1976).

Police Officer May Rely on Information Reported by Other Officers. — The police officer making the affidavit may do so in reliance upon information reported to him by other officers in the performance of their duties. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971).

The police officer may state in his affidavit reports made to him by competent experts, such as the personnel of the FBI laboratories, concerning their examinations of materials forwarded by him to them for such examination and report. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971).

§ 15A-245. Basis for issuance of a search warrant; duty of the issuing official. — (a) Before acting on the application, the issuing official may examine on oath the applicant or any other person who may possess pertinent information, but information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official.

(b) If the issuing official finds that the application meets the requirements of this Article and finds there is probable cause to believe that the search will discover items specified in the application which are subject to seizure under G.S. 15A-242, he must issue a search warrant in accordance with the requirements of this Article. The issuing official must retain a copy of the warrant and warrant application and must promptly file them with the clerk. If he does not so find, the official must deny the application. (1973, c. 1286, s. 1.)

Independent Determination by Issuing Official Required. — A magistrate, by simply signing without reading the paper which a police officer places before him, utterly fails to perform the important judicial function which it is his duty to perform as a neutral and detached magistrate of making his own independent determination from the affidavit submitted to him whether probable cause exists for issuance of the search warrant. State v. Miller, 16 N.C. App. 1, 190 S.E.2d 888 (1972), modified, 282 N.C. 633, 194 S.E.2d 353 (1973).

Sufficiency of Affidavit Determined by Issuing Official Rather than by Affiant. — Whether the affidavit is sufficient to show probable cause must be determined by the issuing magistrate rather than the affiant. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972).

When Probable Cause Exists. — Probable cause under the Fourth Amendment exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. State v. Flowers, 12 N.C. App. 487, 183 S.E.2d 820 (1971).

If the apparent facts set out in an affidavit for a search warrant are such that a reasonable discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a search warrant. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972).

The determination of the existence of probable cause is not concerned with the question of whether the offense charged has been committed in fact, or whether the accused is guilty or innocent, but only with whether the affiant has reasonable grounds for his belief. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972).

In dealing with probable cause, as the very name implies, the Supreme Court deals with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971).

Probable cause deals with probabilities which

are factual and practical considerations of everyday life upon which reasonable and prudent men may act. State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972); State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972).

Probable cause does not mean actual and positive cause, nor does it import absolute certainty. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972).

Within the meaning of the Fourth Amendment, § 15A-243 through this section, probable cause means a reasonable ground to believe that the proposed search will reveal the presence, upon the premises to be searched, of the objects sought and that those objects will aid in the apprehension or conviction of the offender. State v. Riddick, 291 N.C. 399, 230 S.E.2d 506 (1976).

Where when the detailed nature of the informant's report and the fact that the officer swore that his informer was reliable are considered in a common-sense and practical fashion, it would induce a prudent and disinterested magistrate to credit the report and conclude that the informant's information was reliable and not a casual rumor or a conclusory fabrication so that the affidavit was sufficient to warrant a finding of probable cause to search the defendant's house. State v. Chapman, 24 N.C. App. 462, 211 S.E.2d 489 (1975).

The test to determine the sufficiency of affidavits upon which search warrants are issued is that the magistrate must be informed of some of the underlying circumstances from which the informant concluded that what he stated to the affiant was correct, and some of the underlying circumstances from which the officer concluded that the informant whose identity need not be disclosed was "credible" or his information "reliable." State v. Chapman, 24 N.C. App. 462, 211 S.E.2d 489 (1975).

Common-Sense Interpretation of Affidavits. — Affidavits for search warrants must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion. State v. Flowers, 12 N.C. App. 487, 183 S.E.2d 820 (1971); State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

Affidavits are normally drafted by nonlawyers in the midst and haste of a criminal investigation, and technical requirements of elaborate specificity once exacted under common-law pleadings have no proper place in this area. State v. Flowers, 12 N.C. App. 487, 183 S.E.2d 820 (1971); State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

When Facts Furnish Sufficient Basis for Issuance of Warrant. — If the facts before the magistrate supply reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender, it is sufficient basis for the issuance of the search warrant. State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972); State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972); State v. Riddick, 291 N.C. 399, 230 S.E.2d 506 (1976).

Issuing Official May Rely on Sworn Statement of Affiant Appearing in Person. — A judicial official is entitled to rely upon the sworn statement of affiant, an A.B.C. officer, who appears before him in person, in concluding that the affiant is correctly reciting what has been told him by an informer. State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

A magistrate is entitled to rely upon the sworn statement of an affiant police officer who appears before the magistrate in person, in concluding that the affiant is correctly reciting what has been told him by his informant. State v. Shirley, 12 N.C. App. 440, 183 S.E.2d 880 (1971).

Facts outside Written Affidavit May Be Considered. — The judicial officer's attention is not limited to those facts recited in a written affidavit taken under oath. State v. Howell, 18 N.C. App. 610, 197 S.E.2d 616 (1973).

When Affidavit Is Sufficient in Itself. — If the facts set out in the affidavit are sufficient within themselves to justify the finding of probable cause, the affidavit is sufficient. State v. Wooten, 20 N.C. App. 139, 201 S.E.2d 89 (1973).

When Testimony of Witnesses Necessary. — If the affidavit indicates the basis for the finding of probable cause, but is not in itself sufficient to establish probable cause, testimony of witnesses will be necessary to establish whether there was in fact sufficient evidence before the magistrate to justify his finding of probable cause to issue the search warrant. State v. Logan, 18 N.C. App. 557, 197 S.E.2d 238 (1973).

Finding May Be Based on Evidence Not Competent in Trial. — A finding of probable cause for the issuance of search warrants may rest upon evidence which is not competent in a criminal trial. State v. Flowers, 12 N.C. App. 487, 183 S.E.2d 820 (1971).

A valid search warrant may be issued upon the basis of an affidavit setting forth information which may not be competent as evidence. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971); State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972); State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972).

An affidavit may be based on hearsay information if the magistrate is informed of underlying circumstances upon which the informant bases his conclusion as to the whereabouts of the articles and the underlying circumstances upon which the officer concluded that the informant was credible. State v.

Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972); State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972).

The affidavit may be based on hearsay from an undisclosed informant and need not reflect the personal observations of affiant, but the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were present and some of the underlying circumstances from which the affiant concluded that the informant was credible and reliable. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972); State v. Altman, 15 N.C. App. 257, 189 S.E.2d 793 (1972).

Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the articles to be searched for were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was "credible" or his information "reliable." State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971); State v. Hayes, 291 N.C. 293, 230 S.E.2d 146 (1976).

While an affidavit does not have to reflect the personal observations of the affiant, a two-pronged test is required to sustain a search warrant. The first requirement is that the magistrate be informed of some of the underlying circumstances from which the informant drew his conclusions. The second standard is that the magistrate be informed of the underlying circumstances from which affiant concluded that the informant was credible and reliable. State v. McKoy, 16 N.C. App. 349, 191 S.E.2d 897 (1972).

An affidavit for a search warrant met the constitutional standard of reasonableness and probable cause, where the affiant stated that he had received information from a reliable informant that defendant had marijuana in his residence and was growing marijuana some distance from his residence, that the informant was credible because he had given information in the past which led to arrests and convictions, that affiant confirmed the information as to growing marijuana by personal observation, and that affiant, by personal surveillance, observed large amounts of traffic to and from defendant's residence. State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972).

In a prosecution for possession of more than one ounce of marijuana, irrespective of the challenged hearsay in the affidavit to obtain a warrant, the information in the affidavit of the purchase of tetrahydrocannabinols only a few minutes before issuance of the warrant, along with the detailed description of the location of the trailer to be searched, and the results of three weeks of surveillance of the premises constituted probable cause to issue the search warrant. State v. Oldfield, 29 N.C. App. 131, 223 S.E.2d 569, cert. denied, 290 N.C. 96, 225 S.E.2d 325 (1976).

Personal and recent observations by an unidentified informer of criminal activity show that the information was gained in a reliable manner and are more than a bald and unilluminating assertion of suspicion. State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

Information contained in affidavits was sufficient for the magistrate to find probable cause for issuance of search warrants for defendants' premises where such information included a statement that a reliable informer had seen part of the stolen property in defendants' premises. State v. Shanklin, 16 N.C. App. 712, 193 S.E.2d 341 (1972).

Present Reliability Required. — In issuing a search warrant based upon the information of an informant, an averment of previous reliability of the informant is not necessary, but the inquiry is whether the informant's present information is truthful or reliable. State v. Chapman, 24 N.C. App. 462, 211 S.E.2d 489 (1975).

The mere characterization of the informant as being reliable might not, in itself, provide a sufficient factual basis for the magistrate to credit the report of the informer; there must be facts, recited and sworn to in the affidavit as being within the personal knowledge of the affiant, which furnish a sufficiently substantial basis to support the magistrate's independent finding crediting the report of the unidentified informer. State v. Shirley, 12 N.C. App. 440, 183 S.E.2d 880 (1971).

But the statement that the informant has proven reliable in the past is a statement of fact and not a mere conclusion. State v. Altman, 15 N.C. App. 257, 189 S.E.2d 793 (1972).

And Tends to Show That Informer Is Credible. — Where the affidavit stated that the informer had furnished information in the past which had resulted in the seizure of narcotic drugs and subsequent conviction, that tended to show that the informer was credible and his information reliable. State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

The statement in the affidavit that the informant had furnished reliable information in the past which had in fact led to the arrest of several persons and the testimony of the officer prior to the issuance of the warrant were sufficient to show the reliability of the informer. State v. Hayes, 291 N.C. 293, 230 S.E.2d 146 (1976).

And Does Meet Minimum Standards. — The statement that the informant has proven reliable in the past does meet the minimum standards. State v. Altman, 15 N.C. App. 257, 189 S.E.2d 793 (1972); State v. McKoy, 16 N.C. App. 349, 191 S.E.2d 897 (1972).

Where the circumstances set forth in support of the informant's reliability were that he "has proven reliable and credible in the past," those circumstances were the irreducible minimum on which a warrant could be sustained. State v. Altman, 15 N.C. App. 257, 189 S.E.2d 793 (1972); State v. McKoy, 17 N.C. App. 349, 191 S.E.2d 897 (1972).

An affiant's statement that a confidential informant had given this agent good and reliable information in the past that had been checked by the affiant and found to be true meets the minimum standard to sustain a warrant. State v. McKoy, 16 N.C. App. 349, 191 S.E.2d 897 (1972).

An affidavit indicating the reliability of its information by naming an informant, indicating the value of his past assistance and corroborating that information with statements from other officers was sufficient to support the issuance of a search warrant for defendant's premises. State v. McCuien, 17 N.C. App. 109, 193 S.E.2d 349 (1972).

Admission into Evidence of Warrant and Affidavit Containing Hearsay Held Erroneous. — Where the affidavit contained hearsay statements indicating defendant's complicity in another crime without showing that he had been convicted of that crime, the admission into evidence of the search warrant and the accompanying affidavit was erroneous and resulted in error prejudicial to defendant. State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972).

Review of Search Based on Magistrate's Determination of Probable Cause. — When a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing court will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant," and will sustain the judicial determination so long as "there was substantial basis for the magistrate to conclude that the articles searched for were probably present." State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971).

The magistrate's determination of probable cause should be paid great deference by the reviewing court. State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972); State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972).

Resolution of Doubtful Cases. — Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. State v. Altman, 15 N.C. App. 257, 189 S.E.2d 793 (1972).

Where Sole Witness Had No Independent Recollection of Speaking with Judge about Warrant. — Where the sole witness who appeared before the district judge at the time the search warrant was issued had no independent recollection of speaking with the judge about this warrant, a finding of probable cause had to be based solely upon the allegations in the affidavit. State v. Campbell, 14 N.C. App. 493, 188 S.E.2d 560, aff'd, 282 N.C. 125, 191 S.E.2d 752 (1972).

Affidavit Held Sufficient to Establish Probable Cause. — Affidavit describing the property to be seized, giving defendant's name and address, making reference to a confidential informer and his reliability, and stating the information given affiant by the informer was sufficient to establish probable cause to issue a search warrant as required by subsection (b). State v. Davis, 20 N.C. App. 739, 203 S.E.2d 91 (1974).

Where the affidavit detailed the presence of tracks made by tennis shoes with a diamond tread leading from the victim's residence to a point near the defendant's premises, specified reasons for searching those premises for tennis shoes with a diamond tread, for the possible murder weapon, for loot stolen from the victim's home, and gave reasons why such evidence might be found in the defendant's household, the affidavit contained a sufficient recital of facts and underlying circumstances to constitute probable cause for issuance of the search warrant. State v. Riddick, 291 N.C. 399, 230 S.E.2d 506 (1976).

Affidavit Held Sufficient Notwithstanding Erroneous Statement. — Statement in an affidavit given to obtain a search warrant concerning defendant's prior narcotics conviction was error because it was based on erroneous information, though the error was not known to the officer making the affidavit; however, the error was immaterial because the trial court found that the affidavit was nevertheless sufficient on its face to support a finding of probable cause for the issuance of the search warrant for narcotics, and evidence obtained as a result of the search under the warrant was properly admitted. State v. Steele, 18 N.C. App. 126, 196 S.E.2d 379 (1973).

Affidavits Held Not to Furnish Adequate Basis for Finding Probable Cause. — Affidavit failed to furnish an adequate basis for the finding of probable cause since nothing in the affidavit supported the conclusion that any of the events referred to occurred on or in connection with the premises to be searched. State v. Campbell, 14 N.C. App. 493, 188 S.E.2d 560, aff'd, 282 N.C. 125, 191 S.E.2d 752 (1972).

Statements in the affidavit that affiant "is holding" arrest warrants charging defendant with possession or sale of narcotics on various dates in April, 1971, furnished no rational basis for finding probable cause to believe that on May 19, 1971, narcotic drugs would be found in the house. State v. Campbell, 14 N.C. App. 493, 188

S.E.2d 560, aff'd, 282 N.C. 125, 191 S.E.2d 752 (1972).

Statement that persons "have sold" narcotics to the special State Bureau of Investigation agent furnished no additional support for the finding of probable cause where the time and place such sales were made is not stated. State v. Campbell, 14 N.C. App. 493, 188 S.E.2d 560, aff'd, 282 N.C. 125, 191 S.E.2d 752 (1972).

Affidavit was held insufficient to support a finding of probable cause for issuance of a warrant to search defendant's premises for LSD, as the affidavit contained no allegation that either the affiant or the confidential informant had personal knowledge that LSD was on defendant's premises. State v. Graves, 16 N.C. App. 389, 192 S.E.2d 122 (1972).

A search warrant which authorized officers to search for and seize intoxicating liquor possessed for the purpose of sale, while the affidavit upon which the warrant was issued alleged that the occupants had "cards, money, dice and gambling paraphernalia" on the premises to be searched was wholly invalid because it was issued without any showing of the existence of probable cause to search for illicit liquor. State v. Miller, 282 N.C. 633, 194 S.E.2d 353 (1973).

The facts stated in the affidavit failed to furnish any rational basis upon which the issuing officer could reasonably make an independent determination that there was probable cause to believe that the proposed search of the trailer would discover marijuana and marked narcotic money. State v. Armstrong, 33 N.C. App. 52, 234 S.E.2d 197 (1977).

Former Practice. — It was not necessary under former § 15-26 that the affidavit contain within itself all the evidence properly presented to the magistrate. State v. Woods, 26 N.C. App. 584, 216 S.E.2d 492, cert. denied, 288 N.C. 396, 218 S.E.2d 469 (1975).

§ 15A-246. Form and content of the search warrant. — A search warrant must contain:

(1) The name and signature of the issuing official with the time and date of issuance above his signature; and
(2) The name of a specific officer or the classification of officers to whom the warrant is addressed; and
(3) The names of the applicant and of all persons whose affidavits or testimony were given in support of the application; and
(4) A designation sufficient to establish with reasonable certainty the premises, vehicles, or persons to be searched; and
(5) A description or a designation of the items constituting the object of the search and authorized to be seized. (1868-9, c. 178, subch. 3, s. 39; Code, s. 1172; Rev., s. 3164; C. S., s. 4530; 1961, c. 1069; 1969, c. 869, s. 8; 1973, c. 1286, s. 1.)

Constitutional Requirements. — A search warrant and affidavit meet the requirements of this section, as well as the requirements of the Fourth Amendment to the U.S. Constitution, where (1) the warrant describes with reasonable certainty the premises to be searched and the contraband for which the search was to be made, (2) the affidavit indicates the basis for a finding of probable cause, and (3) the warrant is signed by the magistrate and bears the date and hour of its issuance. State v. Bush, 10 N.C. App. 247, 178 S.E.2d 313 (1970).

A search warrant will be presumed regular if irregularity does not appear on the face of the record. State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972); State v. Travatello, 24 N.C. App. 511, 211 S.E.2d 467 (1975).

Purpose of Particularity Requirement. — The requirement that warrants shall particularly describe the things to be seized is to prevent the seizure of one thing under a warrant describing another and to leave nothing to the discretion of the officer executing the warrant in determining what is to be taken. State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972); State v. Shanklin, 16 N.C. App. 712, 193 S.E.2d 341 (1972).

The particularity requirement is to be accorded the most scrupulous exactitude when the things are books, and the basis for the seizure is the ideas which they contain. But when First Amendment rights are not involved, the specificity requirement is more flexible. State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

Common Sense Interpretation. — Search warrants must be tested and interpreted by magistrates and courts in a common sense and realistic fashion, as they are normally drafted by nonlawyers in the midst and haste of a criminal investigation. State v. Hansen, 27 N.C. App. 459, 219 S.E.2d 641 (1975), cert. denied, 289 N.C. 453, 223 S.E.2d 161 (1976).

Technical requirements of elaborate specificity once exacted under common-law pleadings have no proper place now in the area of search warrants. State v. Hansen, 27 N.C.

App. 459, 219 S.E.2d 641 (1975), cert. denied, 289 N.C. 453, 223 S.E.2d 161 (1976).

Warrant Authorizing Seizure of Limited Class of Things Is Not Prohibited. — A warrant empowering officers to seize a limited class of things, i.e., unlawfully possessed narcotic drugs, is not prohibited. State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

Description in Warrant Held Sufficiently Particular. — The description in the search warrant was particular enough to prevent the warrant from being a general search warrant within the prohibition of the Fourth Amendment to the Constitution of the United States and of N.C. Const., Art. I, § 20, where the affidavit upon which it was based referred only to "narcotic drugs, the possession of which is a crime" and did not describe the things to be seized with more particularity. State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

A description of the premises to be searched was not rendered uncertain by the fact that the affidavit incorrectly described the premises as "a brick structure" when in fact it was made of stone. State v. Shirley, 12 N.C. App. 440, 183 S.E.2d 880 (1971).

The words "illegally held narcotic drugs" described the things to be seized with sufficient particularity to prevent the warrant from being a general search warrant within the prohibition of the Fourth Amendment to the Constitution of the United States and of N.C. Const., Art. I, § 20. State v. Shirley, 12 N.C. App. 440, 183 S.E.2d 880 (1971).

A description of a mobile home to be searched was not fatally defective when the warrant named the son as owner when in fact it was rented to the son by his father or when there was another mobile home of the same color as that described in the warrant but which was not owned by either of these parties or occupied by the defendant. State v. Woods, 26 N.C. App. 584, 216 S.E.2d 492, cert. denied, 288 N.C. 396, 218 S.E.2d 469 (1975).

Scope of Warrant Not Exceeded. — The search of defendant's premises did not exceed the scope of the warrant by including a tool shed as well as the house itself. State v. Travatello, 24 N.C. App. 511, 211 S.E.2d 467 (1975).

Search Warrant Held to Comply with Former Section by Reference to Affidavit. — Where an affidavit complied with the provisions of former § 15-26 and met the constitutional standard of reasonableness and probable cause requisite to the issuance of a search warrant, the search warrant, by reference to the affidavit, which was made a part of the warrant, described with reasonable certainty the premises to be searched, sufficiently indicated the basis for the finding of probable cause, and sufficiently described the contraband for which the search was to be conducted. State v. Murphy, 15 N.C. App. 420, 190 S.E.2d 361 (1972).

Under former § 15-26, it was permissible to incorporate the description of the items to be searched for and the place to be searched in the warrant by reference to the affidavit. State v. Flowers, 12 N.C. App. 487, 183 S.E.2d 820 (1971); State v. Shanklin, 16 N.C. App. 712, 193 S.E.2d 341 (1972).

Cited in State v. Riddick, 291 N.C. 399, 230 S.E.2d 506 (1976).

§ 15A-247. Who may execute a search warrant. — A search warrant may be executed by any law-enforcement officer acting within his territorial jurisdiction, whose investigative authority encompasses the crime or crimes involved. (1868-9, c. 178, subch. 3, s. 38; Code, s. 1171; Rev., s. 3163; C. S., s. 4529; 1941, c. 53; 1949, c. 1179; 1955, c. 7; 1965, c. 377; 1969, c. 869, s. 8; 1973, c. 1286, s. 1.)

§ 15A-248. Time of execution of a search warrant. — A search warrant must be executed within 48 hours from the time of issuance. Any warrant not executed within that time limit is void and must be marked "not executed" and returned without unnecessary delay to the clerk of the issuing court. (1973, c. 1286, s. 1.)

§ 15A-249. Officer to give notice of identity and purpose. — The officer executing a search warrant must, before entering the premises, give appropriate notice of his identity and purpose to the person to be searched, or the person in apparent control of the premises to be searched. If it is unclear whether anyone is present at the premises to be searched, he must give the notice in a manner likely to be heard by anyone who is present. (1973, c. 1286, s. 1.)

Purpose of Notice Requirement. — The notice requirement is for the protection of the officers as well as the protection of the occupants and their constitutional rights. State v. Gaines, 33 N.C. App. 66, 234 S.E.2d 42 (1977).

Officers to Give Notice and Demand Entry. — Even though police officers have a valid search or arrest warrant, absent invitation or permission, ordinarily they may not enter a private home unless they first give notice of

their authority and purpose and make a demand for entry. State v. Miller, 16 N.C. App. 1, 190 S.E.2d 888 (1972), modified, 282 N.C. 633, 194 S.E.2d 353 (1973); State v. Gaines, 33 N.C. App. 66, 234 S.E.2d 42 (1977).

Time between Notice and Entry. — The amount of time required to be given between notice and entry must depend on the particular circumstances. State v. Gaines, 33 N.C. App. 66, 234 S.E.2d 42 (1977).

Notice Held Sufficient. — See State v. Gaines, 33 N.C. App. 66, 234 S.E.2d 42 (1977).

§ 15A-250: Reserved for future codification purposes.

§ 15A-251. Entry by force. — An officer may break and enter any premises or vehicle when necessary to the execution of the warrant if:

(1) The officer has previously announced his identity and purpose as required by G.S. 15A-249 and reasonably believes either that admittance is being denied or unreasonably delayed or that the premises or vehicle is unoccupied; or

(2) The officer has probable cause to believe that the giving of notice would endanger the life or safety of any person. (1973, c. 1286, s. 1.)

Where method of entry renders search illegal, the evidence obtained is not competent at defendants' trial. State v. Mitchell, 22 N.C. App. 663, 207 S.E.2d 263 (1974).

§ 15A-252. Service of a search warrant. — Before undertaking any search or seizure pursuant to the warrant, the officer must read the warrant and give a copy of the warrant application and affidavit to the person to be searched, or the person in apparent control of the premises or vehicle to be searched. If no one in apparent and responsible control is occupying the premises or vehicle, the officer must leave a copy of the warrant affixed to the premises or vehicle. (1973, c. 1286, s. 1.)

§ 15A-253. Scope of the search; seizure of items not named in the warrant. — The scope of the search may be only such as is authorized by the warrant and is reasonably necessary to discover the items specified therein. Upon discovery of the items specified, the officer must take possession or custody of them. If in the course of the search the officer inadvertently discovers items not specified in the warrant which are subject to seizure under G.S. 15A-242, he may also take possession of the items so discovered. (1973, c. 1286, s. 1.)

Scope of Warrant Not Exceeded. — The search of defendant's premises did not exceed the scope of the warrant by including a tool shed as well as the house itself. State v. Travatello, 24 N.C. App. 511, 211 S.E.2d 467 (1975).

The trial court in a prosecution for possession of heroin did not err in allowing testimony with respect to a box and its contents found in the trunk of defendant's automobile which was parked in defendant's driveway, since a search warrant authorized a search of the premises of defendant. State v. Logan, 27 N.C. App. 150, 218 S.E.2d 213 (1975).

Items in Plain View. — An item is lawfully seized even though it is not listed in the warrant if the officer is at a place where he has a legal right to be and if the item seized is in plain view. State v. Riddick, 291 N.C. 399, 230 S.E.2d 506 (1976).

While conducting a lawful search where officers found in plain view property identified as that reported missing, these items were lawfully seized. State v. Travatello, 24 N.C. App. 511, 211 S.E.2d 467 (1975).

§ 15A-254. List of items seized. — Upon seizing items pursuant to a search warrant, an officer must write and sign a receipt itemizing the items taken and containing the name of the court by which the warrant was issued. If the items were taken from a person, the receipt must be given to the person. If items are taken from a place or vehicle, the receipt must be given to the owner, or person in apparent control of the premises or vehicle if the person is present; or if he is not, the officer must leave the receipt in the premises or vehicle from which the items were taken. (1973, c. 1286, s. 1.)

§ 15A-255. Frisk of persons present in premises or vehicle to be searched. — An officer executing a warrant directing a search of premises or of a vehicle may, if the officer reasonably believes that his safety or the safety of others then present so requires, search for any dangerous weapons by an external patting of the clothing of those present. If in the course of such a frisk he feels an object which he reasonably believes to be a dangerous weapon, he may take possession of the object. (1973, c. 1286, s. 1.)

§ 15A-256. Detention and search of persons present in private premises or vehicle to be searched. — An officer executing a warrant directing a search of premises not generally open to the public or of a vehicle other than a common carrier may detain any person present for such time as is reasonably necessary to execute the warrant. If the search of such premises or vehicle and of any persons designated as objects of the search in the warrant fails to produce the items named in the warrant, the officer may then search any person present at the time of the officer's entry to the extent reasonably necessary to find property particularly described in the warrant which may be concealed upon the person, but no property of a different type from that particularly described in the warrant may be seized or may be the basis for prosecution of any person so searched. For the purpose of this section, all controlled substances are the same type of property. (1973, c. 1286, s. 1.)

Constitutionality. — The limited searches authorized by this section do not violate the Fourth Amendment of the United States Constitution. State v. Watlington, 30 N.C. App. 101, 226 S.E.2d 186 (1976).

Where police officers have a warrant authorizing the search of a vehicle or premises, it is reasonable to permit a search of persons found in the vehicle or on the premises, within the restrictions of this section, to prevent those persons from concealing the contraband subject matter described in the search warrant. State v. Watlington, 30 N.C. App. 101, 226 S.E.2d 186 (1976).

§ 15A-257. Return of the executed warrant. — An officer who has executed a search warrant must, without unnecessary delay, return to the clerk of the issuing court the warrant together with a written inventory of items seized. The inventory, if any, and return must be signed and sworn to by the officer who executed the warrant. (1973, c. 1286, s. 1.)

§ 15A-258. Disposition of seized property. — Property seized shall be held in the custody of the person who applied for the warrant, or of the officer who executed it, or of the agency or department by which the officer is employed, or of any other law-enforcement agency or person for purposes of evaluation or analysis, upon condition that upon order of the court the items may be retained by the court or delivered to another court. (1973, c. 1286, s. 1.)

§ 15A-259. Application of Article to all warrants; exception as to inspection warrants and special riot situations. — The requirements of this Article apply to search warrants issued for any purpose, except that the contents of and procedure relating to inspection warrants are to be governed by the provisions of Article 4A of Chapter 15 and warrants to inspect vehicles in riot areas or approaching municipalities during emergencies are subject to the special procedures set out in G.S. 14-288.11. Nothing in this Article is intended to alter or affect the emergency search doctrine. (1957, c. 496; 1969, c. 869, s. 8; 1971, c. 872, s. 4; 1973, c. 1286, s. 1.)

ARTICLE 12.

§§ 15A-260 to 15A-265: Reserved for future codification purposes.

ARTICLE 13.

§§ 15A-266 to 15A-270: Reserved for future codification purposes.

ARTICLE 14.

Nontestimonial Identification.

OFFICIAL COMMENTARY

This Article provides an important investigative procedure not presently available under North Carolina statutes. Under this Article, a solicitor may make application to a judge for an order requiring suspects to submit to certain nontestimonial identification procedures such as fingerprints, measurements, blood and urine specimens, saliva, hair and voice samples, handwriting exemplars, photographs and lineups. To obtain such an order the solicitor must show that there is probable cause to believe that a crime punishable by more than one year's imprisonment has been committed and that there are reasonable grounds to suspect that one or more persons committed the offense. If a specific nontestimonial identification procedure will be of material aid in determining if the suspect committed the offense, the judge may issue an order requiring the person named to appear and submit to designated procedures. If the person named in the order either fails to appear or refuses to submit to the designated procedures, he may be punished for contempt of the court which issued the order.

The Commission inserted a number of significant safeguards to accompany this procedure, including the following:

(1) The order must be served at least 72 hours in advance of the time designated for the procedures (unless the judge finds that the nature of the evidence makes it likely that the delay will adversely affect its probative value). § 15A-274.

(2) The person named may seek modification of the time and place designated in the order. § 15A-275.

(3) No one may be detained longer than is necessary to accomplish the procedures. § 15A-279(c).

(4) Extraction of any bodily fluid must be conducted by a qualified member of the health professions; the judge may order medical supervision for any of the other procedures. § 15A-279(a).

(5) No unreasonable or unnecessary force may be used in conducting the procedures. § 15A-279(b).

(6) The person named has the right to have counsel present during any procedures conducted under this section and to have counsel appointed if he cannot afford to retain one. § 15A-279(d). The order must inform the named person of these rights. § 15A-278(5).

(7) No statement made by the named person while the procedures are being conducted may be used in evidence against him unless his attorney was actually present at the time the statement was made. § 15A-279(d).

(8) The subject of the procedures must be given a copy of the results as soon as they are available. § 15A-282.

In two recent decisions, the Supreme Court of the United States held that the compelled production of handwriting specimens and voice samples under orders of a grand jury do not infringe any legitimate Fourth or Fifth Amendment interests. United States v. Dionisio, 410 U.S. 1, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973), and United States v. Mara, 410 U.S. 19, 93 S. Ct. 774, 35 L. Ed. 2d 99 (1973). These decisions contain substantial indications that procedures such as those recommended by the Commission in the nontestimonial identification Article are constitutionally sound, and Davis v. Mississippi, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969) contains a dictum inviting use of a procedure similar to this. The Article also permits defendants charged with serious crimes to initiate such procedures by the State.

Editor's Note. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-271. Authority to issue order. — A nontestimonial identification order authorized by this Article may be issued by any judge upon request of a

prosecutor. As used in this Article, "nontestimonial identification" means identification by fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable physical examination, handwriting exemplars, voice samples, photographs, and lineups or similar identification procedures requiring the presence of a suspect. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor."

For a critical analysis of this article, see 12 Wake Forest L. Rev. 387 (1976).

Applicability of Article. — A construction of §§ 15A-272, 15A-274, 15A-276 and 15A-502 so as to achieve a logical relationship and to effectuate apparent legislative intent mandates that Article 14 of Chapter 15A applies only to suspects and accused persons before arrest, and persons formally charged and arrested who have been released from custody pending trial. The Article does not apply to an in-custody accused. State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

After arrest of a defendant based upon probable cause, a law-enforcement officer may utilize normal investigative procedures including fingerprinting, photographing, lineups, etc., and need not follow exclusively the Article 14 nontestimonial identification procedures. Opinion of Attorney General to Mr. Anthony Brannon, 45 N.C.A.G. 60 (1975).

Effect of Article. — This Article provides an investigative procedure, not previously available in this State, for use in cases where there are reasonable grounds to suspect that a particular person committed an offense punishable by imprisonment for more than one year but where there is yet lacking a sufficient basis for making a lawful arrest. State v. McDonald, 32 N.C. App. 457, 232 S.E.2d 467 (1977).

§ 15A-272. Time of application; additional investigative procedures not precluded. — A request for a nontestimonial identification order may be made prior to the arrest of a suspect or after arrest and prior to trial. Nothing in this Article shall preclude such additional investigative procedures as are otherwise permitted by law. (1973, c. 1286, s. 1.)

Cited in State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

§ 15A-273. Basis for order. — An order may issue only on an affidavit or affidavits sworn to before the judge and establishing the following grounds for the order:

(1) That there is probable cause to believe that an offense punishable by imprisonment for more than one year has been committed;

(2) That there are reasonable grounds to suspect that the person named or described in the affidavit committed the offense; and

(3) That the results of specific nontestimonial identification procedures will be of material aid in determining whether the person named in the affidavit committed the offense. (1973, c. 1286, s. 1.)

Editor's Note. — For a discussion of this article in the context of constitutional requirements, see 12 Wake Forest L. Rev. 387 (1976).

Cited in State v. McDonald, 32 N.C. App. 457, 232 S.E.2d 467 (1977).

§ 15A-274. Issuance of order. — Upon a showing that the grounds specified in G.S. 15A-273 exist, the judge may issue an order requiring the person named or described with reasonable certainty in the affidavit to appear at a designated time and place and to submit to designated nontestimonial identification procedures. Unless the nature of the evidence sought makes it likely that delay will adversely affect its probative value, or when it appears likely that the person named in the order may destroy, alter, or modify the evidence sought or may not appear, the order must be served at least 72 hours before the time designated

for the nontestimonial identification procedure. (1973, c. 1286, s. 1; 1977, c. 832, s. 1.)

Editor's Note. — The 1977 amendment inserted the language beginning "or when it appears likely" and ending "or may not appear" in the second sentence and substituted "nontestimonial identification procedure" for "nontestimonial identification procedures" at the end of that sentence.

Cited in State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

§ 15A-275. Modification of order. — At the request of a person ordered to appear, the judge may modify the order with respect to time and place of appearance whenever it appears reasonable under the circumstances to do so. (1973, c. 1286, s. 1.)

§ 15A-276. Failure to appear. — Any person who fails without adequate excuse to obey an order to appear served upon him pursuant to this Article may be held in contempt of the court which issued the order. (1973, c. 1286, s. 1.)

Cited in State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

§ 15A-277. Service of order. — An order to appear pursuant to this Article may be served by a law-enforcement officer. The order must be served upon the person named or described in the affidavit by delivery of a copy to him personally. The order must be served at least 72 hours in advance of the time of compliance, unless the judge issuing the order has determined, in accordance with G.S. 15A-274, that delay will adversely affect the probative value of the evidence sought or when it appears likely that the person named in the order may destroy, alter, or modify the evidence sought, or may not appear. (1973, c. 1286, s. 1; 1977, c. 832, s. 2.)

Editor's Note. — The 1977 amendment added the language beginning "or when it appears likely" to the end of the section.

§ 15A-278. Contents of order. — An order to appear must be signed by the judge and must state:

(1) That the presence of the person named or described in the affidavit is required for the purpose of permitting nontestimonial identification procedures in order to aid in the investigation of the offense specified therein;
(2) The time and place of the required appearance;
(3) The nontestimonial identification procedures to be conducted, the methods to be used, and the approximate length of time such procedures will require;
(4) The grounds to suspect that the person named or described in the affidavit committed the offense specified therein;
(5) That the person is entitled to be represented by counsel at the procedure, and to the appointment of counsel if he cannot afford to retain one;
(6) That the person will not be subjected to any interrogation or asked to make any statement during the period of his appearance except that required for voice identification;
(7) That the person may request the judge to make a reasonable modification of the order with respect to time and place of appearance, including a request to have any nontestimonial identification procedure other than a lineup conducted at his place of residence; and

(8) That the person, if he fails to appear, may be held in contempt of court. (1973, c. 1286, s. 1.)

Editor's Note. — For a discussion of this article in the context of constitutional requirements, see 12 Wake Forest L. Rev. 387 (1976).

§ 15A-279. Implementation of order. — (a) Nontestimonial identification procedures may be conducted by any law-enforcement officer or other person designated by the judge issuing the order. The extraction of any bodily fluid must be conducted by a qualified member of the health professions and the judge may require medical supervision for any other test ordered pursuant to this Article when he considers such supervision necessary.

(b) In conducting authorized identification procedures, no unreasonable or unnecessary force may be used.

(c) No person who appears under an order of appearance issued under this Article may be detained longer than is reasonably necessary to conduct the specified nontestimonial identification procedures, and in no event for longer than six hours, unless he is arrested for an offense.

(d) Any such person is entitled to have counsel present and must be advised prior to being subjected to any nontestimonial identification procedures of his right to have counsel present during any nontestimonial identification procedure and to the appointment of counsel if he cannot afford to retain counsel. No statement made during nontestimonial identification procedures by the subject of the procedures shall be admissible in any criminal proceeding against him, unless his counsel was present at the time the statement was made.

(e) Any person who resists compliance with the authorized nontestimonial identification procedures may be held in contempt of the court which issued the order pursuant to the provisions of G.S. 5A-12(a) and G.S. 5A-21(b).

(f) A nontestimonial identification order may not be issued against a person previously subject to a nontestimonial identification order unless it is based on different evidence which was not reasonably available when the previous order was issued.

(g) Resisting compliance with a nontestimonial identification order is not itself grounds for finding probable cause to arrest the suspect, but it may be considered with other evidence in making the determination whether probable cause exists. (1973, c. 1286, s. 1; 1977, c. 711, s. 20.)

Editor's Note. — The 1977 amendment, effective July 1, 1978, in subsection (e), added the language beginning with "pursuant to" and added subsections (f) and (g).

For a discussion of this article in the context of constitutional requirements, see 12 Wake Forest L. Rev. 387 (1976).

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, "Parole" shall not apply to persons sentenced before July 1, 1978."

§ 15A-280. Return. — Within 90 days after the nontestimonial identification procedure, a return must be made to the judge who issued the order or to a judge designated in the order setting forth an inventory of the products of the nontestimonial identification procedures obtained from the person named in the affidavit. If, at the time of the return, probable cause does not exist to believe that the person has committed the offense named in the affidavit or any other offense, the person named in the affidavit is entitled to move that the authorized judge issue an order directing that the products and reports of the nontestimonial identification procedures, and all copies thereof, be destroyed. The motion must, except for good cause shown, be granted. (1973, c. 1286, s. 1.)

§ 15A-281. Nontestimonial identification order at request of defendant. — A person arrested for or charged with an offense punishable by imprisonment for more than one year may request that nontestimonial identification procedures be conducted upon himself. If it appears that the results of specific nontestimonial identification procedures will be of material aid in determining whether the defendant committed the offense, the judge to whom the request was directed must order the State to conduct the identification procedures. (1973, c. 1286, s. 1.)

§ 15A-282. Copy of results to person involved. — A person who has been the subject of nontestimonial identification procedures or his attorney must be provided with a copy of any reports of test results as soon as the reports are available. (1973, c. 1286, s. 1.)

§§ 15A-283, 15A-284: Reserved for future codification purposes.

ARTICLE 15.

Urgent Necessity.

§ 15A-285. Non-law-enforcement actions when urgently necessary. — When an officer reasonably believes that doing so is urgently necessary to save life, prevent serious bodily harm, or avert or control public catastrophe, the officer may take one or more of the following actions:

(1) Enter buildings, vehicles, and other premises.
(2) Limit or restrict the presence of persons in premises or areas.
(3) Exercise control over the property of others.

An action taken to enforce the law or to seize a person or evidence cannot be justified by authority of this section. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This Article grants specific authority to law-enforcement officers for taking various nonenforcement actions which are expected of them — actions which are necessary for public safety, but which do not necessarily deal with violations of the criminal law. The section would express the authority, for example, for an officer to enter a dwelling from which he heard cries for help from someone in distress or to order people from a building because of an explosive gas leak. The provision seeks to deter any possibility of its authority being used as a "cover" for searching for criminal evidence or suspects by specifying that no action taken to uncover evidence or suspects can be characterized as an action taken under this Article.

ARTICLE 16.

§§ 15A-286 to 15A-300: Reserved for future codification purposes.

SUBCHAPTER III. CRIMINAL PROCESS.

ARTICLE 17.

Criminal Process.

OFFICIAL COMMENTARY

Criminal process includes the citation, criminal summons, warrant for arrest, and order for arrest. They all serve the function of requiring a person to come to court. Each is issued by an official for some specific cause.

An attempt has been made here to standardize

the component parts of the different instruments, varying a particular component only as it serves a different function. For example, a warrant for arrest contains a statement of the crime based upon a showing of probable cause and an order directing a law-enforcement officer to arrest the defendant. The criminal summons contains the same components except the order directed to the officer to arrest, which is replaced by an order to the defendant to appear. This should serve to emphasize the similarities and differences in the various types of process with resultant accuracy in usage. In addition, this should facilitate the further development of multiple purpose forms, with components which can be selected as desired, resulting in both convenience and economy.

The warrant is the key instrument, both because of frequency of usage and the impact of decisions of the courts. The commentary there explains the development of some differences from present process.

Editor's Note. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-301. Criminal process generally. — (a) Formal Requirements. —

(1) A record of each criminal process issued in the trial division of the General Court of Justice must be maintained in the office of the clerk.

(2) Criminal process, other than a citation, must be signed and dated by the justice, judge, magistrate, or clerk who issues it. The citation must be signed and dated by the law-enforcement officer who issues it.

(b) To Whom Directed. — Warrants for arrest and orders for arrest must be directed to a particular officer, a class of officers, or a combination thereof, having authority and territorial jurisdiction to execute the process. A criminal summons must be directed to the person summoned to appear and must be delivered to and may be served by any law-enforcement officer having authority and territorial jurisdiction to make an arrest for the offense charged. The citation must be directed to the person cited to appear.

(c) Service. —

(1) A law-enforcement officer receiving criminal process for service or execution must note thereon the date of its receipt. Upon execution or service, a copy of the process must be delivered to the person arrested or served.

(2) A corporation may be served with criminal summons as provided in G.S. 15A-773.

(d) Return. —

(1) The officer who serves or executes criminal process must enter the date of the service or execution on the process and return it to the clerk of court in the county in which issued.

(2) If criminal process is not served or executed within the number of days indicated below, it must be returned to the clerk of court in the county in which it was issued, with the reason for the failure of service or execution noted thereon.

a. Warrant for arrest — 90 days.

b. Order for arrest — 90 days.

c. Criminal summons — 90 days or the date the defendant is directed to appear, whichever is earlier.

(3) Failure to return the process to the clerk does not invalidate the process, nor does it invalidate service or execution made after the period specified in subdivision (2).

(4) The clerk to which return is made may redeliver the process to a law-enforcement officer for further attempts at service. If the process is a criminal summons, he may reissue it only upon endorsement of a new designated time and date of appearance.

(e) Copies to Be Made by Clerk. —

(1) The clerk may make a certified copy of any criminal process filed in his office pursuant to subsection (a) when the original process has been lost or when the process has been returned pursuant to subdivision (d)(2). The copy may be executed as effectively as the original process.

(2) When criminal process is returned to the clerk pursuant to subdivision (d)(1) and it appears that the appropriate venue is in another county, the clerk must make and retain a certified copy of the process and transmit the original process to the clerk in the appropriate county.

(3) Upon request of a defendant, the clerk must make and furnish to him without charge one copy of every criminal process filed against him.

(f) Protection of Officer. — An officer receiving criminal process which is complete and regular on its face may execute the process in accordance with its terms and need not inquire into its regularity or continued validity, nor does he incur criminal or civil liability for its due service. (1868-9, c. 178, subch. 3, s. 4; Code, s. 1135; Rev., s. 3159; C. S., s. 4525; 1957, c. 346; 1969, c. 44, s. 28; 1973, c. 1286, s. 1; 1975, 2nd Sess., c. 983, ss. 136, 137.)

OFFICIAL COMMENTARY

Several self-explanatory directory provisions are gathered here, familiar to all who have dealt with service and return of process. The new provisions for mandatory return contained in subsection (d), "Return," are designed to reduce the number of unaccounted-for "floating" warrants and other process. It should be noted that the requirements for 90-day return do not invalidate the process or its service after that time, or in any respect create a limitation on prosecution of the crime. These provisions are administrative and the process may be returned to the officer for further attempts at service.

Subsection (a) provides for the filing of a copy of criminal process in the office of the clerk of superior court. At times an arrest warrant may be issued in one county when the crime has been committed in another and must be tried there. Subsection (e)(2) provides that in that circumstance the clerk keeps a certified copy and forwards the original to the county of appropriate venue.

Subsection (f), "Protection of Officer," is new, added to insure that an officer may execute criminal process promptly without fear or danger of encountering difficulty because of some deficiency not apparent to him.

Cross References. — As to criminal liability for failure to return process, see § 14-242. As to liability of sheriff for failure to execute process, see § 162-14.

Editor's Note. — The 1975, 2nd Sess. amendment substituted "record" for "copy" and "maintained" for "filed" in subdivision (1) of subsection (a) and added the second sentence of subdivision (4) of subsection (d).

Opinions of Attorney General. — Honorable H.M. Shelton, Sheriff of Polk County, 40 N.C.A.G. 176 (1969).

Police to Give Notice and Demand Entry. — Even though police officers have a valid search or arrest warrant, absent invitation or permission, ordinarily they may not enter a private home unless they first give notice of their authority and purpose and make a demand for entry. State v. Miller, 16 N.C. App. 1, 190 S.E.2d 888 (1972), modified, 282 N.C. 633, 194 S.E.2d 353 (1973).

Statute Not Violated. — Where police read the search warrant to the defendant before any search was made and he was advised of its contents, former § 15-21, relating to execution of warrants, was not violated. State v. McDougald, 18 N.C. App. 407, 197 S.E.2d 11 (1973).

§ 15A-302. Citation. — (a) Definition. — A citation is a directive, issued by a law-enforcement officer, that a person appear in court and answer criminal charges.

(b) When Issued. — An officer may issue a citation to any person who he has probable cause to believe has committed a misdemeanor.

(c) Contents. — The citation must:

(1) Identify the crime charged, including the date, and where material, identify the property and other persons involved,

(2) Contain the name and address of the person cited, or other identification if that cannot be ascertained,

(3) Identify the officer issuing the citation, and

(4) Cite the person to whom issued to appear in a designated court, at a designated time and date.

(d) Service. — A copy of the citation must be delivered to the person cited who must sign a receipt on the original, which the officer must file with the clerk.

(e) Dismissal by Prosecutor. — If the prosecutor finds that no crime is charged in the citation, or that there is insufficient evidence to warrant prosecution, he may dismiss the charge and so notify the person cited. An appropriate entry must be made in the records of the clerk. It is not necessary to enter the dismissal in open court or to obtain consent of the judge.

(f) Citation No Bar to Criminal Summons or Warrant. — A criminal summons or a warrant may issue notwithstanding the prior issuance of a citation for the same offense.

(g) Preparation of Form. — The form and content of the citation is as prescribed by the Administrative Officer of the Courts. The form of citation used for violation of the motor vehicle laws must contain a notice that the driving privilege of the person cited may be revoked for failure to appear as cited, and must be prepared as provided in G.S. 7A-148(b). (1973, c. 1286, s. 1; 1975, c. 166, ss. 3, 27.)

OFFICIAL COMMENTARY

Although the use of a citation is quite familiar in North Carolina for traffic cases, it previously has not had statutory sanction as criminal process. Actually, there has not been a citation, but rather a warrant form not acted upon by a judicial officer. (There has been an authorization in § 7A-148 for the chief district judges to prescribe a multicopy uniform traffic ticket, and that is reflected in subsection (g) of this section.)

This statute provides for a separate criminal process, applicable to any misdemeanor. It is issued by a law-enforcement officer to direct the appearance in court of the person charged when the officer lacks authority or deems it inappropriate to make an arrest and take the defendant into custody.

Since the citation is issued by a law-enforcement officer, contempt of court may not be used to enforce obedience to its direction to appear. Thus, other criminal process may be issued if the defendant does not appear.

Subsection (f)(2) refers to a proposed section of the Criminal Code Commission's proposal which would have inserted provisions in Chapter 20 of the General Statutes. The amendment to Chapter 20 was deleted in the General Assembly, but subsection (f)(2) was not deleted.

It should be noted that in certain circumstances the citation can serve as the pleading upon which the trial is based. See § 15A-922 and Article 49, Pleadings and Joinder.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" in subsection (e) and deleted subdivision (2) of subsection (f), which provided for the enforcement of citations in the case of motor vehicle offenses.

§ 15A-303. Criminal summons. — (a) Definition. — A criminal summons consists of a statement of the crime of which the person to be summoned is accused, and an order directing that the person so accused appear and answer to the charges made against him. It is based upon a showing of probable cause supported by oath or affirmation.

(b) Statement of the Crime. — The criminal summons must contain a

statement of the crime of which the person summoned is accused. No criminal summons is invalid because of any technicality of pleading if the statement is sufficient to identify the crime.

(c) Showing of Probable Cause; Record. — The showing of probable cause for the issuance of a criminal summons, and the record thereof, is the same as provided in G.S. 15A-304(d) for the issuance of a warrant for arrest.

(d) Order to Appear. — The summons must order the person named to appear in a designated court at a designated time and date and answer to the charges made against him and advise him that he may be held in contempt of court for failure to appear. Except for cause noted in the criminal summons by the issuing official, an appearance date may not be set more than one month following the issuance or reissuance of the criminal summons.

(e) Enforcement.—

(1) A warrant for arrest, based upon the same or another showing of probable cause, may be issued by the same or another issuing official, notwithstanding the prior issuance of a criminal summons.

(2) An order for arrest, as provided in G.S. 15A-305, may issue for the arrest of any person who fails to appear as directed in a duly executed criminal summons.

(3) A person served with criminal summons who willfully fails to appear as directed may be punished for contempt as provided in G.S. 5-1.

(4) Repealed by Session Laws 1975, c. 166, s. 4.

(f) Who May Issue. — A criminal summons, valid throughout the State, may be issued by any person authorized to issue warrants for arrest. (1973, c. 1286, s. 1; 1975, c. 166, ss. 4, 5; 1975, 2nd Sess., c. 983, s. 138.)

OFFICIAL COMMENTARY

Former § 15-20 authorized the criminal summons, but it was little used. There appears to be no good reason, for in many cases in which a criminal summons could have been used, the law-enforcement officer simply "served" the warrant and did not take the defendant into custody.

The criminal summons can appropriately be used in any case in which it appears that it is not necessary to arrest the defendant and take him into custody to ensure his appearance in court. This should be true in many misdemeanors and in a number of felonies. If the defendant simply is directed to appear in court on the appropriate date, the entire machinery of arrest, processing, and bail can be avoided with resultant savings to the system of criminal justice. This section is separated from the warrant provisions (unlike the former statute), and placed first, in order to call it to the attention of readers of the statutes and encourage its use.

Note that due to the interchangeability of parts of process a warrant for arrest may be based on the criminal summons (it needs only the order to the officer), and the same is true of an order for arrest. Since the summons is issued by a judicial officer, the contempt power also is available.

Subsection (e)(4) refers to a proposed section of the Criminal Code Act which would have inserted provisions in Chapter 20 of the General Statutes. The amendment to Chapter 20 was deleted in the General Assembly, but subsection (e)(4) was not deleted.

Editor's Note. — The 1975 amendment repealed subdivision (4) of subsection (e), which provided for the enforcement of citations in the case of motor vehicle offenses, and inserted "valid throughout the State" in subsection (f).

The 1975, 2nd Sess., amendment added the second sentence of subsection (d).

§ 15A-304. Warrant for arrest. — (a) Definition. — A warrant for arrest consists of a statement of the crime of which the person to be arrested is accused, and an order directing that the person so accused be arrested and held to answer to the charges made against him. It is based upon a showing of probable cause supported by oath or affirmation.

(b) When Issued. — A warrant for arrest may be issued, instead of or subsequent to a criminal summons, when it appears to the judicial official that the person named should be taken into custody. Circumstances to be considered in determining whether the person should be taken into custody may include, but are not limited to, failure to appear when previously summoned, facts making it apparent that a person summoned will fail to appear, danger that the person accused will escape, danger that there may be injury to person or property, or the seriousness of the offense.

(c) Statement of the Crime. — The warrant must contain a statement of the crime of which the person to be arrested is accused. No warrant for arrest, nor any arrest made pursuant thereto, is invalid because of any technicality of pleading if the statement is sufficient to identify the crime.

(d) Showing of Probable Cause. — A judicial official may issue a warrant for arrest only when he is supplied with sufficient information, supported by oath or affirmation, to make an independent judgment that there is probable cause to believe that a crime has been committed and that the person to be arrested committed it. The information must be shown by either or both of the following:

(1) Affidavit,

(2) Oral testimony under oath or affirmation before the issuing official.

If the information is insufficient to show probable cause, the warrant may not be issued.

(e) Order for Arrest. — The order for arrest must direct that a law-enforcement officer take the defendant into custody and bring him without unnecessary delay before a judicial official to answer to the charges made against him.

(f) Who May Issue. — A warrant for arrest, valid throughout the State, may be issued by:

(1) A Justice of the Supreme Court.
(2) A judge of the Court of Appeals.
(3) A judge of the superior court.
(4) A judge of the district court, as provided in G.S. 7A-291.
(5) A clerk, as provided in G.S. 7A-180 and 7A-181.
(6) A magistrate, as provided in G.S. 7A-273. (1868-9, c. 178, subch. 3, ss. 1-3; Code, ss. 1132-1134; 1901, c. 668; Rev., ss. 3156-3158; C. S., ss. 4522-4524; 1955, c. 332; 1969, c. 44, s. 27; c. 1062, s. 1; 1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

The standard format for a warrant for arrest in North Carolina has been an affidavit charging the crime, sworn before a judicial officer, followed by an order to a law-enforcement officer directing the arrest of the defendant. The warrant, consisting of the affidavit and the order, is then used as a pleading for trial.

In Whiteley v. Warden of Wyo. State Penitentiary, 401 U.S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971), the Supreme Court of the United States said: "The decisions of this Court concerning Fourth Amendment probable cause requirements before a warrant for either arrest or search can issue require that the judicial officer issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant." Thus it is clear that the judicial officer must be furnished information and our old conclusory affidavit in the form of a charge of the crime is not sufficient for the purpose. We still need a statement of the crime — for notification to the defendant and for a pleading, and that is provided for in this section.

This section provides for the showing of probable cause by an affidavit (which necessarily will be longer and more detailed if no other evidence in taken) or by the taking of evidence by the judicial officer. It should be emphasized that the judicial officer must have presented to him information from which he can decide that there is probable cause to believe that a crime has been committed and that the person to be arrested committed it — and if the warrant is not based upon such a factual showing, it is invalid under the decisions of the Supreme Court.

In order to emphasize the desirability of

utilizing the criminal summons when arrest and custody are not needed, subsection (b) states the circumstances for the use of a warrant for arrest. That subsection is directory and does not require a finding by the judicial officer, and of course would not invalidate the warrant if the circumstances in fact were absent.

Opinions of Attorney General. — Honorable H.M. Shelton, Sheriff of Polk County, 40 N.C.A.G. 176 (1969).

The issuance of a warrant of arrest is a judicial act. State v. Matthews, 270 N.C. 35, 153 S.E.2d 791 (1967).

Fourth Amendment Applies to Both Arrest Warrants and Search Warrants. — The Fourth Amendment requirement that no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the persons or things to be seized, applies to arrest warrants as well as to search warrants. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972); State v. Freeman, 31 N.C. App. 335, 229 S.E.2d 238 (1976).

It is an essential of jurisdiction that a criminal offense shall be sufficiently charged in a warrant or indictment. State v. Green, 251 N.C. 40, 110 S.E.2d 609 (1959); State v. Jones, 17 N.C. App. 54, 193 S.E.2d 314 (1972).

But it is not an essential of jurisdiction that a warrant be issued prior to arrest and that the defendant be initially arrested thereunder. State v. Green, 251 N.C. 40, 110 S.E.2d 609 (1959); State v. Broome, 269 N.C. 661, 153 S.E.2d 384 (1967); State v. Jones, 17 N.C. App. 54, 193 S.E.2d 314 (1972).

Requirements for Valid Warrant. — A valid warrant of arrest must be based on an examination of the complainant under oath; it must identify the person charged; it must contain directly or by proper reference at least a defective statement of the crime charged; and it must be directed to a lawful officer or to a class of officers commanding the arrest of the accused. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

A warrant of arrest is sufficient if it clearly gives the defendant notice of the charge against him, so that he may prepare his defense, and if it enables him to plead former acquittal or former conviction should he again be brought to trial for the same offense. It must also enable the court to pronounce judgment in case of conviction. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

A warrant should not be quashed or the judgment arrested for mere informalities or absence of refinements. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

Rules Are Less Strict than Those Applicable to Indictments. — A warrant and the affidavit upon which it is based are tested by rules less strict than those applicable to indictments. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

In order to properly charge an assault, there must be a victim named, since by failing to name the particular person assaulted, the defendant would not be protected from a subsequent prosecution for assault upon a named person. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Uniform Traffic Ticket as Warrant. — The Court of Appeals disapproves the use of the Uniform Traffic Ticket as a warrant of arrest. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

A warrant will issue only if it appears to the magistrate from his examination that a criminal offense has been committed. Sutton v. Figgatt, 280 N.C. 89, 185 S.E.2d 97 (1971).

It must appear by the examination that an offense has been committed before any warrant is issued. State v. Moore, 136 N.C. 581, 48 S.E. 573 (1904).

Complaint Need Not Be Written. — In State v. Bryson, 84 N.C. 780 (1881), Ashe, J., in construing the provisions of the act subsequently embodied in former §§ 15-19 and 15-20, says that no written affidavit or complaint is required. State v. Peters, 107 N.C. 876, 12 S.E. 74 (1890).

No Special Form of Affidavit or Complaint Required. — It is not expected nor required, in the absence of special provision to the contrary, that an affidavit or complaint should be in any particular form, or should charge the crime with the fullness or particularity necessary in an information or indictment. State v. Gupton, 166 N.C. 257, 80 S.E. 989 (1914); State v. Higgins, 266 N.C. 589, 146 S.E.2d 681 (1966).

Signature of Affiant Not Essential. — Where the warrant discloses that the affiant was duly sworn before a competent official and is signed by such official, and the name of the affiant is set forth, the fact that the affiant does not subscribe the affidavit is not a fatal defect. State v. Higgins, 266 N.C. 589, 146 S.E.2d 681 (1966).

Sufficiency of Evidence. — The judicial officer issuing an arrest warrant must be supplied with sufficient information to support an independent judgment that there is probable cause for issuing the arrest warrant. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

It is the duty of a magistrate, before issuing a warrant on a criminal charge, except in cases super visum, to require evidence on oath amounting to a direct charge or creating a

strong suspicion of guilt. Welch v. Scott, 27 N.C. 72 (1844).

Information received from a reliable informant is sufficient to support a conclusion that probable cause for arrest exists. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

State Bureau of Investigation agent's affidavit and testimony before a magistrate that another State Bureau of Investigation agent had purchased heroin from defendant furnished sufficient evidence to support the magistrate's determination that probable cause existed for defendant's arrest. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

A Police Officer May Rely on Information Reported by Other Officers. — A police officer making the affidavit for issuance of a warrant may do so in reliance upon information reported to him by other officers in the performance of their duties. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

The relation shown to exist between one State Bureau of Investigation agent and the affiant State Bureau of Investigation agent was sufficient evidence of circumstances upon which the affiant could conclude that the information furnished to the magistrate was credible and reliable. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

Warrants' Issuance Discretionary. — See opinion of Attorney General to Mr. Gerard J. Anderson, Director, Alamance County Department of Social Services, 40 N.C.A.G. 191 (1970).

After the required examination on oath of the complainant and any witnesses who may be produced by him, the justice of the peace is authorized to issue the warrant upon his determination there is sufficient ground for the arrest and prosecution of the accused person for the described criminal offense. State v. Matthews, 270 N.C. 35, 153 S.E.2d 791 (1967).

Former § 15-19 vested discretionary power in officials authorized to issue warrants. State v. Furmage, 250 N.C. 616, 109 S.E.2d 563 (1959).

Appellate Court Cannot Look Behind Warrant. — The appellate court "can only look at the warrant, which is the complaint," and "cannot look behind the warrant for objections lying in the defects or irregularities of the preliminary evidence." State v. Peters, 107 N.C. 876, 12 S.E. 74 (1890). See State v. Bryson, 84 N.C. 780 (1881).

Motion to Quash Warrant Made after Pleading and Participating in Trial. — By pleading and participating in a trial, defendant waives any defect incident to the authority of the person issuing a warrant, and a motion to quash made after the State has rested is addressed to the discretion of the trial judge. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

Arrest of Judgment Where Warrant Altered. — Where defendant was arrested, tried and convicted in district court for permitting a person under the influence of intoxicating liquor to operate his automobile, but the warrant was altered after trial in district court and before any evidence was heard in superior court so that defendant was tried and convicted in superior court on a warrant charging him with driving while under the influence, judgment of the superior court must be arrested since a defendant may be tried upon a warrant in superior court only after there has been a trial and appeal from a conviction by an inferior court having jurisdiction. State v. Chappell, 18 N.C. App. 288, 196 S.E.2d 558 (1973).

§ 15A-305. Order for arrest. — (a) Definition. — As used in this section, an order for arrest is an order issued by a justice, judge, clerk, or magistrate that a law-enforcement officer take a named person into custody.

(b) When Issued. — An order for arrest may be issued when:

(1) A grand jury has returned a true bill of indictment against a defendant who is not in custody and who has not been released from custody pursuant to Article 26 of this Chapter, Bail, to answer to the charges in the bill of indictment.

(2) A defendant who has been arrested and released from custody pursuant to Article 26 of this Chapter, Bail, fails to appear as required.

(3) The defendant has failed to appear as required by a duly executed criminal summons issued pursuant to G.S. 15A-303.

(4) A defendant has violated the conditions of probation.

(5) In any criminal proceeding in which the defendant has become subject to the jurisdiction of the court, it becomes necessary to take the defendant into custody.

(6) It is authorized by G.S. 15A-803 in connection with material witness proceedings.

(7) The common-law writ of capias has heretofore been issuable.

(8) When a defendant fails to appear as required in a show cause order issued in a criminal proceeding.

(9) It is authorized by G.S. 5A-16 in connection with contempt proceedings.

(c) Statement of Cause and Order; Copy of Indictment. —

(1) The process must state the cause for its issuance and order an officer described in G.S. 15A-301(b) to take the person named therein into custody and bring him before the court. If the defendant is to be held without bail, the order must so provide.

(2) When the order is issued pursuant to subdivision (b)(1), a copy of the bill of indictment must be attached to each copy of the order for arrest.

(d) Who May Issue. — An order for arrest, valid throughout the State, may be issued by any person authorized to issue warrants for arrest. (1973, c. 1286, s. 1; 1975, c. 166, s. 6.)

OFFICIAL COMMENTARY

This section provides a new term and more formality for our former "capias." Other than the change in the name, which substitutes English for Latin and should lend clarity, the most striking provision is the statutory requirement that the cause for the issuance of the process be stated. Some "capias" forms already follow this practice. It was felt that in addition to limiting issuance to proper circumstances, this device leads to more ready compliance by the person to be taken into custody. The format would follow that of the summons and the warrant for arrest, both of which contain a statement of the crime (for which we here substitute "cause for arrest") followed by an order. The following is a suggested format for the body of the process: "CAUSE FOR ARREST OF John Doe

The person named above having been charged with the crime of embezzlement and having been released on his own recognizance to appear at the July 14, 1975, Session of the Superior Court of Wake County, failed to appear.

ORDER: You are commanded to arrest the person named above and bring him before this session of this court. Should you be unable to execute this process before the end of this session, you are directed to:

X secure his/her appearance at the next session by taking bail in the sum of $5,000.00, or in default thereof, by committing him/her to the county jail of this county.

commit him/her to the county jail of this county to be held without bail."

Editor's Note. — The 1975 amendment added subsection (d).

The 1977 amendment, effective July 1, 1978, in subdivision (4) of subsection (b), deleted "or suspension of his sentence" following probation and added subdivisions (8) and (9) of such subsection.

For article on probation and parole revocation procedures and related issues, see 13 Wake Forest L. Rev. 5 (1977).

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, "Parole" shall not apply to persons sentenced before July 1, 1978."

Order of Arrest Referring to Attached Affidavit or Complaint. — When the order of arrest referred to attached affidavit or complaint, the affidavit or complaint became a part of the warrant of arrest. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

ARTICLE 18.

§§ 15A-306 to 15A-353: Reserved for future codification purposes.

ARTICLE 19.

§§ 15A-354 to 15A-400: Reserved for future codification purposes.

SUBCHAPTER IV. ARREST.

ARTICLE 20.

Arrest.

§ 15A-401. Arrest by law-enforcement officer. — (a) Arrest by Officer Pursuant to a Warrant. —

(1) Warrant in Possession of Officer. — An officer having a warrant for arrest in his possession may arrest the person named or described therein at any time and at any place within the officer's territorial jurisdiction.

(2) Warrant Not in Possession of Officer. — An officer who has knowledge that a warrant for arrest has been issued and has not been executed, but who does not have the warrant in his possession, may arrest the person named therein at any time. The officer must inform the person arrested that the warrant has been issued and serve the warrant upon him as soon as possible.

(b) Arrest by Officer Without a Warrant. —

(1) Offense in Presence of Officer. — An officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense in the officer's presence.

(2) Offense Out of Presence of Officer. — An officer may arrest without a warrant any person who the officer has probable cause to believe:

a. Has committed a felony; or

b. Has committed a misdemeanor, and:

1. Will not be apprehended unless immediately arrested, or

2. May cause physical injury to himself or others, or damage to property unless immediately arrested.

(c) How Arrest Made. —

(1) An arrest is complete when:

a. The person submits to the control of the arresting officer who has indicated his intention to arrest, or

b. The arresting officer, with intent to make an arrest, takes a person into custody by the use of physical force.

(2) Upon making an arrest, a law-enforcement officer must:

a. Identify himself as a law-enforcement officer unless his identity is otherwise apparent,

b. Inform the arrested person that he is under arrest, and

c. As promptly as is reasonable under the circumstances, inform the arrested person of the cause of the arrest, unless the cause appears to be evident.

(d) Use of Force in Arrest. —

(1) Subject to the provisions of subdivision (2), a law-enforcement officer is justified in using force upon another person when and to the extent that he reasonably believes it necessary:

a. To prevent the escape from custody or to effect an arrest of a person who he reasonably believes has committed a criminal offense, unless he knows that the arrest is unauthorized; or

b. To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to effect an arrest or while preventing or attempting to prevent an escape.

(2) A law-enforcement officer is justified in using deadly physical force upon another person for a purpose specified in subdivision (1) of this subsection only when it is or appears to be reasonably necessary thereby:

a. To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force;

b. To effect an arrest or to prevent the escape from custody of a person who he reasonably believes is attempting to escape by means of a deadly weapon, or who by his conduct or any other means indicates that he presents an imminent threat of death or serious physical injury to others unless apprehended without delay; or

c. To prevent the escape of a person from custody imposed upon him as a result of conviction for a felony.

Nothing in this subdivision constitutes justification for willful, malicious or criminally negligent conduct by any person which injures or endangers any person or property, nor shall it be construed to excuse or justify the use of unreasonable or excessive force.

(e) Entry on Private Premises or Vehicle; Use of Force. —

(1) A law-enforcement officer may enter private premises or a vehicle to effect an arrest when:

a. The officer has in his possession a warrant or order for the arrest of a person or is authorized to arrest a person without a warrant or order having been issued,

b. The officer has reasonable cause to believe the person to be arrested is present, and

c. The officer has given, or made reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice would present a clear danger to human life.

(2) The law-enforcement officer may use force to enter the premises or vehicle if he reasonably believes that admittance is being denied or unreasonably delayed, or if he is authorized under subsection (e)(1)c to enter without giving notice of his authority and purpose. (1868-9, c. 178, subch. 1, ss. 3, 5; Code, ss. 1126, 1128; Rev., ss. 3178, 3180; C. S., ss. 4544, 4546; 1955, c. 58; 1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

(a) Arrest by law-enforcement officer. As has been true, a law-enforcement officer may arrest at any place with an arrest warrant in his possession. The former rule is modified by providing that when an officer knows that there is a warrant but does not have it in his possession, the officer is permitted to arrest pursuant to the warrant and serve the warrant as soon as possible.

(b) Arrest by officer without warrant. In addition to the usual authorization to arrest without a warrant for crimes committed in his presence, the officer is given broadened authority to arrest for crimes committed out of his presence when he has probable cause to make the arrest. North Carolina law has limited arrest without a warrant for crimes not committed in the presence of the officer to felonies, when there is reasonable ground to believe that the person will evade arrest if not immediately taken into custody. Here the authority is broadened, as is the case in a number of other states, to include felonies generally and misdemeanors when there exists one of the "emergency" situations of danger of escape or danger of injury or property damage.

In connection with this expanded arrest authority, it should be noted that "peace warrant" provisions have been repealed and a new crime of "communicating threats" has been created in § 14-277.1. This combination should be more effective in dealing with situations in which peace warrants have been used.

(c) How arrest made. For convenience the existing law of North Carolina as to when an arrest is complete is codified and states more fully the requirements for notification to the person arrested (compare the former § 15-47).

(d) Use of force in arrest. This section codifies an area not heretofore mentioned in our statutes. While the officer is authorized to use force to the extent that he reasonably believes it necessary to effect an arrest, prevent an escape, or defend himself or another from imminent physical force, the authorization to utilize deadly force is substantially more limited. That force is permitted only in the defense situation or when necessary to prevent the risk of death or serious physical injury to others, made manifest by the use of a deadly weapon or

other conduct or means, or to prevent the escape of a convicted felon.

It should be noted that the last paragraph makes it clear that the law-enforcement officer cannot act with indifference to the safety of others in the use of force. Shooting into a crowded street would be an obvious example of criminally negligent conduct, and this section would not justify such action.

(e) Entry on private premises or vehicle; use of force. In State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970), the court said: "In North Carolina, under G.S. 15-44, even where there is reasonable ground to believe that a person guilty of a felony is concealed in a house, there exists no right, in the absence of special and emergency circumstances, to break into the house and arrest the person unless and until admittance has been demanded and denied." This statute codifies that idea and states that the emergency which will justify the omission of the demand is that which presents clear danger to human life. Subdivision (2) provides that the officer may use force concomitant with his right to enter.

I. General Consideration.
II. Arrest without Warrant.
  A. In General.
  B. Illustrative Cases.
    1. Offense in Presence of Officer.
    2. Offense Out of Presence of Officer.
III. Use of Force in Arrest.
IV. Entry on Premises.

I. GENERAL CONSIDERATION.

Cross References. — As to arrest in civil cases, see § 1-409 et seq. As to arrest of persons violating the laws regulating intoxicating liquors, see § 18A-19 et seq. As to power of bank examiner to arrest, see § 53-121. As to arrest for violation of the weights and measures laws, see § 81A-16. As to arrest by State forest rangers, see § 113-55.1. As to arrest by appointees of superintendents of the State hospitals for the mentally disordered, see § 122-33. As to arrest by the commanding officer of militia, see § 127A-148. As to apprehension of runaway from State youth institution, see § 134A-24. As to arrest of parolee from the State prison whose parole has been revoked, see § 148-63.

Editor's Note. — For an article on the law of arrest in North Carolina, see 15 N.C.L. Rev. 101. For an article and note on arrest without warrant in misdemeanor cases, see 33 N.C.L. Rev. 17 (1954); 35 N.C.L. Rev. 290 (1957). For an article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 N.C.L. Rev. 262 (1971).

The law does not discharge a defendant from criminal liability merely because his arrest is not lawful, unless the offense charged stems from such arrest. State v. Jones, 17 N.C. App. 54, 193 S.E.2d 314 (1972).

Arrest May Be Constitutionally Valid Though Illegal. — The words "illegal" and "unconstitutionally" are not synonymous. An arrest is constitutionally valid when the officers have probable cause to make it. Thus an arrest may be constitutionally valid and yet "illegal" under State law. State v. Eubanks, 283 N.C. 556, 196 S.E.2d 706 (1973).

Every statement made by a person in custody as a result of an illegal arrest is not ipso facto involuntary and inadmissible, but the facts and circumstances surrounding such arrest and the in-custody statement should be considered in determining whether the statement is voluntary and admissible. Voluntariness remains as the test of admissibility. State v. Faulkner, 5 N.C. App. 113, 168 S.E.2d 9 (1969).

Evidence Not Excluded When Arrest Constitutionally Valid. — When an arrest is constitutionally valid but illegal under the law of North Carolina, the facts discovered or the evidence obtained as a result of the arrest need not be excluded as evidence in the trial of the action. State v. Eubanks, 283 N.C. 556, 196 S.E.2d 706 (1973).

An illegal arrest, unaccompanied by violent or oppressive circumstances, would not be more coercive than a legal arrest. State v. Faulkner, 5 N.C. App. 113, 168 S.E.2d 9 (1969).

A formal declaration of arrest by the officer is not a prerequisite to the making of an arrest. State v. Tippett, 270 N.C. 588, 155 S.E.2d 269 (1967).

Finding That Defendant Was Taken into Custody Is Tantamount to Finding Defendant under Arrest. — A finding and conclusion that defendant was taken into custody is tantamount to finding and concluding that defendant was under arrest at the time of a search. State v. Jackson, 11 N.C. App. 682, 182 S.E.2d 271, aff'd, 280 N.C. 122, 185 S.E.2d 202 (1971).

A person has the right to resist an unlawful arrest. State v. Williams, 32 N.C. App. 204, 231 S.E.2d 282 (1977).

And may flee from an unlawful arrest. State

v. Williams, 32 N.C. App. 204, 231 S.E.2d 282 (1977).

Applied in State v. Williams, 31 N.C. App. 237, 229 S.E.2d 63 (1976); Autry v. Mitchell, 420 F. Supp. 967 (E.D.N.C. 1976); In re Johnson, 32 N.C. App. 492, 232 S.E.2d 486 (1977); State v. Bradley, 32 N.C. App. 666, 233 S.E.2d 603 (1977); In re Jacobs, 33 N.C. App. 195, 234 S.E.2d 639 (1977).

Quoted in State v. Hagler, 32 N.C. App. 444, 232 S.E.2d 712 (1977).

Stated in State v. Hardy, 31 N.C. App. 67, 228 S.E.2d 487 (1976), appeal dismissed, 291 N.C. 713, 232 S.E.2d 202 (1977).

Cited in State v. Weddington, 28 N.C. App. 269, 220 S.E.2d 853 (1976).

II. ARREST WITHOUT WARRANT.

A. In General.

The Constitution does not dictate the circumstances under which arrest warrants are required. Whether an arrest warrant must be obtained is determined by State law alone. Likewise, State law alone determines the sanction to be applied for failure to obtain an arrest warrant where one is required. State v. Eubanks, 283 N.C. 556, 196 S.E.2d 706 (1973).

In this State the power of arrest without warrant is defined and limited entirely by legislative enactments. And the rule is that where the right and power of arrest without warrant is regulated by statute, an arrest without warrant except as authorized by statute is illegal. State v. Mobley, 240 N.C. 476, 83 S.E.2d 100 (1954).

An arrest without warrant except as authorized by statute is illegal. State v. Moore, 275 N.C. 141, 166 S.E.2d 53 (1969); State v. Jacobs, 277 N.C. 151, 176 S.E.2d 744 (1970); State v. Harris, 9 N.C. App. 649, 177 S.E.2d 445 (1970); State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Cooper, 17 N.C. App. 184, 193 S.E.2d 352 (1972); State v. Denton, 17 N.C. App. 684, 195 S.E.2d 334 (1973); State v. Little, 27 N.C. App. 54, 218 S.E.2d 184 (1975).

Where the right and power of arrest without warrant is regulated by statute, an arrest without warrant except as authorized by statute is illegal. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Statute Applies Only to State Officers. — The North Carolina statute governing arrests without warrant applies only to peace officers of the State and in the enforcement of the State law, and does not affect the conduct or powers of federal officers unless the principles therein are extended to such officers by a federal statute, when in the enforcement of a valid federal law. State v. Burnett, 183 N.C. 703, 110 S.E. 588 (1922).

The superintendent of a convict gang was not such an officer as was contemplated by former § 15-41, relating to arrest without warrant. State v. Stancill, 128 N.C. 606, 38 S.E. 926 (1901).

Statute Not Intended to Legalize Warrantless Entry. — Former § 15-41, relating to arrest without warrant, was never intended to legalize a warrantless entry upon premises which could not otherwise be lawfully entered except under authority of a valid warrant. State v. Miller, 16 N.C. App. 1, 190 S.E.2d 888 (1972), modified, 282 N.C. 633, 194 S.E.2d 353 (1973).

"Probable Cause". — Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed. State v. Harris, 9 N.C. App. 649, 177 S.E.2d 445 (1970); State v. Streeter, 283 N.C. 203, 195 S.E.2d 502 (1973).

Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Alexander, 279 N.C. 527, 184 S.E.2d 274 (1971); State v. Cooper, 17 N.C. App. 184, 193 S.E.2d 352 (1972); State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974); State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976), cert. denied, 429 U.S. 1123, 97 S. Ct. 1160, 51 L. Ed. 2d 573 (1977).

An arrest without a warrant is based upon probable cause if the facts and circumstances known to the arresting officer warrant a prudent man in believing that a felony has been committed and the person to be arrested is the felon. State v. Alexander, 279 N.C. 527, 184 S.E.2d 274 (1971); State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974); State v. Campbell, 30 N.C. App. 652, 228 S.E.2d 52 (1976).

One does not have probable cause unless he has information of facts which, if submitted to a magistrate, would require the issuance of an arrest warrant. State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Alexander, 279 N.C. 527, 184 S.E.2d 274 (1971); State v. Cooper, 17 N.C. App. 184, 193 S.E.2d 352 (1972).

Probable cause to believe that the person has committed a felony exists without question where the officer has personal knowledge that a warrant has been issued for the arrest of such person, which warrant charges a felony. State v. Denton, 17 N.C. App. 684, 195 S.E.2d 334 (1973).

The existence of probable cause is a pragmatic question to be determined in each case in the light of the particular circumstances and the particular offense involved. State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Cooper, 17 N.C. App. 184, 193 S.E.2d 352 (1972); State v. Young, 27 N.C. App. 308, 219 S.E.2d 261 (1975).

The existence of probable cause justifying an

arrest without a warrant is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Gibson, 15 N.C. App. 445, 190 S.E.2d 315 (1972); State v. Cooper, 17 N.C. App. 184, 193 S.E.2d 352 (1972); State v. Young, 27 N.C. App. 308, 219 S.E.2d 261 (1975).

To establish probable cause, the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith. State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Alexander, 279 N.C. 527, 184 S.E.2d 274 (1971); State v. Cooper, 17 N.C. App. 184, 193 S.E.2d 352 (1972); State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974); State v. Young, 27 N.C. App. 308, 219 S.E.2d 261 (1975); State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976), cert. denied, 429 U.S. 1123, 97 S. Ct. 1160, 51 L. Ed. 2d 573 (1977).

Flight from unlawful arrest cannot be added to other relevant facts to give the officer probable cause for making a warrantless arrest. State v. Williams, 32 N.C. App. 204, 231 S.E.2d 282 (1977).

When Flight May Be Considered in Assessing Probable Cause. — Flight is a strong indicia of mens rea, and when coupled with other relevant facts or the specific knowledge on the part of the arresting officer relating the subject to the evidence of the crime, it may properly be considered in assessing probable cause. State v. Williams, 32 N.C. App. 204, 231 S.E.2d 282 (1977).

Probable cause and reasonable ground to believe are substantially equivalent terms. State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Cooper, 17 N.C. App. 184, 193 S.E.2d 352 (1972); State v. Hardy, 31 N.C. App. 67, 228 S.E.2d 487 (1976).

The terms "probable cause," as used in the Fourth Amendment to the federal Constitution, and "reasonable ground," as used in former § 15-41, are substantially equivalents having virtually the same meaning. State v. Alexander, 279 N.C. 527, 184 S.E.2d 274 (1971); State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974).

"Reasonable ground" and "probable cause" are basically equivalent terms with similar meanings. State v. Young, 27 N.C. App. 308, 219 S.E.2d 261 (1975), cert. denied, 289 N.C. 455, 223 S.E.2d 164 (1976).

Reasonable Ground for Belief. — The felony need not necessarily be committed in the presence of the officer. Indeed, in order to justify the arrest it is not essential that any such serious offense be shown to have been actually committed. It is only necessary that the officer have reasonable ground to believe such offense has been committed. Moreover, an arresting officer is protected against consequences of an erroneous arrest based on mistaken identity of the offender. State v. Mobley, 240 N.C. 476, 83 S.E.2d 100 (1954).

In order to justify an arrest without warrant, it is not required that a felony be shown actually to have been committed; it is only necessary that the officer have reasonable ground to believe that such an offense has been committed. State v. Alexander, 279 N.C. 527, 184 S.E.2d 274 (1971); State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974); State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976), cert. denied, 429 U.S. 1123, 97 S. Ct. 1160, 51 L. Ed. 2d 573 (1977).

There is nothing in the statute that makes it mandatory or permissible for an officer to arrest a felon without a warrant when the felony was not committed in his presence, unless he has reasonable ground to believe such felony had been committed and that the accused would evade arrest if not immediately taken into custody. State v. Hucks, 264 N.C. 160, 141 S.E.2d 299 (1965).

In making an arrest upon personal observation and without a warrant an officer will be excused, though no offense was perpetrated, if the circumstances are such as to reasonably warrant the belief that it had been. State v. McNinch, 90 N.C. 695 (1884); State v. Campbell, 182 N.C. 911, 110 S.E. 86 (1921), aff'd, 262 U.S. 728, 43 S. Ct. 519, 67 L. Ed. 1203 (1923). As to what constitutes reasonable ground, see State v. Blackwelder, 182 N.C. 899, 109 S.E. 644 (1921).

An officer need not show that a felony has actually been committed. It is only necessary for the officer to have reasonable ground to believe that such an offense has been committed. State v. Campbell, 30 N.C. App. 652, 228 S.E.2d 52, appeal dismissed, 291 N.C. 324, 230 S.E.2d 677 (1976).

Description as Furnishing Reasonable Ground for Belief. — A description of either a person or an automobile furnishes reasonable ground for arresting and detaining a criminal suspect. State v. Jacobs, 277 N.C. 151, 176 S.E.2d 744 (1970).

The courts have held that a description of an assailant's physical characteristics and his clothing may supply reasonable grounds for believing that he had committed a felony. State v. Dickens, 278 N.C. 537, 180 S.E.2d 844 (1971).

Reasonable Ground for Belief Drawn from Totality of Circumstances. — The basis of reasonable ground for belief that felony has been committed is drawn from the totality of facts and circumstances surrounding the arrest, known to the officers. State v. Little, 27 N.C. App. 54, 218 S.E.2d 184, cert. denied, 288 N.C. 512, 219 S.E.2d 347 (1975).

Reasonable Ground for Belief May Be Based on Information Given Officer by Another. — Reasonable ground for belief, which is an element of the officer's right to arrest without

a warrant, may be based upon information given to the officer by another, the source of such information being reasonably reliable. Upon this question it is immaterial that such information, being hearsay, is not, itself, competent in evidence at the trial of the person arrested. State v. Roberts, 276 N.C. 98, 171 S.E.2d 440 (1970); State v. McMillan, 19 N.C. App. 721, 200 S.E.2d 339 (1973); State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974); State v. Hardy, 31 N.C. App. 67, 228 S.E.2d 487 (1976).

Probable cause may be based upon information given to the officer by another, the source of such information being reasonably reliable. State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976), cert. denied, 429 U.S. 1123, 97 S. Ct. 1160, 51 L. Ed. 2d 573 (1977).

Likelihood of Escape. — The likelihood of evasion of arrest, frequently referred to as the likelihood of escape, by the person to be arrested is not a factor to be considered in determining the right of a police officer to arrest without a warrant when the offense, felony or misdemeanor, has been committed in the presence of the officer, or when the officer has reasonable ground to believe that the offense has been committed in his presence by the person to be arrested. State v. Roberts, 276 N.C. 98, 171 S.E.2d 440 (1970).

In determining whether officers had reasonable grounds to believe that the defendant would evade arrest if not taken into immediate custody, the nature of the felony, the hour of the day or night, the character and reputation of the neighborhood where the arrest was made, the number of suspects, and of the officers available for assistance, and the likely consequences of the officers' failure to act promptly must necessarily be taken into consideration. State v. Roberts, 6 N.C. App. 312, 170 S.E.2d 193 (1969), aff'd, 276 N.C. 98, 171 S.E.2d 440 (1970); State v. Kennon, 20 N.C. App. 195, 201 S.E.2d 80 (1973).

For other cases decided under former § 15-41, which made likelihood of escape a condition to an officer's right to arrest without warrant for a felony not committed in his presence, see State v. Jacobs, 277 N.C. 151, 176 S.E.2d 744 (1970); State v. Alexander, 279 N.C. 527, 184 S.E.2d 274 (1971); State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974); State v. White, 25 N.C. App. 398, 213 S.E.2d 394 (1975); State v. Little, 27 N.C. App. 54, 218 S.E.2d 184 (1975).

Arrest Not Complete Where Defendant Fled from Unlawful Attempt to Arrest. — Where the defendant fled from the unlawful attempt to arrest him, the arrest was not complete under subsection (c)(1) because the defendant did not "submit to the control" of the officer, nor had the officer taken him "into custody by the use of physical force." State v. Williams, 32 N.C. App. 204, 231 S.E.2d 282 (1977).

Burden on State to Show Legality of Arrest. — It was incumbent upon the State to satisfy the jury from the evidence beyond a reasonable doubt that defendant violated § 14-335 in the presence of the officer, or that the officer had reasonable grounds to believe the defendant had done so, in order to establish the authority and duty of the officer to make the arrest without a warrant. State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965).

Action for Unlawful Arrest — Admissible Evidence. — An officer may make an arrest without a warrant when he acts in good faith and has reasonable grounds to believe that a felony has been committed, and that a particular person is guilty thereof and might escape unless arrested, and in an action against an officer for malicious and unlawful arrest, evidence that a robbery had been committed is held competent upon the issue, and defendant's evidence tending to show good faith and that he was acting within the provisions of the statute in arresting plaintiffs, was properly submitted to the jury. Hicks v. Nivens, 210 N.C. 44, 185 S.E. 469 (1936).

Same — Proof of Actual Commission of Crime Not Necessary. — A peace officer may justify an arrest without a warrant, when he shows satisfactory reasons for his belief of the fact and the guilt of the suspected party, and that delay in procuring a warrant might enable the party to escape. In such case, proof of actual commission of the crime is not necessary. Neal v. Joyner, 89 N.C. 287 (1883).

Same — Verdict of Not Guilty Not Tantamount to Finding of No Reasonable Grounds. — Verdict of not guilty of the misdemeanor for which defendant was arrested — drunken driving — was not tantamount to a finding that the arresting officer did not have reasonable grounds to believe that defendant had committed such offense in his presence and that defendant therefore could lawfully resist the arrest. State v. Jefferies, 17 N.C. App. 195, 193 S.E.2d 388 (1972).

The failure of the State to satisfy the jury beyond a reasonable doubt of defendant's guilt of the offense charged is a far cry from a failure to satisfy the jury beyond a reasonable doubt that the arresting officer had reasonable ground to believe defendant had committed the offense in the officer's presence. In order to justify an officer in making an arrest without a warrant, it is not essential that the offense be shown to have been actually committed. It is only necessary that the officer have reasonable ground to believe such offense has been committed. State v. Jefferies, 17 N.C. App. 195, 193 S.E.2d 388 (1972).

Same — Question for Jury. — The reasonableness of the officer's grounds to believe the defendant had committed a misdemeanor in the officer's presence, when properly raised, is a factual question to be

decided by the jury. State v. Jefferies, 17 N.C. App. 195, 193 S.E.2d 388 (1972).

B. Illustrative Cases.

1. Offense in Presence of Officer.

Sheriff may arrest anyone committing crime of trespass in his presence. State v. Brown, 264 N.C. 191, 141 S.E.2d 311 (1965).

Where one defendant broke a window in a clothing store in the presence of police officers, and the only other person present was the other defendant, who was standing beside the first defendant when the latter broke the window, who then moved across the street and back with the first defendant, who left the scene with the first defendant when the marked police car appeared, and who was still with the first defendant some 15 minutes later when the officers found them together in the restaurant, under the circumstances, the officers had reasonable ground to believe that the second defendant was actively aiding and abetting the first defendant and was equally guilty with the first defendant of at least the misdemeanor of window breaking. State v. Gibson, 15 N.C. App. 445, 190 S.E.2d 315 (1972).

Defendant Found at Still Engaged in Manufacture of Whiskey. — An alcoholic beverage control officer who saw defendant at a still unlawfully engaged in the manufacture of whiskey had a lawful right to arrest defendant there without a warrant. State v. Taft, 256 N.C. 441, 124 S.E.2d 169 (1962).

Violation of Motor Vehicle Act. — An officer has a right to make an arrest without a warrant if a violation of the Motor Vehicle Act is actually committed in his presence. State v. McCaskill, 270 N.C. 788, 154 S.E.2d 907 (1967).

If the officer saw the commission of a violation of the Motor Vehicle Act, a misdemeanor, he would have the right to enter the premises where the defendant lived in order to make an arrest without a warrant. State v. McCaskill, 270 N.C. 788, 154 S.E.2d 907 (1967).

Driving Motor Vehicle While under Influence of Intoxicants. — A highway patrolman apprehending a person driving a motor vehicle on the public highway while under the influence of intoxicating liquor is authorized to arrest such person without a warrant, and such arrest is legal. State v. Broome, 269 N.C. 661, 153 S.E.2d 384 (1967).

Where an officer sees a person intoxicated at a public bar, the officer may arrest such person without a warrant for violation of § 14-335. State v. Shirlen, 269 N.C. 695, 153 S.E.2d 364 (1967).

The presence of the defendant and his driver upon the streets while curfew was in effect was a violation of an ordinance, and declared thereby to be a misdemeanor, unless they were traveling for an excepted purpose. The arresting officer having, at least, reasonable ground to believe that the defendant had committed a misdemeanor in his presence, the arrest without a warrant was lawful. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Carrying Concealed Weapon. — Where police officers stopped defendant's car to make a routine driver's license check and defendant removed revolver from a bag in the back seat, the police properly arrested him without a warrant inasmuch as they had reasonable ground to believe defendant was committing a misdemeanor — carrying a concealed weapon in violation of § 14-269 — in their presence. State v. White, 18 N.C. App. 31, 195 S.E.2d 576 (1973).

Where a fully-justified frisk by a police officer revealed that defendant was carrying a revolver, and the officer had probable cause to arrest him for carrying a concealed weapon in violation of § 14-269, at that point, the officer had absolute knowledge that defendant was violating the statute and that he was committing a misdemeanor in his presence. Thus, defendant's arrest for carrying a concealed weapon was not in violation of his constitutional rights, and the police officer did not exceed his authority under State law to arrest without a warrant. State v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

Arrest of Participants in Indecent Show. — See Brewer v. Wynne, 163 N.C. 319, 79 S.E. 629 (1913).

2. Offense Out of Presence of Officer.

Arrest for Drunken Driving Out of Presence of Officer Not Authorized. — An arrest of a defendant without a warrant for the offense of operating a motor vehicle on a public highway while under the influence of an intoxicant is illegal where the defendant has not operated the vehicle in the arresting officer's presence. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Since defendant did not operate his motor vehicle on a public street or highway "in the presence of the officer," and since the officer had no reasonable ground to believe defendant had done so, defendant's arrest without a warrant was illegal. State v. Eubanks, 283 N.C. 556, 196 S.E.2d 706 (1973).

Arrest for Manslaughter. — Probable cause to believe defendant had committed the felony of manslaughter was present where, through his investigation, the officer had reasonable cause to believe the defendant had driven his vehicle while under the influence of intoxicating liquor and that he had driven his vehicle across the median of the highway, struck one vehicle and crashed into a second vehicle, killing the two occupants. State v. Stewardson, 32 N.C. App. 344, 232 S.E.2d 308 (1977).

Information Sufficient to Authorize Arrest

for Robbery. — Where arresting officer knew that a robbery had been committed by one who had fled and had a general description of the felon, of his checkered pants, and of the cut on the rear of his right leg, and defendant was found at the location described in the officer's information and had property on his person similar to that taken in the robbery, such information in possession of the officers was amply sufficient to authorize the arrest without a warrant. State v. Grier, 268 N.C. 296, 150 S.E.2d 443 (1966); State v. Dickens, 278 N.C. 537, 180 S.E.2d 844 (1971).

Where a police officer who had been informed of a felony committed by a barefooted white man, wearing coveralls, was looking for such a man and at about 3 A.M. he found the defendant, who answered the description, hiding behind a bush two blocks from the scene of the crime, it was lawful for him to arrest the defendant without a warrant. State v. Tippett, 270 N.C. 588, 155 S.E.2d 269 (1967); State v. Dickens, 278 N.C. 537, 180 S.E.2d 844 (1971).

Reasonable grounds existed for an arrest without a warrant in a case where the arresting officer had information that a robbery had been committed by a person who fled and the officer was furnished a description of the assailant and the clothing which he wore. The officer was also advised that the assailant had a cut on his leg and that he could probably be found at a certain address. Upon arriving at the given address, he found defendant, whose appearance coincided with the description furnished, and arrest was made without warrant. State v. Jacobs, 277 N.C. 151, 176 S.E.2d 744 (1970).

Where the police had a description of defendants, including their height, weight, estimated age, clothing, color and complexion, one defendant had been identified from photographs by two eyewitnesses and one informer, a second informer whose information had led to the conviction of seven persons within the past two years, had told police that defendants were the individuals involved in this robbery, had told police how he came into possession of this information and how it was revealed to him, the totality of these facts and circumstances would warrant a prudent man in believing that the felony of armed robbery had been committed and that these defendants participated in commission of the crime, the Supreme Court held that the officers acted on reasonable ground and with probable cause. State v. Alexander, 279 N.C. 527, 184 S.E.2d 274 (1971).

Where although the officer had not personally participated in investigation of the robbery for which defendant was arrested, but the record showed that at the time he made the arrest he knew that defendant had been identified from a photograph by one of the eyewitnesses as the man who was involved in the robbery, the arresting officer had probable cause to believe defendant had committed a felony. State v. McDonald, 32 N.C. App. 457, 232 S.E.2d 467 (1977).

Description of Robbers and Vehicle. — The patrolman was justified in assuming, based upon the radio alert that he had just received, that the four Negro men he observed traveling north from Greensboro in a 1968 blue and white Dodge Charger automobile bearing the District of Columbia license plate "GWYNN" were the same men as those just described to him as the perpetrators of an armed robbery, and he had reasonable grounds to stop and take them into custody. State v. Westry, 15 N.C. App. 1, 189 S.E.2d 618 (1972).

When the police officer had been notified by the State highway patrol radio dispatcher that a bank robbery and shooting had taken place and that a maroon Cadillac bearing New Jersey license plates had been seen outside the bank, and when the police officer shortly thereafter saw the car answering this description traveling away from the scene of the crime, he had sufficient probable cause to stop the vehicle and search it for contraband and weapons as well as probable cause to arrest the defendant therein. State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976), cert. denied, 429 U.S. 1123, 97 S. Ct. 1160, 51 L. Ed. 2d 573 (1977).

When the victim in an assault and robbery charge pointed out the defendant to an officer as being one of his assailants, the officer not only had the right but the duty to arrest the defendant. State v. Grant, 248 N.C. 341, 103 S.E.2d 339 (1958).

Where the victim of a robbery gave officers a description of the men who robbed him and the vehicle in which they were riding, and where on the same night men fitting the description given the officers and riding in a vehicle similar to the one described to the officers were apprehended and arrested by the officers, the Supreme Court held that the officers had ample evidence of probable cause to authorize the making of the arrest. State v. Jacobs, 277 N.C. 151, 176 S.E.2d 744 (1970).

The facts and circumstances surrounding defendant's arrest for armed robbery furnished plenary evidence to support a reasonable belief on the part of the officers that defendant had committed a felony. State v. Alexander, 279 N.C. 527, 184 S.E.2d 274 (1971).

When police officers stopped an automobile fitting the description of one used in conjunction with a robbery and observed a pistol on the seat of the automobile, they had reasonable ground to believe that defendant had committed a felony and would evade arrest if not taken into custody. State v. Bell, 270 N.C. 25, 153 S.E.2d 741 (1967); State v. Dickens, 278 N.C. 537, 180 S.E.2d 844 (1971).

Where a felonious breaking and entering

and a felonious larceny had occurred, and footprints led from the scene of the felonies to a wooded area, and the stolen items were found in that wooded area, and later the police saw a person enter that area and look around, then the police had reasonable ground upon which to believe that person had committed the two felonies; that he would evade arrest if not immediately taken into custody; and thus the search of his person (which produced positive evidence of his guilt) was legal. State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971).

An arrest without warrant was upheld when the evidence disclosed that the officer had information that the felony of breaking and entering had been committed, and the defendants fitted the description of the perpetrators of the crimes. State v. Roberts, 6 N.C. App. 312, 170 S.E.2d 193 (1969), aff'd, 276 N.C. 98, 171 S.E.2d 440 (1970).

Discovery by police of a bag of money, together with previous observations of the defendants and a defendant's resulting flight gave officers sufficient probable cause to believe that a felony had been committed and subsequently to place all three defendants under arrest without a warrant. State v. Allen, 15 N.C. App. 670, 190 S.E.2d 714 (1972), rev'd on other grounds, 282 N.C. 503, 194 S.E.2d 9 (1973).

The warrantless arrest of a defendant for the felonious possession of LSD and the subsequent warrantless searches of his person were held lawful, where (1) the arresting officer received information from a reliable informant that two unknown persons, accompanied by the defendant, were on a certain street and that the two unknown persons had narcotic drugs in their possession; (2) the officer briefly observed the three suspects walking on the sidewalk; (3) the officer arrested the defendant on the street for the possession of narcotic drugs, but the search of defendant's person at that time uncovered no drugs; and (4) a subsequent "strip search" at the police station resulted in the finding of LSD tablets in defendant's clothing. State v. Parker, 11 N.C. App. 648, 182 S.E.2d 264 (1971).

Arrest for Sale of LSD. — Where the officer received information from an informant of known reliability that a described person was at that time at a particular location engaged in selling LSD, went to the scene accompanied by another officer and found the defendant, dressed in the manner described by the second informant, observed the defendant for several minutes, during which time his actions were consistent with the activity of selling LSD, and where, when the officers approached, defendant started walking rapidly away, the officer's own observations and defendant's activities in the officer's presence served to verify the information furnished by the reliable informant, and thus, it was lawful for the officer to effect a warrantless arrest. State v. Hardy, 31 N.C. App. 67, 228 S.E.2d 487 (1976).

Arrest for Possession of Heroin for Purpose of Sale. — A police officer had reasonable grounds to arrest defendant without a warrant for the felony of possessing heroin for purpose of sale, where a person suffering from a narcotics overdose told the officer that the defendant had administered hypodermically narcotic drugs to him and that the defendant had narcotic drugs on his person. State v. Jackson, 11 N.C. App. 682, 182 S.E.2d 271, aff'd, 280 N.C. 122, 185 S.E.2d 202 (1971).

Rearrest of Escaped Convict. — An escaped convict may be rearrested in any county of the State without new process, by the officer in charge of him, to compel him to complete the service of the sentence imposed by the court. State v. Finch, 177 N.C. 599, 99 S.E. 409 (1919).

An escapee from the State's prison system may be lawfully seized and held in custody by the police, with or without probable cause. State v. White, 21 N.C. App. 173, 203 S.E.2d 644 (1974).

Escapees Lacked Standing to Challenge Probable Cause for Arrest. — See State v. White, 21 N.C. App. 173, 203 S.E.2d 644 (1974).

III. USE OF FORCE IN ARREST.

Purpose of Deadly Force Provision. — Subsection (d)(2) was designed solely to codify and clarify those situations in which a police officer may use deadly force without fear of incurring criminal or civil liability. State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

Officer Cannot Shoot at Fleeing Misdemeanant. — Where a person is fleeing from arrest, charged with a misdemeanor, and is out of the control of the officer, such officer is guilty of an assault if he shoots at the said person. And indeed the use of a pistol in attempting to arrest for a misdemeanor is excessive force. Sossamon v. Cruse, 133 N.C. 470, 45 S.E. 757 (1903).

Reasonableness of Grounds for Using Force a Jury Question. — In an action for wrongful death growing out of the mortal wounding of intestate in a scuffle while a police officer was attempting to arrest him, the court should have instructed the jury that the jury and not the officer must be the judge of the reasonableness of the grounds on which the officer acted. Perry v. Gibson, 247 N.C. 212, 100 S.E.2d 341 (1957), aff'd, 249 N.C. 134, 105 S.E.2d 277 (1958).

IV. ENTRY ON PREMISES.

Reasonable grounds for belief can be based upon information given to an officer by another, the source of such information being reasonably reliable. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

Open door obviates the demand for admittance by first knocking. State v. Rudisill, 20 N.C. App. 313, 201 S.E.2d 368 (1973).

Officers Admitted by Owner of House. — The arrest without warrant of the defendant for armed robbery, the defendant having been discovered hiding in the attic of a house, is lawful where the discovery and arrest of the defendant occurred after the owner of the house had admitted the officers by the front door. State v. Basden, 8 N.C. App. 401, 174 S.E.2d 613 (1970).

Officer Gave Proper Notice. — Where the searching officer made the announcement to the person at the door and repeated it to the other occupants as soon as he came upon them, the requirement that such notice be given as will identify the officer and protect the occupants and the officer is satisfied. State v. Rudisill, 20 N.C. App. 313, 201 S.E.2d 368 (1973).

Entry without Notice May Be Proper under Special and Emergency Conditions. — While under ordinary circumstances the officers must announce their purpose and demand admittance before making a forcible entry to conduct a search pursuant to a valid search warrant, such an entry may be proper under special and emergency conditions when it reasonably appears that such an announcement and demand by the officer and the delay consequent thereto would provoke the escape of the suspect, place the officer in peril, or cause the destruction or disposition of critical evidence. State v. Watson, 19 N.C. App. 160, 198 S.E.2d 185 (1973).

Forcible Entry Where Admittance Demanded and Denied. — Compliance with the requirement of former § 15-44 that admittance be "demanded and denied" serves to identify the official status of those seeking admittance. The requirement is for the protection of the officers as well as for the protection of the occupant and the recognition of his constitutional rights. State v. Covington, 273 N.C. 690, 161 S.E.2d 140 (1968); State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

The requirement that admittance be demanded and denied would seem to apply even though the officers have a search warrant or warrant of arrest. State v. Covington, 273 N.C. 690, 161 S.E.2d 140 (1968); State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972); State v. Rudisill, 20 N.C. App. 313, 201 S.E.2d 368 (1973).

Even where there is reasonable ground to believe that a person guilty of a felony is concealed in a house, there exists no right, in the absence of special and emergency circumstance, to break into the house and arrest the person unless and until admittance has been demanded and denied. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

There was sufficient compliance with the requirement that entrance be demanded and denied before a police officer can forcibly enter a dwelling for the purpose of making an arrest, where defendant had observed the officer's uniform and was aware of his official status, the officer had seen defendant looking out a door and knew that defendant had observed him, and the officer twice called out defendant's name and received no reply before he opened the door to defendant's residence. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

The requirement that a police officer, armed with an arrest warrant or search warrant, must demand and be denied admittance before making forcible entry, serves to identify his official status and to protect both the officer and the occupant. State v. Shue, 16 N.C. App. 696, 193 S.E.2d 481 (1972); State v. Gagne, 22 N.C. App. 615, 207 S.E.2d 384 (1974).

Where an officer comes armed with process founded on a breach of the peace, he may, after demand of admittance for the purpose of making the arrest, and refusal of the occupant to open the doors of a house, lawfully break them in order to effect an entrance and if he act in good faith in doing so, both he and his posse comitatus will be protected. 15 N.C.L. Rev. 125, citing State v. Mooring, 115 N.C. 709, 20 S.E. 182 (1894).

The fact that silence greeted the officers' demands for entrance and that defendant was not found in the house did not make their entry illegal. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

Length of Time Prior to Forcible Entry Must Be Reasonable. — The length of time an officer must wait before breaking in to serve a valid warrant must be reasonable under the circumstances as they appear to him. State v. Watson, 19 N.C. App. 160, 198 S.E.2d 185 (1973).

Entry Held Lawful. — The entry of police officers into the house in which the defendant and his companions were hiding, and the arrest without warrant of the occupants therein for the offense of armed robbery, was proper and lawful where (1) the felony of armed robbery had been committed at an ABC store, (2) within a few minutes after the robbery the officers discovered in the driveway of the house the automobile which they reasonably believed had been used in the robbery, (3) all curtains on the windows of the house were drawn, and (4) the occupants of the house failed to respond to the officers' knock at the front door. State v. Basden, 8 N.C. App. 401, 174 S.E.2d 613 (1970).

The question of whether there was an actual breaking of the door is not determinative of the issue of whether or not the statute is applicable. State v. Turnbull, 16 N.C. App. 542, 192 S.E.2d 689 (1972).

§ 15A-402. Territorial jurisdiction of officers to make arrests. — (a) Territorial Jurisdiction of State Officers. — Law-enforcement officers of the State of North Carolina may arrest persons at any place within the State.

(b) Territorial Jurisdiction of County and City Officers. — Law-enforcement officers of cities and counties may arrest persons within their particular cities or counties and on any property and rights-of-way owned by the city or county outside its limits.

(c) City Officers, Outside Territory. — Law-enforcement officers of cities may arrest persons at any point which is one mile or less from the nearest point in the boundary of such city.

(d) County and City Officers, Immediate and Continuous Flight. — Law-enforcement officers of cities and counties may arrest persons outside the territory described in subsections (b) and (c) when the person arrested has committed a criminal offense within that territory, for which the officer could have arrested the person within that territory, and the arrest is made during such person's immediate and continuous flight from that territory.

(e) County Officers, Outside Territory, for Felonies. — Law-enforcement officers of counties may arrest persons at any place in the State of North Carolina when the arrest is based upon a felony committed within the territory described in subsection (b). (1935, c. 204; 1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

The Commission here provides a straightforward statement of the territorial jurisdiction of officers to make arrests, bringing together the provisions previously split between Chapter 15 and Chapter 160A. Although it is generally conceded that there is a power of "hot pursuit" for going beyond normal territorial jurisdiction, there has been little authority on the subject in North Carolina, and no statutory coverage other than that referred to in § 15-42 and in Chapter 160A. The Commission here proposed a statement of that authority and uses the term "immediate and continuous flight," a term more commonly used in statutes and which conveys the requisite idea without the undesirable connotations of dangerous chases inherent in the phrase "hot pursuit."

Technical violation of this section does not necessarily require exclusion of evidence obtained in the search incident to the arrest. State v. Mangum, 30 N.C. App. 311, 226 S.E.2d 852 (1976).

§ 15A-403. Arrest by officers from other states. — (a) Any law-enforcement officer of a state contiguous to the State of North Carolina who enters this State in fresh pursuit and continues within this State in such fresh pursuit of a person who is in immediate and continuous flight from the commission of a criminal offense, has the same authority to arrest and hold in custody such person on the ground that he has committed a criminal offense in another state which is a criminal offense under the laws of the State of North Carolina as law-enforcement officers of this State have to arrest and hold in custody a person on the ground that he has committed a criminal offense in this State.

(b) If an arrest is made in this State by a law-enforcement officer of another state in accordance with the provisions of subsection (a), he must, without unnecessary delay, take the person arrested before a judicial official of this State, who must conduct a hearing for the purpose of determining the lawfulness of the arrest. If the judicial official determines that the arrest was lawful, he must commit the person arrested to await a reasonable time for the issuance of an extradition warrant by the Governor of this State or release him

pursuant to Article 26 of this Chapter, Bail. If the judicial official determines that the arrest was unlawful, he must discharge the person arrested.

(c) This section applies only to law-enforcement officers of a state which by its laws has made similar provision for the arrest and custody of persons closely pursued within its territory. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section is based upon the "Uniform Fresh Pursuit Act," and permits officers from other states in fresh pursuit of a person who has committed an offense to make the arrest in North Carolina. The Commission has restricted the act by limiting it to officers from contiguous states, requiring reciprocal provisions, requiring that the offender be taken before a judicial officer in this State for determination of lawfulness of the arrest, and requiring extradition proceedings for his removal.

§ 15A-404. Detention of offenders by private persons. — (a) No Arrest; Detention Permitted. — No private person may arrest another person except as provided in G.S. 15A-405. A private person may detain another person as provided in this section.

(b) When Detention Permitted. — A private person may detain another person when he has probable cause to believe that the person detained has committed in his presence:

(1) A felony,
(2) A breach of the peace,
(3) A crime involving physical injury to another person, or
(4) A crime involving theft or destruction of property.

(c) Manner of Detention. — The detention must be in a reasonable manner considering the offense involved and the circumstances of the detention.

(d) Period of Detention. — The detention may be no longer than the time required for the earliest of the following:

(1) The determination that no offense has been committed.
(2) Surrender of the person detained to a law-enforcement officer as provided in subsection (e).

(e) Surrender to Officer. — A private person who detains another must immediately notify a law-enforcement officer and must, unless he releases the person earlier as required by subsection (d), surrender the person detained to the law-enforcement officer. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section would replace the old concept of "citizen's arrest" with a concept of "citizen's detention." North Carolina has authorized the private citizen to make arrests in certain limited circumstances — essentially felonies and breaches of the peace in his presence. To those two situations are added crimes involving physical injury to another person and a general authorization with regard to crimes involving theft or destruction of property.

The important conceptual change is from "arrest" to "detention." The notion of a private citizen "arresting" another in certain circumstances had led persons at times to act without authority and at times to place themselves or others in unjustified danger. Perhaps a safer idea is that the private citizen may detain the offender sufficiently long to turn him over to a law-enforcement officer. Though there may be little or no difference in the physical actions taken, it is hoped that this will be a clearer and safer concept for the private citizen.

This section has no effect on the 1971 addition to § 14-72.1 which provides that a merchant is not civilly liable for reasonably detaining persons believed to have violated the "shoplifting" statute.

Applied in Autry v. Mitchell, 420 F. Supp. 967 (E.D.N.C. 1976).

§ 15A-405. Assistance to law-enforcement officers by private persons to effect arrest or prevent escape; benefits for private persons. — (a) Assistance upon Request; Authority. — Private persons may assist law-enforcement officers in effecting arrests and preventing escapes from custody when requested to do so by the officer. When so requested, a private person has the same authority to effect an arrest or prevent escape from custody as the officer making the request. He does not incur civil or criminal liability for an invalid arrest unless he knows the arrest to be invalid. Nothing in this subsection constitutes justification for willful, malicious or criminally negligent conduct by such person which injures or endangers any person or property, nor shall it be construed to excuse or justify the use of unreasonable or excessive force.

(b) Benefits to Private Persons. — A private person assisting a law-enforcement officer pursuant to subsection (a) is:

(1) To be treated as a citizen duly deputized as a deputy by a sheriff or other law-enforcement officer in an emergency for the purposes of G.S. 143-166(m) (Law-Enforcement Officers' Benefit and Retirement Fund);

(2) Entitled to the same benefits as a "law-enforcement officer" as that term is defined in G.S. 143-166.2(4) (Law-Enforcement Officers', Firemen's and Rescue Squad Workers' Death Benefit Act); and

(3) To be treated as an employee of the employer of the law-enforcement officer within the meaning of G.S. 97-2(2) (Workmen's Compensation Act).

The Governor and the Council of State are authorized to allocate funds from the Contingency and Emergency Fund for the payment of benefits under subdivisions (1) and (3) when no other source is available for the payment of such benefits and when they determine that such allocation is necessary and appropriate. (1868-9, c. 178, subch. 1, s. 2; Code, s. 1125; Rev., s. 3181; C. S., s. 4547; 1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

Source: §§ 15-45, 14-224. Subsection (a) of this section changes the former law making it the duty of the private citizen to assist a law-enforcement officer in making arrests and preventing escapes under certain circumstances when requested to do so. Here there is substituted a broader, but permissive, statute. Thus the criminal sanction provided by § 14-224 is repealed. When so requested, the private citizen has the same authority, both as to extent and as to limitation, as the officer making the request, but he is protected from civil or criminal liability, if the arrest is invalid, unless he knows it is invalid.

Subsection (b) of this section brings together several benefits available to law-enforcement officers and makes them available to private citizens assisting law-enforcement officers pursuant to subsection (a). Except for the Death Benefit Act, these benefits have already been available to private citizens in some circumstances.

(1) Section 143-166(m) makes the Law-Enforcement Officers' Benefit and Retirement Fund available to "any citizen duly deputized as a deputy by a sheriff or other law-enforcement officer in an emergency." The effect here is to dispense with any formalities.

(2) The Law-Enforcement Officers' Death Benefit Act is applicable only to full-time officers, § 143-166.2(4). No funding problem is created by making the act applicable to the private citizen under these circumstances, for the benefits are payable from the Contingency and Emergency Fund.

(3) The Workmen's Compensation Act, § 97-2(2), defines "employee" to include "deputy sheriffs appointed to serve in an emergency, but as to those so appointed, only during the continuation of the emergency." We here again dispense with the formalities and make the act applicable to private persons acting pursuant to subsection (a). Of course, that subsection is limited to requested help in effecting arrests and

preventing escapes, thus generally presenting an emergency situation.

(By way of comparison, note that § 160A-282 makes the benefits of the North Carolina Workmen's Compensation Act applicable to auxiliary police.)

The last sentence of subsection (b) makes the Contingency and Emergency Fund available, if necessary, to assist in payments under subdivisions (1) and (3) — unnecessary as to subdivision (2) for those benefits are paid from the Contingency and Emergency Fund. While it should not ordinarily be necessary, it was thought advisable to grant this authority in order to prevent loss to the citizen in the event of the failure of other funding. Compare the provisions for the State Volunteer Fire Department in §§ 69-24 and 69-25.

ARTICLE 21.

§§ 15A-406 to 15A-453: Reserved for future codification purposes.

ARTICLE 22.

§§ 15A-454 to 15A-500: Reserved for future codification purposes.

SUBCHAPTER V. CUSTODY.

ARTICLE 23.

Police Processing and Duties upon Arrest.

Editor's Note. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-501. Police processing and duties upon arrest generally. — Upon the arrest of a person, with or without a warrant, but not necessarily in the order hereinafter listed, a law-enforcement officer:

(1) Must inform the person arrested of the charge against him or the cause for his arrest.

(2) Must, with respect to any person arrested without a warrant and, for purpose of setting bail, with respect to any person arrested upon a warrant or order for arrest, take the person arrested before a judicial official without unnecessary delay.

(3) May, prior to taking the person before a judicial official, take the person arrested to some other place if the person so requests.

(4) May, prior to taking the person before a judicial official, take the person arrested to some other place if such action is reasonably necessary for the purpose of having that person identified.

(5) Must without unnecessary delay advise the person arrested of his right to communicate with counsel and friends and must allow him reasonable time and reasonable opportunity to do so. (1868-9, c. 178, subch. 1, s. 7; Code, s. 1130; Rev., s. 3182; C. S., s. 4548; 1937, c. 257, ss. 1, 2; 1955, c. 889; 1969, c. 296; 1973, c. 1286, s. 1; 1975, c. 166, ss. 7, 8.)

OFFICIAL COMMENTARY

This section is similar to former § 15-47. Some of the provisions of that statute are separately covered, and it has been possible to simplify the format of this section.

Subdivisions (3) and (4) are based upon the American Law Institute's Model Code of Pre-Arraignment Procedure, Tentative Draft No. 1, Section 3.09 (1) (Alternate Provision) and Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967). North Carolina statutes formerly did not provide such a section. See § 15-24 (Arrest with a warrant) and § 15-46 (Arrest without a warrant).

Editor's Note. — The 1975 amendment added "or the cause for his arrest" at the end of subdivision (1) and substituted "order for arrest" for "order of arrest" in subdivision (2).

For note on right to counsel in pretrial situations, see 38 N.C.L. Rev. 630 (1960).

For article entitled, "The Applicability of Miranda to the Police Booking Process," see 1976 Duke L.J. 574 (1976).

Opinions of Attorney General. — Mr. Lee J. Greer, Prosecutor, Thirteenth Judicial District, 40 N.C.A.G. 351 (1969).

Statute Implements Constitutional Rights. — To implement the constitutional rights under N.C. Const., Art. I, § 23, the General Assembly enacted former § 15-47, relating to the duties of an arresting officer and similar to this section. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Duty of Officer Making Arrest without Warrant. — A police officer within the limits of his city may summarily and without warrant arrest a person for a misdemeanor committed in his presence. But in such case it is the duty of the officer to inform the person arrested of the charge against him and immediately take him before someone authorized to issue criminal warrants and have warrant issued, giving him opportunity to provide bail and communicate with counsel and friends. Perry v. Hurdle, 229 N.C. 216, 49 S.E.2d 400 (1948).

Liability of Officer for Wrongful Delay in Procuring Warrant. — A warrant must be procured as soon after the arrest as possible and, where it appears that this was not done, the officer responsible for the arrest is personally answerable in damages. Hobbs v. City of Washington, 168 N.C. 293, 84 S.E. 391 (1915).

The rights of communication go with a man into jail, and reasonable opportunity to exercise them must be afforded by the restraining authorities. The denial of the opportunity to exercise that right is a denial of the right. State v. Wheeler, 249 N.C. 187, 105 S.E.2d 615 (1958); State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Right to Communication Includes Right of Access. — A defendant is entitled to consult with friends and relatives and to have them make observations of his person. The right to communicate with counsel and friends necessarily includes the right of access to them. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Communication Not Limited to Receiving Professional Advice. — Under N.C. Const., Art. I, § 23, and former § 15-47, a defendant's communication and contacts with the outside world were not limited to receiving professional advice from his attorney. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Right to Communication When Intoxication Is Essential Element of Offense. — When one is taken into police custody for an offense of which intoxication is an essential element, time is of the essence. Intoxication does not last. Ordinarily a drunken man will "sleep it off" in a few hours. Thus, if one accused of driving while intoxicated is to have witnesses for his defense, he must have access to his counsel, friends, relatives, or some disinterested person within a relatively short time after his arrest. He is entitled to communicate with them immediately, and this is true whether he is arrested at 2:00 in the morning or 2:00 in the afternoon. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

The denial of request for permission to contact counsel as soon as a person is charged with a crime involving the element of intoxication is a denial of a constitutional right resulting in irreparable prejudice to his defense. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

A defendant's guilt or innocence under § 20-138 depends upon whether he is intoxicated at the time of his arrest. His condition then is the crucial and decisive fact to be proven. Permission to communicate with counsel and friends is of no avail if those who come to the jail in response to a prisoner's call are not permitted to see for themselves whether he is intoxicated. In this situation, the right of a defendant to communicate with counsel and friends implies, at the very least, the right to have them see him, observe and examine him, with reference to his alleged intoxication. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

One who is detained by police officers under a charge of driving while under the influence of an intoxicant has the same constitutional and statutory rights, including the rights given under N.C. Const., Art. I, § 23, as any other accused. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

A defendant is entitled to counsel at every critical stage of the proceedings against him. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

A critical stage has been reached in a defendant's case when, immediately after officers have interrogated the defendant and conducted their test for sobriety, they charge him with the offense of driving while intoxicated, and the denial of counsel at this

point makes it impossible for a defendant to have disinterested witnesses observe his condition and to obtain a blood test by a doctor — the only means by which defendant might prove his innocence. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

The fact that a person is defendant's lawyer as well as his friend does not impair his right to see the defendant at a critical time of the proceedings. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

The object of a preliminary hearing is to effect a release for one who is held in violation of his rights. State v. Chamberlain, 263 N.C. 406, 139 S.E.2d 620 (1965).

When the required bail bond is given and approved, the accused is to be released. State v. Hill, 9 N.C. App. 279, 176 S.E.2d 41 (1970).

Effect of Violation of Statute. — Former § 15-47, relating to duties of an arresting officer, did not prescribe mandatory procedures affecting the validity of a trial. State v. Hargett, 255 N.C. 412, 121 S.E.2d 589 (1961); Carroll v. Turner, 262 F. Supp. 486 (E.D.N.C. 1966), cert. denied, 390 U.S. 969, 88 S. Ct. 1085, 19 L. Ed. 2d 1176 (1968); State v. McCloud, 276 N.C. 518, 173 S.E.2d 753 (1970); State v. Able, 13 N.C. App. 365, 185 S.E.2d 422 (1971).

The violation of former § 15-47, in regard to bail and the manner of detention of defendant under arrest, would not render defendant's voluntary confession incompetent. State v. Exum, 213 N.C. 16, 195 S.E. 7 (1938).

While there are circumstances under which a failure to observe the provisions of former §§ 15-46 and 15-47, relating to arrest without warrant and duties of arresting officers, may not affect constitutional rights, yet where an offense as serious as robbery with firearms is charged, such failure must be given great weight in a hearing under the Post-Conviction Hearing Act (§ 15-217 et seq.). State v. Graves, 251 N.C. 550, 112 S.E.2d 85 (1960).

Confession Held Involuntary. — Defendant's youth, his low mentality, and limited education, his incommunicado detention and interrogation for 19 hours by a number of different police officers who allowed him only scant time to rest, the inadequate explanation of his constitutional rights and the suggestions that it would be better for him to confess, the failure of the police to notify his parents or to afford him the opportunity to consult with a lawyer, and the delay in producing him before a magistrate — all of these elements combined to establish that defendant's confession could not be deemed a voluntary act and that its admission into evidence denied him due process of law. Thomas v. North Carolina, 447 F.2d 1320 (4th Cir. 1971).

§ 15A-502. Photographs and fingerprints. — (a) A person charged with the commission of a felony or a misdemeanor may be photographed and his fingerprints may be taken for law-enforcement records only when he has been:

(1) Arrested or committed to a detention facility, or

(2) Committed to imprisonment upon conviction of a crime, or

(3) Convicted of a felony.

(b) This section does not authorize the taking of photographs or fingerprints when the offense charged is a misdemeanor under Chapter 20 of the General Statutes, "Motor Vehicles," for which the penalty authorized does not exceed a fine of five hundred dollars ($500.00), imprisonment for six months, or both.

(c) This section does not authorize the taking of photographs or fingerprints of a "child" as defined for the purposes of G.S. 7A-278(2), unless the case has been transferred to the superior court division pursuant to G.S. 7A-280.

(d) This section does not prevent the taking of photographs, moving pictures, video or sound recordings, fingerprints, or the like to show a condition of intoxication or for other evidentiary use.

(e) Fingerprints or photographs taken pursuant to subsection (a) may be forwarded to the State Bureau of Investigation, the Federal Bureau of Investigation, or other law-enforcement agencies. (1973, c. 1286, s. 1; 1977, c. 711, s. 22.)

OFFICIAL COMMENTARY

This section carries forward the concept of the present provisions of the former first two paragraphs of § 114-19 in a more logical location than in the Chapter dealing with the Department of Justice. Those provisions have been simplified and broadened in some respects, but restricted as to motor vehicle and juvenile offenses.

Editor's Note. — The 1977 amendment reenacted subsection (c) without change.

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, "Parole" shall not apply to persons sentenced before July 1, 1978."

For article entitled, "The Applicability of Miranda to the Police Booking Process," see 1976 Duke L.J. 574 (1976).

Cited in State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

§ 15A-503. Police assistance to persons arrested while unconscious or semiconscious. — (a) Whenever a law-enforcement officer arrests a person who is unconscious, semiconscious, or otherwise apparently suffering from some disabling condition, and who is unable to provide information on the causes of the condition, the officer should make a reasonable effort to determine if the person arrested is wearing a bracelet or necklace containing the Medic Alert Foundation's emergency alert symbol to indicate that the person suffers from diabetes, epilepsy, a cardiac condition, or any other form of illness which would cause a loss of consciousness. If such a symbol is found indicating that the person being arrested suffers from one of those conditions, the officer must make a reasonable effort to have appropriate medical care provided.

(b) Failure of a law-enforcement officer to make a reasonable effort to discover an emergency alert symbol, as required by this section, does not by itself establish negligence of the officer, but may be considered along with other evidence to determine if the officer took reasonable precautions to ascertain the emergency medical needs of the person in his custody.

(c) A person who is provided medical care under the provisions of this section is liable for the reasonable costs of that care unless he is indigent.

(d) Repealed by Session Laws 1975, c. 818, s. 1. (1975, c. 306, s. 1; c. 818, s. 1.)

Editor's Note. — The 1975 amendment repealed subsection (d), which stated: "Willful false representation of the existence of diabetes, epilepsy, a cardiac condition, or other disabling condition covered by this section, is punishable as provided in G.S. 14-223.1."

§§ 15A-504 to 15A-510: Reserved for future codification purposes.

ARTICLE 24.

Initial Appearance.

Editor's Note. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-511. Initial appearance. — (a) Appearance before Magistrate. —

(1) A law-enforcement officer making an arrest with or without a warrant must take the arrested person without unnecessary delay before a magistrate as provided in G.S. 15A-501.

(2) The magistrate must proceed in accordance with this section, except in those cases in which he has the power to determine the matter pursuant to G.S. 7A-273. In those cases, if the arrest has been without a warrant, the magistrate must prepare a magistrate's order containing a statement of the crime with which the defendant is charged.

(3) If the defendant brought before a magistrate is so unruly as to disrupt and impede the proceedings, becomes unconscious, is grossly intoxicated, or is otherwise unable to understand the procedural rights afforded him by the initial appearance, upon order of the magistrate he may be confined or otherwise secured. If this is done, the magistrate's order must provide for an initial appearance within a reasonable time so as to make certain that the defendant has an opportunity to exercise his rights under this Chapter.

(b) Statement by the Magistrate. — The magistrate must inform the defendant of:

(1) The charges against him;

(2) His right to communicate with counsel and friends; and

(3) The general circumstances under which he may secure release under the provisions of Article 26, Bail.

(c) Procedure When Arrest Is without Warrant; Magistrate's Order. — If the person has been arrested, for a crime, without a warrant:

(1) The magistrate must determine whether there is probable cause to believe that a crime has been committed and that the person arrested committed it, and in the manner provided by G.S. 15A-304(d).

(2) If the magistrate determines that there is no probable cause the person must be released.

(3) If the magistrate determines that there is probable cause, he must issue a magistrate's order:

a. Containing a statement of the crime of which the person is accused in the same manner as is provided in G.S. 15A-304(c) for a warrant for arrest, and

b. Containing a finding that the defendant has been arrested without a warrant and that there is probable cause for his detention.

(4) Following the issuance of the magistrate's order, the magistrate must proceed in accordance with subsection (e) and must file the order with any supporting affidavits and records in the office of the clerk.

(d) Procedure When Arrest Is Pursuant to Warrant. — If the arrest is made pursuant to a warrant, the magistrate must proceed in accordance with subsection (e).

(e) Commitment or Bail. — If the person arrested is not released pursuant to subsection (c), the magistrate must release him in accordance with Article 26 of this Chapter, Bail, or commit him to an appropriate detention facility pursuant to G.S. 15A-521 pending further proceedings in the case.

(f) Powers Not Limited to Magistrate. — Any judge, justice, or clerk of the General Court of Justice may also conduct an initial appearance as provided in this section. (1868-9, c. 178, subch. 1, s. 7; Code, s. 1130; Rev., s. 3182; C. S., s. 4548; 1973, c. 1286, s. 1; 1975, c. 166, ss. 9-11; 1975, 2nd Sess., c. 983, s. 141.)

OFFICIAL COMMENTARY

When an arrested person is brought before a magistrate, the magistrate may try the matter if it is within his jurisdiction. Otherwise, there are two possibilities. If the person has been arrested without a warrant, and there has been no judicial determination of probable cause, the magistrate should make that determination, and release the defendant if it is lacking. The determination is made in the same manner as when a warrant is sought. Section 15-46 provided for the issuance of a warrant in such a case — even though the defendant had already been arrested. The new procedure utilizes all of the statements in the warrant format, but eliminates the actual order for arrest. At this point an order of commitment or bail is appropriate if the defendant is not released.

Of course, if the defendant has been arrested under a warrant there already has been an initial determination of probable cause, and it is not necessary to repeat that step. If the defendant is continued in custody, the magistrate must proceed to set bail.

While the steps in this section ordinarily will be performed by a magistrate, it was thought prudent also to authorize other judicial officers to perform these steps (subsection (f)).

Editor's Note. — The 1975 amendment inserted "a magistrate's order containing" in the second sentence of subdivision (2) of subsection (a), substituted "release under the provisions of Article 26, Bail" for "pretrial release" at the end of subdivision (3) of subsection (b) and inserted "for a crime" in the introductory language of subsection (c).

The 1975, 2nd Sess. amendment added subdivision (3) of subsection (a).

Effect of Failure to Take Arrested Person before Magistrate. — Former § 15-46, requiring a person arrested without warrant to be taken before a magistrate with jurisdiction to issue a warrant in the case, did not prescribe mandatory procedures affecting validity of trial. Carroll v. Turner, 262 F. Supp. 486 (E.D.N.C. 1966), cert. denied, 390 U.S. 969, 88 S. Ct. 1085, 19 L. Ed. 2d 1176 (1968); State v. Broome, 269 N.C. 661, 153 S.E.2d 384 (1967); State v. McCloud, 276 N.C. 518, 173 S.E.2d 753 (1970); State v. Able, 13 N.C. App. 365, 185 S.E.2d 422 (1971).

Court did not err in not allowing defendant's motion to quash the warrant charging him with resisting arrest for the reason that he was arrested without a warrant and was not taken before a magistrate as provided by former § 15-46, because the State Supreme Court has held that that section did not prescribe mandatory procedures affecting the validity of a trial. State v. Foust, 18 N.C. App. 138, 196 S.E.2d 375 (1973).

This section does not prescribe mandatory procedures affecting the validity of the trial in the absence of a showing that defendant was prejudiced thereby. State v. Burgess, 33 N.C. App. 76, 234 S.E.2d 40 (1977).

Cited in State v. Terry, 30 N.C. App. 372, 226 S.E.2d 846 (1976).

§§ 15A-512 to 15A-520: Reserved for future codification purposes.

ARTICLE 25.

Commitment.

Editor's Note. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-521. Commitment to detention facility pending trial. — (a) Commitment. — Every person charged with a crime and held in custody who has not been released pursuant to Article 26 of this Chapter, Bail, must be committed by a written order of the judicial official who conducted the initial appearance as provided in Article 24 to an appropriate detention facility as provided in this section.

(b) Order of Commitment; Modification. — The order of commitment must:

(1) State the name of the person charged or identify him if his name cannot be ascertained.

(2) Specify the offense charged.

(3) Designate the place of confinement.

(4) If release is authorized pursuant to Article 26 of this Chapter, Bail, state the conditions of release. If a separate order stating the conditions has been entered, the commitment may make reference to that order, a copy of which must be attached to the commitment.

(5) Subject to the provisions of subdivision (4), direct, as appropriate, that the defendant be:

a. Produced before a district court judge pursuant to Article 29 of this Chapter, First Appearance before District Court Judge,

b. Produced before a district court judge for a probable cause hearing as provided in Article 30 of this Chapter, Probable-Cause Hearing,

c. Produced for trial in the district or superior court, or
d. Held for other specified purposes.

(6) State the name and office of the judicial official making the order and be signed by him.

The order of commitment may be modified or continued by the same or another judicial official by supplemental order.

(c) Copies and Use of Order, Receipt of Prisoner. —

(1) The order of commitment must be delivered to a law-enforcement officer, who must deliver the order and the prisoner to the detention facility named therein.

(2) The jailer must receive the prisoner and the order of commitment, and note on the order of commitment the time and date of receipt. As used in this subdivision, "jailer" includes any person having control of a detention facility.

(3) Upon releasing the prisoner pursuant to the terms of the order, or upon delivering the prisoner to the court, the jailer must note the time and date on the order and return it to the clerk.

(4) Repealed by Session Laws 1975, 2nd Sess., c. 983, s. 142.

(d) Commitment of Witnesses. — If a court directs detention of a material witness pursuant to G.S. 15A-803, the court must enter an order in the manner provided in this section, except that the order must:

(1) State the reason for the detention in lieu of the description of the offense charged, and

(2) Direct that the witness be brought before the appropriate court when his testimony is required. (1868-9, c. 178, subch. 3, ss. 24, 32; Code, ss. 1155, 1163; Rev., ss. 3230, 3232; C. S., ss. 4597, 4599; 1973, c. 1286, s. 1; 1975, 2nd Sess., c. 983, s. 142.)

OFFICIAL COMMENTARY

This section essentially carries forward the provisions of Article 12 of Chapter 15, Commitment to Prison (§§ 15-125, 126, and 127).

Changes from the old law involve first tying the new statute in with the modifications in the bail provisions and in the provisions relating to probable cause hearings. In addition specific designation of the county jail as the place of confinement is omitted, and provision is made for modification or continuation of the order.

The subsection relating to copies of the order is new. The former statute did not in terms require an order, but rather contained a directive as to the contents of an order for pretrial commitment. In some counties the practice had arisen of omitting the order of commitment, and simply writing the amount of the bond on the face of the warrant. Subsection (a) will require the order, and subsection (c) will ensure that the officer having the prisoner in custody will have the original order, that a copy of every order of commitment issued by a judicial officer will be on file in the clerk's office in which it was issued, and that if the prisoner is transferred to another county, the copy of the order of commitment will go to the clerk's office in that county. This will provide a source of information in the clerk's office about the population of the local detention facilities.

Editor's Note. — The 1975, 2nd Sess. amendment deleted subdivision (4) of subsection (c), relating to filing of the order of commitment.

Section Inapplicable to Detention of Federal Prisoner in Local Jail. — See opinion of Attorney General to Mr. Louis A. Giovanetti, Special Agent, United States Department of Justice, Federal Bureau of Investigation, 45 N.C.A.G. 258 (1976).

Verbal Order Invalid. — A verbal order of a magistrate sending a prisoner to jail, whether made before or after the examination on the warrant, is not a sufficient authority for the officer to whom the order is given. State v. James, 78 N.C. 455 (1878).

§§ 15A-522 to 15A-530: Reserved for future codification purposes.

ARTICLE 26.

Bail.

OFFICIAL COMMENTARY

In formulating its bail provisions, the Commission referred to several sources, among them D.C. Code, Sections 23-1321 to 23-1332, as enacted by the District of Columbia Court Reform and Criminal Procedure Act of 1970, and A.B.A. Project on Standards for Criminal Justice, Standards Relating to Pretrial Release (1968). The Commission worked upon several successive drafts quite extensively, however, and the final product is not recognizably similar to the provisions of any other jurisdiction.

The major changes proposed in our bail laws are:

(1) Making bail on appeal from superior court discretionary in all cases.

(2) Inserting a carefully worked out procedure which is designed to result in more efficient handling of bond forfeitures. No person as to whom a judgment on a forfeiture remains outstanding for more than 10 days may become surety on any bail bond in the judicial district so long as the judgment remains unsatisfied.

A proposal of the Commission to give the bail-setting official the option of authorizing release on a bail bond to be secured with a deposit of 10% of the amount of the bond with the clerk was removed in the course of passage by the General Assembly.

The Commission discussed the professional bail bondsman. It finally decided that he still provides a service in a number of counties, and except for § 15A-541 the Article does not mention the professional bondsman. He is treated in law as any other person acting as a surety upon a bail bond, although certain restrictive provisions are obviously written with the bondsman in mind. The Commission also discussed the advisability of revising the provisions relating to licensing of professional bondsmen in Chapter 85A of the General Statutes, and making that Chapter applicable to all counties. In the press of its work, however, the Commission never found time to develop this as part of its 1973 proposal.

Editor's Note. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-531. Definitions. — As used in this Article the following definitions apply unless the context clearly requires otherwise:

(1) Bail Bond. — An undertaking by the principal to appear in court as required upon penalty of forfeiting bail to the State of North Carolina in a stated amount. Bail bonds include an unsecured appearance bond, an appearance bond secured by a cash deposit of the full amount of the bond, an appearance bond secured by a mortgage pursuant to G.S. 109-25, and an appearance bond secured by at least one solvent surety.

(2) Obligor. — A principal or a surety on a bail bond.

(3) Principal. — A defendant or material witness obligated to appear in court as required upon penalty of forfeiting bail under a bail bond.

(4) Surety. — One who, with the principal, is liable for the amount of the bail bond upon forfeiture of bail. (1973, c. 1286, s. 1; 1975, c. 166, s. 12.)

OFFICIAL COMMENTARY

The reference in § 15A-531(1) to "premium-secured appearance bond" is to the bond issued by the clerk upon a deposit of 10% of the face amount. In amending Article 26 to delete provisions pertaining to this type of bond, the General Assembly overlooked the phrase in subdivision (1).

Cross Reference. — As to mortgage in lieu of security for appearance, see § 109-25.

Editor's Note. — The 1975 amendment deleted "a premium-secured appearance bond" following "an unsecured appearance bond" in the second sentence of subdivision (1).

For comment on bail in North Carolina, see 5 Wake Forest Intra. L. Rev. 300 (1969).

Recognizance Binds to Three Things. — It is said by the highest authority that a recognizance (or bail bond) in general binds to three things: (1) To appear and answer either to a specified charge or to such matters as may be objected; (2) to stand and abide by the judgment of the court; and (3) not to depart without leave of the court; and that each of these particulars is distinct and independent. State v. Schenck, 138 N.C. 560, 49 S.E. 917 (1905); State v. Eure, 172 N.C. 874, 89 S.E. 788 (1916); State v. Mallory, 266 N.C. 31, 145 S.E.2d 335 (1965), cert. denied, 384 U.S. 928, 86 S. Ct. 1443, 16 L. Ed. 2d 531 (1966).

Surety Not Relieved. — The liability of a surety upon an appearance bond is a continuing one until discharged by renewal of bond or production and surrender of principal. (See §§ 15-122, 15-123.) He is not released by the principal's having been drunk and under arrest when his case was called in court and continued, and by the principal's having since become a fugitive from justice under charge of a different offense. State v. Holt, 145 N.C. 450, 59 S.E. 64 (1907).

When Time and Place Specified. — If the recognizance specifies time and place, the defendant cannot be held to be in default for not appearing at some other time or place. State v. Houston, 74 N.C. 174 (1876).

Thus a recognizance, conditioned that the defendant appear at the courthouse in C, on the eighth Monday after the fourth Monday in March, is not forfeited by the defendant's failure to appear on Feb. 22. State v. Houston, 74 N.C. 174 (1876).

Same — Effect of Subsequent Law. — A recognizance conditioned for the appearance of a party at one day is not forfeited by his failure to appear at another day, to which the holding of the court was changed by a law passed after the taking of the recognizance, the law containing no provision that recognizances should be returned and parties appear on that day. State v. Melton, 44 N.C. 426 (1853).

When Appearance at Next Term Specified. — A recognizance for the appearance of the defendant at the next term of the court to be held for a given county is valid and binds the defendant to appear at the next term and at the courthouse, although neither time nor place is specifically named; because everyone knows, or is presumed to know, the time and place of holding the court. State v. Houston, 74 N.C. 174 (1876).

Continuance Does Not Release. — The continuance of a criminal case does not release the recognizance given for the appearance of the defendant. State v. Morgan, 136 N.C. 593, 48 S.E. 604 (1904).

Defendant Must Appear until Discharged. — An appearance bond by its terms, and under the uniform ruling of the court, requires that the defendant appear term after term until he is discharged on a verdict of acquittal or by order of the court. An appearance bond is in lieu of custody in jail, in which case the defendant could not be released until discharged by order of the court. State v. Eure, 172 N.C. 874, 89 S.E. 788 (1916).

Agreement by Solicitor (Now District Attorney) Will Not Relieve. — An agreement by a solicitor (now district attorney) for the State to discharge a defendant if he would become a State's witness against codefendant will not relieve such defendant from a forfeited recognizance. State v. Moody, 69 N.C. 529 (1873).

§ 15A-532. Persons authorized to determine conditions for release. — Judicial officials may determine conditions for release of persons brought before them, in accordance with this Article. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section builds upon the definition of "judicial official" in § 15A-101(5).

§ 15A-533. Right to pretrial release in capital and noncapital cases. — (a) A defendant charged with a noncapital offense must have conditions of pretrial release determined, in accordance with G.S. 15A-534.

(b) A judge may determine in his discretion whether a defendant charged with

a capital offense may be released before trial. If he determines release is warranted, the judge must authorize release of the defendant in accordance with G.S. 15A-534. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

The shift to the word "judge" in subsection (b) is intentional. The section restates in simplified fashion the provisions of former § 15-102 and § 15-103.

Editor's Note. — For note on right to pretrial release when charged with capital offense, see 6 Wake Forest Intra. L. Rev. 327 (1970).

§ 15A-534. Procedure for determining conditions of pretrial release. — (a) In determining conditions of pretrial release a judicial official must impose one of the following conditions:

(1) Release the defendant on his written promise to appear.

(2) Release the defendant upon his execution of an unsecured appearance bond in an amount specified by the judicial official.

(3) Place the defendant in the custody of a designated person or organization agreeing to supervise him.

(4) Require the execution of an appearance bond in a specified amount secured by a cash deposit of the full amount of the bond, by a mortgage pursuant to G.S. 109-25, or by at least one solvent surety.

If condition (3) is imposed, however, the defendant may elect to execute an appearance bond under subdivision (4). If a judicial official orders release of a defendant under conditions (1), (2), or (3), he may also place restrictions on the travel, associations, conduct, or place of abode of the defendant.

(b) The judicial official in granting pretrial release must impose condition (1), (2), or (3) in subsection (a) above unless he determines that such release will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses. Upon making the determination, the judicial official must then impose condition (4) in subsection (a) above instead of condition (1), (2), or (3).

(c) In determining which conditions of release to impose, the judicial official must, on the basis of available information, take into account the nature and circumstances of the offense charged; the weight of the evidence against the defendant; the defendant's family ties, employment, financial resources, character, and mental condition; the length of his residence in the community; his record of convictions; his history of flight to avoid prosecution or failure to appear at court proceedings; and any other evidence relevant to the issue of pretrial release.

(d) The judicial official authorizing pretrial release under this section must issue an appropriate order containing a statement of the conditions imposed, if any; inform the defendant in writing of the penalties applicable to violations of the conditions of his release; and advise him that his arrest will be ordered immediately upon any violation. The order of release must be filed with the clerk and a copy given the defendant.

(e) A magistrate or a clerk may modify his pretrial release order at any time prior to the first appearance before the district court judge. At or after such first appearance, except when the conditions of pretrial release have been reviewed by the superior court pursuant to G.S. 15A-539, a district court judge

may modify a pretrial release order of the magistrate or clerk or any pretrial release order entered by him at any time prior to:

(1) In a misdemeanor case tried in the district court, the noting of an appeal; and

(2) In a case in the original trial jurisdiction of the superior court, the binding of the defendant over to superior court after the holding, or waiver, of a probable-cause hearing.

After a case is before the superior court, a superior court judge may modify the pretrial release order of a magistrate, clerk, or district court judge, or any such order entered by him, at any time prior to the time set out in G.S. 15A-536(a).

(f) For good cause shown any judge may at any time revoke an order of pretrial release. Upon application of any defendant whose order of pretrial release has been revoked, the judge must set new conditions of pretrial release in accordance with this Article.

(g) In imposing conditions of pretrial release and in modifying and revoking orders of release under this section, the judicial official must take into account all evidence available to him which he considers reliable and is not strictly bound by the rules of evidence applicable to criminal trials.

(h) A bail bond posted pursuant to this section is effective and binding upon the obligor throughout all stages of the proceeding in the trial division of the General Court of Justice until the entry of judgment in the district court from which no appeal is taken or the entry of judgment in the superior court. The obligation of an obligor, however, is terminated at an earlier time if:

(1) A judge authorized to do so releases the obligor from his bond; or

(2) The principal is surrendered by a surety in accordance with G.S. 15A-540; or

(3) The proceeding is terminated by voluntary dismissal by the State before forfeiture is ordered under G.S. 15A-544(b); or

(4) Prayer for judgment has been continued indefinitely in the district court.

(1973, c. 1286, s. 1; 1975, c. 166, s. 13.)

OFFICIAL COMMENTARY

This section differs from the prior law in expressly favoring the policy that pretrial release of the defendant should be effected under the three conditions that do not depend upon the defendant's financial condition. Subsection (b). Only if the official determines that none of those conditions will assure the appearance of the defendant or protect against other possible harm may he impose the requirement that the defendant post a secured bond. Although the other possible harm may affect which conditions are imposed, the Commission steered clear of the preventive-detention controversy. The proposal allows the defendant to elect to post a secured bail bond rather than to be subjected to release in someone's custody, and his dangerousness and potential for harm, other than the risk of nonappearance, are not factors to be considered in setting the conditions of release on the secured bail bond. See subsection (a).

Subsection (d) requires the defendant to be given a copy of the pretrial release order. Thus the defendant will have in written form a statement of the conditions imposed on him and notice of the penalties for failure to appear as required.

There are special provisions relating to modification or revocation of pretrial release orders tailored to the various pretrial stages in subsection (e). The general modification or revocation provisions as to all release orders are in § 15A-538 to § 15A-540. Because of the need on occasion to act swiftly to revoke conditions of release which may not be adequate to keep a defendant from fleeing prior to trial, subsection (f) allows revocation by any judge at any time. Presumably a district court judge would not revoke an order of release of a superior court judge without excellent cause.

Subsection (h) carries forward in modified form the provisions of § 15-104.1(a).

Editor's Note. — The 1975 amendment substituted "first" for "initial" in two places near the beginning of subsection (e).

Accused May Deposit Cash. — The law contemplates that a defendant in a criminal prosecution may give security for his appearance to answer to the charge and the Supreme Court has held that the fact that defendant of his own volition, chooses to deposit the amount of the bond required in cash is not a violation of the statute, but a compliance with its spirit and meaning. White v. Ordille, 229 N.C. 490, 50 S.E.2d 499 (1948), citing State v. Mitchell, 151 N.C. 716, 66 S.E. 202 (1909).

Cash deposited by accused as security for his appearance remains his property subject to the conditions of a recognizance, the magistrate becoming the custodian of the cash for the benefit of the State only insofar as the debt of accused to the State is concerned. If defendant fails to perform the conditions, the deposit will be subject to forfeiture. But if he performs the conditions, the cash deposit would be returnable to him. This is a right which he may enforce against the custodian of the deposit. White v. Ordille, 229 N.C. 490, 50 S.E.2d 499 (1948).

And Is Liable to Attachment. — A defendant in a criminal prosecution who is a nonresident of the State, and who voluntarily deposits cash in lieu of bond for his appearance for a preliminary hearing, has such property right and interest in the deposit as is liable to attachment and garnishment at the instance of his creditor pending such preliminary hearing. White v. Ordille, 229 N.C. 490, 50 S.E.2d 499 (1948).

§ 15A-535. Issuance of policies on pretrial release. — (a) Subject to the provisions of this Article, the senior resident superior court judge of each judicial district in consultation with the chief district court judge must devise and issue recommended policies to be followed within the district in determining whether, and upon what conditions, a defendant may be released before trial.

(b) In any county in which there is a pretrial release program, the senior resident superior court judge of the judicial district may, after consultation with the chief district court judge, order that defendants accepted by such program for supervision shall, with their consent, be released by judicial officials to supervision of such programs, and subject to its rules and regulations, in lieu of releasing the defendants on conditions (1), (2), or (3) of G.S. 15A-534(a). (1973, c. 1286, s. 1; 1975, c. 791, s. 1.)

OFFICIAL COMMENTARY

The section changes the provision of § 15-103.1 that the chief district court judge in each district issues policies on bail matters. The bill puts this duty upon the senior resident superior court judge of the district, after consultation with the chief district court judge.

Editor's Note. — The 1975 amendment designated the existing section as subsection (a) and added subsection (b).

§ 15A-536. Release after conviction in the superior court. — (a) A defendant whose guilt has been established in the superior court and is either awaiting sentence or has filed an appeal from the judgment entered may be ordered released upon conditions in accordance with the provisions of this Article.

(b) If release is ordered, the judge must impose the conditions set out in G.S. 15A-534(a) which will reasonably assure the presence of the defendant when required and provide adequate protection to persons and the community. If no single condition gives the assurance, the judge may impose the condition in G.S. 15A-534(a)(3) in addition to any other condition and may also, or in lieu of the

condition in G.S. 15A-534(a)(3), place restrictions on the travel, associations, conduct, or place of abode of the defendant.

(c) In determining what conditions of release to impose, the judge must, on the basis of available information, consider the appropriate factors set out in G.S. 15A-534(c).

(d) A judge authorizing release of a defendant under this section must issue an appropriate order containing a statement of the conditions imposed, if any; inform the defendant in writing of the penalties applicable to violations of the conditions of his release; and advise him that his arrest will be ordered immediately upon any such violation. The order of release must be filed with the clerk and a copy given the defendant.

(e) An order of release may be modified or revoked by any superior court judge who has ordered the release of a defendant under this section or, if that judge is absent from the judicial district, by any other superior court judge. If the defendant is placed in custody as the result of a revocation or modification of an order of release, the defendant is entitled to an immediate hearing on whether he is again entitled to release and, if so, upon what conditions.

(f) In imposing conditions of release and in modifying and revoking orders of release under this section, the judge must take into account all evidence available to him which he considers reliable and is not strictly bound by the rules of evidence applicable to criminal trials. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section parallels § 15A-534, except that after conviction in superior court release is discretionary with the judge. Section 15-183 granted absolute right to bail on appeal in noncapital cases, and gave a discretionary right on appeal when a sentence of life imprisonment had been imposed in a capital case. This section would authorize bail to be set or denied in a judge's discretion in all cases — including capital cases.

It should be noted that § 15A-534(h) continues the original bail bond in force until final judgment in superior court unless the judge sooner releases the obligor. Presumably in a case in which there would be a delay between the verdict or plea of guilty and the sentencing, and the judge determined that the risk of flight had materially increased, the judge would terminate the original conditions of pretrial release and allow release, if at all, under this section.

In General. — In the absence of statute, an accused would have no right to bail pending an appeal. State v. Bradsher, 189 N.C. 401, 127 S.E. 349 (1925).

There is no right under the United States Constitution to have bond pending appeal, either in State or federal court. Reddy v. Snepp, 357 F. Supp. 999 (W.D.N.C. 1973).

Amount of Bail. — The question of the amount to be fixed for bond pending appeal is largely in the discretion of the court below. State v. Parker, 220 N.C. 416, 17 S.E.2d 475 (1941); Reddy v. Snepp, 357 F. Supp. 999 (W.D.N.C. 1973).

§ 15A-537. Persons authorized to effect release. — (a) Following any authorization of release of any person in accordance with the provisions of this Article, any judicial official must effect the release of that person upon satisfying himself that the conditions of release have been met. In the absence of a judicial official, any law-enforcement officer or custodial official having the person in custody must effect the release upon satisfying himself that the conditions of release have been met, but law-enforcement and custodial agencies may administratively direct which officers or officials are authorized to effect release under this section. Satisfying oneself whether conditions of release are met includes determining if sureties are sufficiently solvent to meet the bond

obligation, but no judicial official, officer, or custodial official may be held civilly liable for actions taken in good faith under this section.

(b) Upon release of the person in question, the person effecting release must file any bond, deposit, or mortgage and other papers pertaining to the release with the clerk of the court in which release was authorized.

(c) For the limited purposes of this section, any law-enforcement officer or custodial official may administer oaths to sureties and take other actions necessary in carrying out the duties imposed by this section. Any surety bond so taken is to be regarded in every respect as any other bail bond. (1973, c. 1286, s. 1; 1977, c. 711, s. 23.)

OFFICIAL COMMENTARY

Subsection (a) as introduced concerned only judicial officials and made it plain that in addition to the order setting conditions of release that there must also, except as provided in subsections (b) and (c), be an order of the judicial official directing release from custody. As revised in the General Assembly, however, the subsection seems to authorize law-enforcement officers to effect release at any time after conditions of release have been set and a judicial official is absent — upon the officer's determination that the conditions of release are met. This makes the part of subsection (b) restricting that type of release to situations after imprisonment redundant.

Subsections (b) and (c) carry forward in modified form the provisions of § 15-108.

Editor's Note. — The 1977 amendment, effective July 1, 1978, rewrote this section.

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, "Parole" shall not apply to persons sentenced before July 1, 1978."

§ 15A-538. Modification of order on motion of person detained; substitution of surety. — (a) A person who is detained or objects to the conditions required for his release which were imposed or allowed to stand by order of a district court judge may apply in writing to a superior court judge to modify the order.

(b) The power to modify an order includes the power to substitute sureties upon any bond. Substitution or addition of acceptable sureties may be made at the request of any obligor on a bond or, in the interests of justice, at the request of a prosecutor under the provisions of G.S. 15A-539. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

Traditionally a defendant sought to have bail reduced or the conditions of release modified by the habeas corpus procedure. The Commission's policy as reflected in this section is to build into the procedure at various stages a requirement that conditions of release be reviewed. In addition, this section permits the defendant or any other obligor to request modification, including a substitution of sureties.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" in subsection (b).

§ 15A-539. Modification upon motion of prosecutor. — A prosecutor may at any time apply to an appropriate district court judge or superior court judge for modification or revocation of an order of release under this Article. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

This section ties in with the previous one. If a solicitor believes that conditions of release imposed are not adequate to insure the defendant's appearance, or that the surety on defendant's bond is not solvent, he may apply to the appropriate judge for an order modifying the conditions. If modification is sought, and the order has been made or allowed to stand by a district court judge, subsection (a) indicates that the solicitor must apply to a superior court judge. In other cases, the modification and revocation provisions in § 15A-534(e) and (f) should be consulted. Compare § 15A-536(e).

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor."

§ 15A-540. Surrender of a principal by a surety; setting new conditions of release. — (a) A surety may surrender his principal to the sheriff of the county in which the principal is bonded to appear. A surety may arrest his principal for the purpose of returning him to the sheriff. Upon surrender of the principal the sheriff must provide a receipt to the surety, a copy of which must be filed with the clerk. Upon application by the surety after the surrender of the principal, before the forfeiture of bail under G.S. 15A-544(b), the clerk must exonerate him from his bond.

(b) A principal surrendered by his surety is entitled to an immediate hearing on whether he is again entitled to release and, if so, upon what conditions. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section carries forward the provisions of § 15-122 and § 15-123. The Commission debated whether to retain the arrest provision, and decided that in some cases the professional bondsman would be more effective in tracking down an absent defendant than regular law-enforcement officers. The power of the judge to reduce the amount of the bond forfeiture provides an incentive to the bondsman to bring the defendant to court even though he has once failed to appear.

Compliance with Section Protects Surety. — Where a defendant surrenders his principal in open court in discharge of himself as bail, he is acting in the clear exercise of an undoubted legal right. The entry of the fact made upon the records of the court was therefore proper, and the court could not by their subsequent action deprive the defendant of the benefit of it. Underwood v. McLaurin, 49 N.C. 17 (1856).

§ 15A-541. Persons prohibited from becoming surety. — (a) No sheriff, deputy sheriff, other law-enforcement officer, judicial official, attorney, parole officer, probation officer, jailer, assistant jailer, employee of the General Court of Justice, other public employee assigned to duties relating to the administration of criminal justice, or spouse of any such person may in any case

become surety on a bail bond for any person other than a member of his immediate family. In addition no person covered by this section may act as agent for any bonding company or professional bondsman. No such person may have an interest, directly or indirectly, in the financial affairs of any firm or corporation whose principal business is acting as bondsman.

(b) A violation of this section is a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section expands upon the provisions contained in § 15-107.1.

§ 15A-542. False qualification by surety. — (a) No person may sign an appearance bond as surety knowing or having reason to know that he does not own sufficient property over and above his exemption allowed by law to enable him to pay the bond should it be ordered forfeited.

(b) A violation of this section is a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

The Commission decided against freighting its 1973 bail recommendations with any proposals concerning direct regulation or licensing of commercial bondsmen. However, certain abuses sought to be cured by licensing may be eliminated by the misdemeanor of false qualification by surety.

§ 15A-543. Penalties for failure to appear. — (a) In addition to forfeiture imposed under G.S. 15A-544, any person released pursuant to this Article who willfully fails to appear before any court or judicial official as required is subject to the criminal penalties set out in this section.

(b) A violation of this section is a felony punishable by a fine not to exceed three thousand dollars ($3,000), imprisonment for not more than three years, or both, if:

(1) The violator was released in connection with a felony charge against him; or

(2) The violator was released under the provisions of G.S. 15A-536.

(c) If, except as provided in subsection (b) above, a violator was released in connection with a misdemeanor charge against him, a violation of this section is a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment not to exceed six months, or both. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section makes willful failure to appear a criminal offense in a bail bond case as well as when a defendant was released on his own recognizance. If the violator was released in connection with a felony, or a misdemeanor after conviction in superior court, the failure to appear is a felony.

§ 15A-544. Forfeiture. — (a) By entering into a bail bond the obligor submits himself to the jurisdiction of the court and irrevocably appoints the clerk as his agent for any proceedings with reference to the bond. His liability may be enforced on motion without the necessity of an independent action.

(b) If the principal does not comply with the conditions of the bail bond, the court having jurisdiction must enter an order declaring the bail to be forfeited. If forfeiture is ordered by the court, a copy of the order of forfeiture and notice that judgment will be entered upon the order after 30 days must be served on each obligor. Service is to be made by the sheriff by delivery of the order and notice to him or by delivery at his dwelling house or place of abode with some person of suitable age and discretion residing therein. If the sheriff is unable to effect service because an obligor cannot be found or has no dwelling house or place of abode known to the sheriff, he must file a return to this effect; the clerk must then mail a copy of the order of forfeiture and notice to the obligor at his address of record and note on the original the date of mailing. Service is complete three days after the mailing.

(c) If the principal does not appear before the court having jurisdiction within 30 days of the date of service, or on the first day of the next session of court commencing more than 30 days after the date of service, and satisfy the court that his appearance on the date set was impossible or that his failure to appear was without his fault, the court must enter judgment for the State against the principal and his sureties for the amount of the bail and the costs of the proceedings. If the principal appears within the time allowed following the date of service and satisfies the court that his appearance on the date set was impossible or that his failure to appear was without his fault, the order of forfeiture must be set aside. If the principal appears but is unable to satisfy the court that his appearance on the date set was impossible or that his failure to appear was without his fault, but the court determines that justice does not require the forfeiture of the full amount of the bond, the court may enter judgment in an amount it considers appropriate.

(d) To facilitate the procedure under this section, the clerk in each county must present a forfeiture roll at the first session of superior court commencing more than 30 days after the entry of any order of forfeiture in either the district or superior court. The forfeiture roll must list the names of all principals as to which forfeiture has been ordered in the county in the past three years and as to which judgments of forfeiture against obligors have not been entered or, if entered, not yet satisfied by execution. In addition, the forfeiture roll must show the amount of the bond ordered forfeited in each case and the names of all sureties liable on each bond.

(e) At any time within 90 days after entry of the judgment against a principal or his surety, or on the first day of the next session of court commencing more than 90 days after the entry of the judgment, the court may direct that the judgment be remitted in whole or in part, upon such conditions as the court may impose, if it appears that justice requires the remission of part or all of the judgment.

(f) If a judgment has not been remitted within the period provided in subsection (e) above, the clerk must issue execution on the judgment within 30 days, and remit the clear proceeds to the county for use in maintaining free public schools. Any clerk who fails to perform his duty as required in this subsection is subject to a penalty of five hundred dollars ($500.00).

(g) If a return of execution upon a judgment against an obligor remains unsatisfied for 10 days, the obligor may not become surety on any bail bond in the judicial district so long as the judgment remains unsatisfied.

(h) For extraordinary cause shown, the court which has entered judgment upon a forfeiture of a bond may, after execution, remit the judgment in whole or in part and order the clerk to refund such amounts as the court considers

appropriate. Any person moving for remission of judgment must do so by verified petition, and a copy of the petition must be served upon the attorney for the county school board at least three working days prior to the hearing on the motion. The moving party must notify the attorney for the school board of the time and place of the hearing, and such attorney, if he so desires, must be given an opportunity to appear and be heard. If money has been paid to the county pursuant to execution on a judgment of forfeiture, it must refund to the person entitled the amount of any remission granted under the terms of this subsection upon receipt of a certified copy of the judgment of remission from the clerk. (1868-9, c. 178, subch. 2, s. 10; Code, s. 1225; Rev., s. 3214; C. S., s. 4582; 1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section attempts to set up an orderly procedure for forfeiture. Forfeiture actions are to be handled by motion; no separate action need be instituted by the State. Key provisions of the revised procedure include:

(1) The clerk must periodically present district and superior court judges with a forfeiture roll. This is intended to make sure that court officials are constantly reminded of the forfeiture problem — in hopes that they will be spurred to action.

(2) An obligor on a bail bond, which would include the surety and the principal, may not become surety on any bail bond in the judicial district so long as a forfeiture judgment has remained unsatisfied for more than 10 days.

Cross Reference. — As to forfeiture of bail, see also §§ 15-110 through 15-124.

Independent Proceeding Unnecessary. — The judgment that the recognizance has been forfeited must be entered in the court, and in the cause, in which said recognizance was filed and it is not required that the prosecution for the forfeiture of such recognizance shall be taken by an independent proceeding. State v. Sanders, 153 N.C. 624, 69 S.E. 272 (1910).

Notice Must Be Given. — This section has made it imperative that before suing out execution on a forfeited recognizance, a scire facias shall issue, and judgment be had thereon. State v. Mills, 19 N.C. 552 (1837).

Object of Notice. — The object of a scire facias is to notify the cognizor to show cause, if any he have, wherefore the cognizee should not have execution of the same thereby acknowledged. State v. Mills, 19 N.C. 552 (1837).

Judgment against Bond on Same Day Defendant Failed to Appear Was Error. — The trial court erred in entering judgment absolute against defendant's cash bond on the same day that defendant was called and failed to appear. State v. Hawkins, 14 N.C. App. 127, 187 S.E.2d 418 (1972).

Trial Judge Has Discretion. — The power given by this section is a matter of judicial discretion in the judges below, which cannot be reviewed except for some error in a matter of law or legal inference. State v. Moody, 74 N.C. 73 (1876); State v. Morgan, 136 N.C. 593, 48 S.E. 604 (1904); State v. Hawkins, 14 N.C. App. 129, 187 S.E.2d 417 (1972).

Whether a judgment will be made absolute, or whether it will be stricken out, either upon condition or otherwise, rests in the discretion of the judge of the superior court. State v. Clarke, 222 N.C. 744, 24 S.E.2d 619 (1943); State v. Wiggins, 228 N.C. 76, 44 S.E.2d 471 (1947).

Court May Remit Penalty without Setting Aside Forfeiture. — Where a motion is made to set aside the entry of forfeiture of a recognizance, its refusal does not prevent the court from reducing or remitting the penalty. State v. Morgan, 136 N.C. 593, 48 S.E. 604 (1904).

Petition after Final Judgment. — A surety on a bail bond may present a petition for relief to the judge of the superior court, notwithstanding that a final judgment has been rendered. State v. Bradsher, 189 N.C. 401, 127 S.E. 349 (1925); State v. Dew, 240 N.C. 595, 83 S.E.2d 482 (1954).

Where judgment absolute has been entered against the surety on an appearance bond, the surety is entitled, upon the later apprehension and delivery of the defendant to the authorities of that county for trial, to be heard upon its motion to modify or vacate the judgment absolute. State v. Dew, 240 N.C. 595, 83 S.E.2d 482 (1954).

The superior courts have authority to lessen or remit forfeited recognizances upon the petition of the party aggrieved, either before or after final judgment. State v. Moody, 74 N.C. 73 (1876); State v. Hawkins, 14 N.C. App. 129, 187 S.E.2d 417 (1972).

Injunction to Restrain Enforcement of Execution. — A motion by the surety asking that the forfeiture theretofore entered upon the appearance bond be stricken out, for that defendant had been subsequently arrested, is addressed to the sound discretion of the court in the exercise of its power to remit the forfeiture, and does not serve to stay execution on the judgment entered against the surety, and therefore the court, while the motion is pending, may hear and determine the surety's application for injunction to restrain enforcement of the execution issued on the judgment. The remedy for a reduction or remission of the forfeiture is by application under this section. Tar Heel Bond Co. v. Krider, 218 N.C. 361, 11 S.E.2d 291 (1940), followed in State v. Brown, 218 N.C. 368, 11 S.E.2d 294 (1940).

Arrest Does Not Discharge Forfeiture of Appearance Bond. — The arrest of defendant in a criminal proceeding and his trial and conviction does not discharge the original forfeiture of his appearance bond, and judgment absolute against the surety may be entered after defendant has been arrested. In such case the defendant is not arrested and surrendered by the surety. Surrender by the bail after recognizance is forfeited does not discharge the bail, but is merely addressed to the discretionary power of the court to reduce or remit the forfeiture. Tar Heel Bond Co. v. Krider, 218 N.C. 361, 11 S.E.2d 291 (1940), followed in State v. Brown, 218 N.C. 368, 11 S.E.2d 294 (1940).

Where the surety's answer amounts to nothing more than a plea for additional time, without allegation of facts disclosing excusable neglect or constituting a legal defense or appealing to the conscience and sense of fair play, the surety is not entitled to a hearing as a matter of right, and judgment absolute against the surety is proper. State v. Dew, 240 N.C. 595, 83 S.E.2d 482 (1954).

A superior court judge had authority to review an order of bond forfeiture entered by another superior court judge. State v. Hawkins, 14 N.C. App. 129, 187 S.E.2d 417 (1972).

§ 15A-545: Reserved for future codification purposes.

OFFICIAL COMMENTARY

This section, pertaining to the procedure applicable to the premium-secured appearance bond, was deleted by the General Assembly.

§ 15A-546. Contempt. — Nothing in this Article is intended to interfere with or prevent the exercise by the court of its contempt powers. (1973, c. 1286, s. 1.)

§ 15A-547. Right to habeas corpus. — Nothing in this Article is intended to abridge the right of habeas corpus. (1973, c. 1286, s. 1.)

ARTICLE 27.

§§ 15A-548 to 15A-574: Reserved for future codification purposes.

ARTICLE 28.

§§ 15A-575 to 15A-600: Reserved for future codification purposes.

SUBCHAPTER VI. PRELIMINARY PROCEEDINGS.

ARTICLE 29.

First Appearance before District Court Judge.

OFFICIAL COMMENTARY

In cases in the original jurisdiction of the superior court, primarily felonies, the defendant must be brought as soon as possible before a district court judge. No witnesses are required at this first appearance. The main purposes of it are:

(1) To make sure the defendant's right to counsel is assured for the further proceedings.

(2) To determine the sufficiency of the charge.

(3) To review or determine the conditions of pretrial release.

(4) Set the date for, or secure a waiver of, the probable-cause hearing.

A defendant may not waive this first appearance before the judge, but he may appear through counsel. Section 15A-601(a) states that it is not a critical stage of the proceedings.

This step in the procedure is a new one so far as our statutes are concerned, though something of this nature has been utilized in several districts. It is considered important to have a district court judge process cases slated for trial in superior court at an early stage. Many delays are caused now when a defendant shows up at subsequent proceedings without counsel; a prime responsibility of the judge is to make sure the defendant has or gets counsel. Also, a date set by a judge for a probable-cause hearing is more likely to be met by the parties, without a continuance, than one set by a magistrate.

In drafting this Article and Article 30, Probable-Cause Hearing, the Commission consulted, among others, the following: Article 180 of the New York Criminal Procedure Law; a preliminary draft of what is now American Law Institute, A Model Code of Pre-Arraignment Procedure — Tentative Draft No. 5, Article 310, First Appearance (1972); and Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts, Rules 5 (Initial Appearance Before the Magistrate) and 5.1 (Preliminary Examination) (January 1970).

Editor's Note. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-601. First appearance before a district court judge; right in felony and other cases in original jurisdiction of superior court; consolidation of first appearance before magistrate and before district court judge. — (a) Any defendant charged in a magistrate's order under G.S. 15A-511 or criminal process under Article 17 of this Chapter, Criminal Process, with a crime in the original jurisdiction of the superior court must be brought before a district court judge in the judicial district in which the crime is charged to have been committed. This first appearance before a district court judge is not a critical stage of the proceedings against the defendant.

(b) When a district court judge conducts an initial appearance as provided in G.S. 15A-511, he may consolidate those proceedings and the proceedings under this Article.

(c) Unless the defendant is released pursuant to Article 26 of this Chapter, Bail, first appearance before a district court judge must be held within 96 hours after the defendant is taken into custody or at the first regular session of the district court in the county, whichever occurs first. If the defendant is not taken into custody, or is released pursuant to Article 26 of this Chapter, Bail, within 96 hours after being taken into custody, first appearance must be held at the next session of district court held in the county. This subsection does not apply to a defendant whose first appearance before a district court judge has been set in a criminal summons pursuant to G.S. 15A-303(d).

(d) Upon motion of the defendant, the first appearance before a district court judge may be continued to a time certain. The defendant may not waive the holding of the first appearance before a district court judge but he need not appear personally if he is represented by counsel at the proceeding. (1973, c. 1286, s. 1; 1975, 2nd Sess., c. 983, ss. 139, 140.)

OFFICIAL COMMENTARY

The first appearance is required to occur in all events within 96 hours if the defendant is in custody. In some counties with infrequent regular sessions of court, this will require that

a district court judge come into the county for a special session or that the defendant be taken to another county in the district to appear before a district court judge. It should be noted that Article 3, Venue, sets pretrial venue except for the probable-cause hearing in the judicial district rather than the county.

Editor's Note. — The 1975, 2nd Sess., amendment deleted the former third sentence of subsection (c), which related to continuance of the first appearance with the consent of the defendant and the solicitor, and the former fourth sentence of subsection (c), which was identical to the second sentence of present subsection (d), added the present third sentence of subsection (c) and added subsection (d).

This section does not prescribe mandatory procedures affecting the validity of the trial in the absence of a showing that defendant was prejudiced thereby. State v. Burgess, 33 N.C. App. 76, 234 S.E.2d 40 (1977).

Practice under Former § 15-88. — See Brooks v. Edwards, 396 F. Supp. 662 (W.D.N.C. 1974).

Applied in State v. Selph, 33 N.C. App. 157, 234 S.E.2d 453 (1977).

Cited in State v. Dangerfield, 32 N.C. App. 608, 233 S.E.2d 663 (1977).

§ 15A-602. Warning of right against self-incrimination. — Except when he is accompanied by his counsel, the judge must inform the defendant of his right to remain silent and that anything he says may be used against him. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

Section 15-89 required that a defendant at a preliminary hearing be advised of his right to silence; this provision, borrowing from the Miranda warnings, also tells him that anything he does say can be used against him.

§ 15A-603. Assuring defendant's right to counsel. — (a) The judge must determine whether the defendant has retained counsel or, if indigent, has been assigned counsel.

(b) If the defendant is not represented by counsel, the judge must inform the defendant that he has important legal rights which may be waived unless asserted in a timely and proper manner and that counsel may be of assistance to the defendant in advising him and acting in his behalf. The judge must inform the defendant of his right to be represented by counsel and that he will be furnished counsel if he is indigent.

(c) If the defendant asserts that he is indigent and desires counsel, the judge must proceed in accordance with the provisions of Article 36 of Chapter 7A of the General Statutes.

(d) If the defendant is found not to be indigent and indicates that he desires to be represented by counsel, the judge must inform him that he should obtain counsel promptly.

(e) If the defendant desires to waive representation by counsel, the waiver must be in writing in accordance with the provisions of Article 36 of Chapter 7A of the General Statutes except as otherwise provided in this Article. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This provision is intended to place responsibility on the judge to take the necessary steps to see that the defendant secures counsel for the next stages of the proceedings — or to see that a valid waiver of counsel is entered.

§ 15A-604. Determination of sufficiency of charge. — (a) The judge must examine each criminal process or magistrate's order and determine whether each charge against the defendant charges a criminal offense within the original jurisdiction of the superior court.

(b) If the judge determines that the process or order fails to charge a criminal offense within the original jurisdiction of the superior court, he must notify the prosecutor and take further appropriate action, including one or more of the following:

(1) Dismiss the charge.
(2) Permit the State to amend the statement of the crime in the process or order.
(3) Continue the proceedings, for not more than 24 hours, to permit the State to initiate new charges.
(4) With the consent of the prosecutor, set the case for trial in the district court if the charge is found to be within the original jurisdiction of the district court. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

The judge must review the charge to make sure it is properly stated. Doing this here may save much trouble later. The section contains two new provisions:

(1) If there is a technical defect in the charge but the facts indicate the defendant has committed an offense, the judge may continue the proceedings up to 24 hours. This is to keep the defendant from taking this opportunity to flee the jurisdiction. See the commentary to § 15A-956.

(2) The section allows the case to be set for trial in district court if it turns out to be in the jurisdiction of the district court. The consent of the solicitor is required for this type of diversion of the case.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" wherever it appeared in this section.

§ 15A-605. Additional proceedings at first appearance before judge. — The judge must:

(1) Inform the defendant of the charges against him;
(2) Determine that the defendant or his counsel has been furnished a copy of the process or order; and
(3) Determine or review the defendant's eligibility for release under Article 26 of this Chapter, Bail. (1973, c. 1286, s. 1.)

§ 15A-606. Demand or waiver of probable-cause hearing. — (a) The judge must schedule a probable-cause hearing unless the defendant waives in writing his right to such hearing. A defendant represented by counsel, or who desires to be represented by counsel, may not before the date of the scheduled hearing waive his right to a probable-cause hearing without the written consent of the defendant and his counsel.

(b) Evidence of a demand or waiver of a probable-cause hearing may not be admitted at trial.

(c) If the defendant waives a probable-cause hearing, the district court judge must bind the defendant over to the superior court for further proceedings in accordance with this Chapter.

(d) If the defendant does not waive a probable-cause hearing, the district court judge must schedule a hearing not later than 15 working days following the initial appearance before the district court judge; if no session of the district

court is scheduled in the county within 15 working days, the hearing must be scheduled for the first day of the next session. The hearing may not be scheduled sooner than five working days following such initial appearance without the consent of the defendant and the prosecutor.

(e) If an unrepresented defendant is not indigent and has indicated his desire to be represented by counsel, the district court judge must inform him that he has a choice of appearing without counsel at the probable-cause hearing or of securing the attendance of counsel to represent him at the hearing. The judge must further inform him that the judge presiding at the hearing will not continue the hearing because of the absence of counsel except for extraordinary cause.

(f) Upon a showing of good cause, a scheduled probable-cause hearing may be continued by the district court upon timely motion of the defendant or the State. Except for extraordinary cause, a motion is not timely unless made at least 48 hours prior to the time set for the probable-cause hearing.

(g) If after the first appearance before a district court judge a defendant with consent of counsel desires to waive his right to a probable-cause hearing, he may do so in writing filed with the court signed by defendant and his counsel. Upon waiver the defendant must be bound over to the superior court. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

If a defendant fully apprised of his rights does not wish to have a lawyer and also wishes to waive the probable-cause hearing, he may do so. But if he has counsel or wishes to have counsel, whether appointed or retained, waiver is only allowed if the defendant and his counsel waive in writing — either at the first appearance before the judge, or at a later time prior to the scheduled date of the probable-cause hearing. The purpose is to put more certainty in the scheduling, and holding, of probable-cause hearings.

A fairly strict time period of three weeks (15 working days) is set as the outside limit for scheduling the probable-cause hearing. In order to give the parties time to prepare, it may not be set sooner than a week (five working days) without the consent of both parties.

To prevent the common problem of inconveniencing witnesses who show up at a hearing only to discover that it is continued and they must return at a later time, a motion for continuance of the probable-cause hearing by either party must be made at least 48 hours in advance of the scheduled hearing except in highly unusual cases. If the continuance is granted, a 48-hour period should be sufficient to allow the witnesses to be notified not to come to the hearing until the later date.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" in the second sentence of subsection (d).

No Right to Hearing after Indictment. — This section does not entitle a criminal defendant to a probable-cause hearing as a matter of right after a bill of indictment has been returned. State v. Dangerfield, 32 N.C. App. 608, 233 S.E.2d 663 (1977).

There is nothing in this Chapter or its legislative history which demonstrates the legislature's intention to alter the preexisting rule which dispensed with the requirement for a preliminary, or probable-cause, hearing when the defendant has been charged by indictment. State v. Sutton, 31 N.C. App. 697, 230 S.E.2d 572 (1976).

Hearing within Specific Time Not Required by Due Process. — Due process does not require that a probable-cause hearing be held within a specific number of days following arrest. State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977).

Court Determines "Good Cause" and "Extraordinary Cause". — The determinations of "good cause" and "extraordinary cause" for purposes of a continuance are for the trial court. State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977).

Hearing Not Required Prior to Enactment of Section. — See State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975), cert. denied, U.S. , 97 S. Ct. 2971, 53 L. Ed. 2d 1091 (1977).

A defendant may waive the preliminary hearing and consent to be bound over to the superior court to await grand jury action without forfeiting any defense or right available to him. Gasque v. State, 271 N.C. 323, 156 S.E.2d

740 (1967), cert. denied, 390 U.S. 1030, 88 S. Ct. 1423, 20 L. Ed. 2d 888 (1968).

It has been the practice in this State for generations that a defendant can waive a preliminary examination and be bound over to the superior court. Gasque v. State, 271 N.C. 323, 156 S.E.2d 740 (1967), cert. denied, 390 U.S. 1030, 88 S. Ct. 1423, 20 L. Ed. 2d 888 (1968).

The preliminary hearing may be waived, in which case the defendant is bound over to the superior court to await grand jury action without forfeiting any right or defense available to him. State v. Hairston, 280 N.C. 220, 185 S.E.2d 633, cert. denied, 409 U.S. 888, 93 S. Ct. 194, 34 L. Ed. 2d 145 (1972).

§§ 15A-607 to 15A-610: Reserved for future codification purposes.

ARTICLE 30.

Probable-Cause Hearing.

OFFICIAL COMMENTARY

The procedure in Article 9 of Chapter 15 was called a "preliminary examination"; it was more commonly known as the "preliminary hearing." This code has two preliminary hearings before a judge in district court: the first appearance before a district court judge and the probable-cause hearing. "Probable-cause hearing" was chosen deliberately to emphasize that the purpose is to screen the case to make sure it warrants being bound over to superior court; affording discovery opportunities to the defendant is not a purpose of the proceeding.

Although the Article does not specifically so state, it is clear from the provisions of Article 29, First Appearance before District Court Judge, that probable-cause hearings are only held in cases within the original jurisdiction of the superior court.

Several of the sources consulted by the Commission in drafting this Article are cited at the end of the general commentary to Article 29, First Appearance before District Court Judge.

Editor's Note. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-611. Probable-cause hearing procedure. — (a) At the probable-cause hearing:

(1) A prosecutor must represent the State.

(2) The defendant may be represented by counsel.

(3) The defendant may testify as a witness in his own behalf and call and examine other witnesses, and produce other evidence in his behalf.

(4) Each witness must testify under oath or affirmation and is subject to cross-examination.

(b) The State must by nonhearsay evidence, or by evidence that satisfies an exception to the hearsay rule, show that there is probable cause to believe that the offense charged has been committed and that there is probable cause to believe that the defendant committed it, except:

(1) A report or copy of a report made by a physicist, chemist, firearms identification expert, fingerprint technician, or an expert or technician in some other scientific, professional, or medical field, concerning the results of an examination, comparison, or test performed by him in connection with the case in issue, when stated by such person in a report made by him, is admissible in evidence.

(2) If there is no serious contest, reliable hearsay is admissible to prove value, ownership of property, possession of property in another than

the defendant, lack of consent of the owner, possessor, or custodian of property to its taking or to the breaking or entering of premises, chain of custody, authenticity of signatures, and the existence and text of a particular ordinance or regulation of a governmental unit or agency. The district court judge is not required to exclude evidence on the ground that it was acquired by unlawful means.

(c) If a defendant appears at a probable-cause hearing without counsel, the judge must determine whether counsel has been waived. If he determines that counsel has been waived, he may proceed without counsel. If he determines that counsel has not been waived, except in a situation covered by G.S. 15A-606(e) he must take appropriate action to secure the defendant's right to counsel.

(d) A probable-cause hearing may not be held if an information in superior court is filed upon waiver of indictment before the date set for the hearing. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

Section 15-89 appeared to provide that a magistrate examine the defendant at a preliminary hearing, and the defendant was not put under oath. Under the new procedure, it is specified that a solicitor must appear for the State and that the defendant may, but obviously need not, testify. If the defendant testifies, however, it must be upon oath, and he is subject to cross-examination.

Section 15-87 indicated that prosecution witnesses must testify upon oath in preliminary hearings, but did not specify the nature of admissible evidence. This section stipulates that the evidence must be nonhearsay except for (1) traditional exceptions to the hearsay rule, (2) reports by certain technical experts, and (3) certain types of hearsay when there is no serious contest. There was some controversy within the Commission on this point, and the provision is a compromise between those who wished to require evidence that would be competent at a trial and those who wished to allow reliable hearsay generally. The Commission believes that its compromise would prevent the State from holding back a truly key witness, for example, the victim in a rape case, but would not force the State to bring all its witnesses to the probable-cause hearing and in effect turn it into a mini-trial.

Another controversial provision on which a compromise position was reached deals with the exclusion of evidence at the probable-cause hearing on the ground that it was unlawfully obtained. Some felt that the State simply should not be permitted at any stage to use unconstitutionally obtained evidence, and that the district court judge should be forced to rule on the matter. Others noted that some of the most difficult five-to-four decisions of the Supreme Court of the United States have involved the exclusion of evidence assertedly acquired by unlawful means, and that the district court judge should not take the time and trouble to decide such an issue — as it almost inevitably would have to be decided again at the superior court level. (If no probable cause were found after exclusion of vital evidence, the solicitor would be free to reopen the case through submission of an indictment to the grand jury; if probable cause were found, it is clear that neither party would consider himself bound by the district court judge's ruling on the motion to suppress.) The compromise wording states that the district court judge is not required to exclude the evidence. In a difficult case involving close questions of law or fact, the judge could decline to exclude and pass the matter on to the superior court if he otherwise found probable cause. In a clear-cut or flagrant case, however, the district court would be free to exclude the evidence and likely wash out at an early stage a case doomed to be lost in any event. The Commission searched for language that would embody the ideas here expressed, but the several drafts studied raised more problems than they solved. It finally decided to leave the matter in the discretion of the district court judge.

Subsection (c) allows a defendant to appear without counsel if a proper, knowing waiver has been effected in writing. If a defendant who can afford to retain counsel appears without counsel, despite the warning given him as provided in § 15A-606(e), the probable-cause hearing may proceed without counsel for the defendant.

The Commission's proposal contained a subsection stating that once the judge heard sufficient evidence to make out probable cause, he could decline to hear further evidence. This refusal to hear further evidence applied to witnesses of the State and the defense. An exception was made for the defendant himself if he desired to testify. In the General Assembly

this passage was deleted because it was thought district court judges might be encouraged by it to cut proceedings too short. In answer to objections that deletion would prolong probable-cause hearing unduly, the proponents of deletion pointed out that under the rules of evidence a judge may bar testimony that is repetitious or merely cumulative.

Another matter governing witnesses may be appropriate at this point. Section 15-90 permitted sequestration of witnesses. This provision is omitted from this Article because the Commission deemed it unnecessary. The judge already has discretionary power to sequester witnesses if the need arises.

Subsection (d) as introduced expressed the theory embraced by a majority of the Commission that the district court loses jurisdiction if an indictment or information is filed in superior court — therefore rendering null any further proceedings in the district court. At one stage, however, a legislative committee amended the proposal to restrict the power of a solicitor to bypass the probable-cause hearing and deleted reference to the indictment. Subsequently this restriction on the power to submit indictments was itself deleted, but there was a failure to restore mention of the indictment in subsection (d). In view of the preexisting jurisdictional law and the fairly clear legislative intent, however, it seems certain that no probable-cause hearing may be held in district court once the superior court has gained jurisdiction through the return of a true bill of indictment.

Cross References. — As to the right of an accused to testify as a witness, see § 8-54. As to hearing by the coroner in lieu of other preliminary hearings, see § 152-10.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" in subdivision (1) of subsection (a).

For comment on admissibility of confessions, see 43 N.C.L. Rev. 972 (1965). For article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 N.C.L. Rev. 262 (1971).

The purpose of a preliminary hearing is to determine whether there has been an offense committed, and, if so, whether there is probable cause to believe that the accused committed it. Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970).

Former Statutes Not Mandatory. — Former §§ 15-85 and 15-87, relating to preliminary examination of arrested persons, did not prescribe mandatory procedures affecting the validity of a trial. State v. Hargett, 255 N.C. 412, 121 S.E.2d 589 (1961).

Former § 15-87 did not prescribe mandatory procedures affecting the validity of a trial. State v. Able, 13 N.C. App. 365, 185 S.E.2d 422 (1971).

A preliminary hearing is not an essential prerequisite to the finding of an indictment in this jurisdiction. State v. Hargett, 255 N.C. 412, 121 S.E.2d 589 (1961); Gasque v. State, 271 N.C. 323, 156 S.E.2d 740 (1967), cert. denied, 390 U.S. 1030, 88 S. Ct. 1423, 20 L. Ed. 2d 888 (1968), quoting State v. Hackney, 240 N.C. 230, 81 S.E.2d 778 (1954); State v. Able, 13 N.C. App. 365, 185 S.E.2d 422 (1971); State v. Foster, 282 N.C. 189, 192 S.E.2d 320 (1972).

If the grand jury finds an indictment, there is no need to conduct a preliminary examination. State v. Foster, 282 N.C. 189, 192 S.E.2d 320 (1972).

It is proper to try the defendant upon a bill of indictment without a preliminary hearing. State v. Hargett, 255 N.C. 412, 121 S.E.2d 589 (1961); State v. Able, 13 N.C. App. 365, 185 S.E.2d 422 (1971); State v. Foster, 282 N.C. 189, 192 S.E.2d 320 (1972).

The State may dispense with the proceeding, since it is not essential to the finding of an indictment. Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970).

A preliminary hearing is not a constitutional requirement, nor is it essential to the finding of an indictment. State v. Hairston, 280 N.C. 220, 185 S.E.2d 633, cert. denied, 409 U.S. 888, 93 S. Ct. 194, 34 L. Ed. 2d 145 (1972).

Neither the North Carolina nor the United States Constitution requires a preliminary hearing. State v. Foster, 282 N.C. 189, 192 S.E.2d 320 (1972).

There is no provision in the North Carolina Constitution or United States Constitution requiring a preliminary hearing. Carroll v. Turner, 262 F. Supp. 486 (E.D.N.C. 1966), cert. denied, 390 U.S. 969, 88 S. Ct. 1085, 19 L. Ed. 2d 1176 (1968).

The general rule in the United States is that in absence of a statute, a preliminary hearing is not a prerequisite or an indispensable step in the prosecution of a person accused with crime, and an accused person is not entitled to a preliminary hearing as a matter of substantive right. Carroll v. Turner, 262 F. Supp. 486 (E.D.N.C. 1966), cert. denied, 390 U.S. 969, 88 S. Ct. 1085, 19 L. Ed. 2d 1176 (1968); State v. Foster, 282 N.C. 189, 192 S.E.2d 320 (1972).

Hearing Not Required after Indictment. — This section does not require a preliminary hearing after defendant is indicted for a felony and the superior court acquires jurisdiction. State v. Page, 32 N.C. App. 478, 232 S.E.2d 460 (1977).

There is nothing in this Chapter or its legislative history which demonstrates the legislature's intention to alter the preexisting rule which dispensed with the requirement for a preliminary, or probable-cause, hearing when the defendant has been charged by indictment. State v. Sutton, 31 N.C. App. 697, 230 S.E.2d 572 (1976).

A preliminary hearing is not an arraignment. Carroll v. Turner, 262 F. Supp. 486 (E.D.N.C. 1966), cert. denied, 390 U.S. 969, 88 S. Ct. 1085, 19 L. Ed. 2d 1176 (1968).

Nor is it a trial. Carroll v. Turner, 262 F. Supp. 486 (E.D.N.C. 1966), cert. denied, 390 U.S. 969, 88 S. Ct. 1085, 19 L. Ed. 2d 1176 (1968).

It is merely a course of procedure whereby a possible abuse of power may be prevented. Carroll v. Turner, 262 F. Supp. 486 (E.D.N.C. 1966), cert. denied, 390 U.S. 969, 88 S. Ct. 1085, 19 L. Ed. 2d 1176 (1968).

A preliminary hearing is a critical stage in a criminal proceeding. Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970).

At which the assistance of counsel for an indigent accused is required. Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970).

Under § 7A-451(b)(4), a preliminary hearing is a critical stage in a criminal proceeding and an indigent person is entitled to services of counsel at such hearing. State v. Hairston, 280 N.C. 220, 185 S.E.2d 633, cert. denied, 409 U.S. 888, 93 S. Ct. 194, 34 L. Ed. 2d 145 (1972).

A preliminary hearing may be held unless waived by defendant. State v. Foster, 282 N.C. 189, 192 S.E.2d 320 (1972).

The hearing of probable cause before a committing magistrate or inferior judge can be readily dispensed with by the State in this jurisdiction, since a preliminary hearing is not an essential prerequisite to the finding of an indictment. Gasque v. State, 271 N.C. 323, 156 S.E.2d 740 (1967), cert. denied, 390 U.S. 1030, 88 S. Ct. 1423, 20 L. Ed. 2d 888 (1968).

Failure to Provide Preliminary Hearing Did Not Preclude Prosecution of Defendant. — Where nothing in the record disclosed that defendant was adversely affected at trial on account of the postponement of the scheduled preliminary hearings and the eventual abandonment of this procedure after the grand jury had returned the indictments, those irregularities as may have occurred in connection with the failure to provide a preliminary hearing for defendant were insufficient to preclude prosecution of defendant for the crimes for which he was indicted. State v. Foster, 282 N.C. 189, 192 S.E.2d 320 (1972).

Person Charged Must Be Present. — There can be no examination in the absence of the person charged. Lovick v. Atlantic Coast Line R.R., 129 N.C. 427, 40 S.E. 191 (1901).

And May Introduce Witnesses. — The accused may introduce his own witnesses. Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970).

The testimony of witnesses at the hearing is subject to cross-examination by the accused, or by his lawyer should he have counsel. Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970).

§ 15A-612. Disposition of charge on probable-cause hearing. — (a) At the conclusion of a probable-cause hearing the judge must take one of the following actions:

(1) If he finds that the defendant probably committed the offense charged, or a lesser included offense of such offense within the original jurisdiction of the superior court, he must bind the defendant over to a superior court for further proceedings in accordance with this Chapter. The judge must note his findings in the case records.

(2) If he finds no probable cause as to the offense charged but probable cause with respect to a lesser included offense within the original jurisdiction of the district court, he may set the case for trial in the district court in accordance with the terms of G.S. 15A-613. In the absence of a new pleading, the judge may not set a case for trial in the district court on any offense which is not lesser included.

(3) If he finds no probable cause pursuant to subdivisions (1) or (2) as to any charge, he must dismiss the proceedings in question.

(b) No finding made by a judge under this section precludes the State from instituting a subsequent prosecution for the same offense. (1973, c. 1286, s. 1; 1975, c. 166, s. 14.)

OFFICIAL COMMENTARY

This section sets out the options a judge has after conducting a probable-cause hearing. The provision in subsection (b) simply states existing law. According to prevailing custom, neither the solicitor nor anyone else would attempt to start the case again in district court through issuance of a warrant or other process unless there was new evidence. The solicitor, if he disagreed with the decision of the district court judge, would also have the option of submitting a bill to the grand jury despite the finding in district court.

Editor's Note. — The 1975 amendment substituted "pleading" for "warrant or information" in the second sentence of subdivision (2) of subsection (a).

A preliminary hearing is not a trial; and the district judge, in his capacity as committing magistrate, passes only on the narrow question of whether probable cause exists and, if so, the fixing of bail if the offense is bailable. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 537, 34 L. Ed. 2d 499 (1972).

Discharge of Accused by District Judge Sitting as Committing Magistrate Is Not Acquittal. — The district judge, when sitting as a committing magistrate as authorized by § 7A-272(b), does not render a verdict; and a discharge of the accused is not an acquittal and does not bar a later indictment. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972).

§ 15A-613. Setting offense for trial in district court. — If an offense set for trial in the district court under the terms of G.S. 15A-604(b)(4) or any provision of G.S. 15A-612 is a lesser included offense of the charge before the court on a pleading, the judge may:

(1) Accept a plea of guilty or no contest, with the consent of the prosecutor; or

(2) Proceed to try the offense immediately, with the consent of both the defendant and the prosecutor.

Otherwise, the judge must enter an appropriate order for subsequent calendaring of the case for trial in the district court. The trial so ordered may not be earlier than five working days nor later than 15 working days from the date of the order. The judge must note in the case records the new offense with which the defendant is charged, has been tried, or to which he entered a plea of guilty or no contest. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

This section governs district court disposition of charges on lesser included offenses of those in the criminal pleadings before the court. At the probable-cause hearing, the district court judge may then and there accept a guilty plea or plea of no contest to an included offense in the district court's trial jurisdiction, with the consent of the solicitor. If both parties are ready, trial on the included misdemeanor may be held immediately. If both parties do not consent, however, the included offense must be set for trial at a later date. The minimum time period of a week (five working days) should permit the solicitor to dismiss and secure appropriate new charges at the felony or misdemeanor level if he believes the district court judge was mistaken in finding no probable cause as to any higher offense. This time would even permit him to secure a superior court judge's order convening a special session of the grand jury if he thought the case warranted this action.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" wherever it appeared in this section.

§ 15A-614. Review of eligibility for pretrial release. — Upon binding a defendant in custody over to the superior court for trial or upon entering an order for subsequent calendaring of the case of such a defendant for trial in the district court, the judge must again review the eligibility of the defendant for release under Article 26 of this Chapter, Bail. (1973, c. 1286, s. 1.)

§§ 15A-615 to 15A-620: Reserved for future codification purposes.

ARTICLE 31.

The Grand Jury and Its Proceedings.

OFFICIAL COMMENTARY

Although a clear majority of the Commission believed that the grand jury as presently constituted serves little in the way of a truly functional purpose in the administration of criminal justice, the Commission determined early that it should not burden its 1973 recommendations with a proposed constitutional amendment to abolish the grand jury in whole or in part. Among the reasons for favoring retention of the grand jury was that it brings desirable citizen participation into the administration of the criminal justice system.

Following the decision to retain the grand jury, the Commission studied drafts based on New York law that would have greatly expanded various powers of the grand jury. For various reasons most of the provisions working an expansion of powers were eliminated. The result was a grand jury very much like the present one so far as processing bills of indictment is concerned; as for its other duties, the Article generally restricts the grand jury even more than before.

Editor's Note. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-621. "Grand jury" defined. — A grand jury is a body consisting of not less than 12 nor more than 18 persons, impaneled by a superior court and constituting a part of such court. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section is intended to restate existing law.

§ 15A-622. Formation and organization of grand jury; other preliminary matters. — (a) The mode of selecting grand jurors and of drawing and impaneling grand jurors is governed by this Article and Chapter 9 of the General Statutes, Jurors. Challenges to the panel from which grand jurors were drawn are governed by the procedure in G.S. 15A-1211.

(b) To impanel a new grand jury, the presiding judge must direct that the names of all persons returned as jurors be separately placed in a container. The clerk must draw out the names of 18 persons to serve as grand jurors. Of these 18, the first nine drawn serve until the first session of court at which criminal cases are heard held in the county after the following January 1, and thereafter until their replacements are selected and sworn. The next nine serve until the first session of court at which criminal cases are heard held in the county after the following July 1, and thereafter until their replacements are selected and sworn. If this formula results in any term likely to be shorter than two months or longer than 15 months, the presiding judge impaneling the grand jury may modify the terms. Thereafter, beginning with the first session of superior court at which criminal cases are heard held in the county following January 1 and July 1 of each year, nine new grand jurors must be selected in the manner provided above to replace the jurors whose terms have expired. All new grand jurors so selected serve until the first session of court at which criminal cases are heard held after January 1 or July 1 which most nearly results in a 12-month term, and thereafter until their replacements are selected and sworn. If a vacancy occurs in the membership of the grand jury, the superior court judge next convening the jury or next holding a session of court at which criminal cases are heard in the county may order that a new juror be drawn in the manner provided above to fill the vacancy.

(c) Neither the grand jury panel nor any individual grand juror may be challenged, but a superior court judge may:

(1) At any time before new grand jurors are sworn, discharge them, or discharge the grand jury, and cause new grand jurors or a new grand jury to be drawn if he finds that jurors have not been selected in accordance with law or that the grand jury is illegally constituted; or

(2) At any time after a grand juror is drawn, refuse to swear him, or discharge him after he has been sworn, upon a finding that he is disqualified from service, incapable of performing his duties, or guilty of misconduct in the performance of his duties so as to impair the proper functioning of the grand jury.

(d) The presiding judge may excuse a grand juror from service of the balance of his term, upon his own motion or upon the juror's request for good cause shown. The foreman may excuse individual jurors from attending particular sessions of the grand jury, except that he may not excuse more than two jurors for any one session.

(e) After the impaneling of a new grand jury, or the impaneling of nine new jurors under the terms of this section, the presiding judge must appoint one of the grand jurors as foreman and may appoint another to act as foreman during any absence or disability of the foreman. Unless removed for cause by a superior court judge, the foreman serves until his successor is appointed and sworn.

(f) The foreman and other new grand jurors must take the oath prescribed in G.S. 11-11. After new grand jurors have been sworn, the presiding judge may give the grand jurors written or oral instructions relating to the performance of their duties. At subsequent sessions of court, the presiding judge is not required to give any additional instructions to the grand jurors.

(g) At any time when a grand jury is in recess, a superior court judge may, upon application of the prosecutor or upon his own motion, order the grand jury reconvened for the purpose of dealing with a matter requiring grand jury action. (1779, c. 157, s. 11, P. R.; R. C., c. 31, s. 33; 1879, c. 12; Code, ss. 404, 1742; Rev., ss. 1969, 1971; C. S., ss. 2333, 2336; 1929, c. 228; 1967, c. 218, s. 1; 1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1977, c. 711, s. 24.)

OFFICIAL COMMENTARY

This section replaces certain procedural provisions relating to grand jurors in Article 4 of Chapter 9, Grand Jurors, which is slated for repeal. The rest of Chapter 9, though, is left intact and is cross-referenced in subsection (a). The provisions as to length of tenure are essentially similar to the former statute in Chapter 9, though it is rewritten and modified in minor ways.

Subsection (c) embodies a change, as § 9-22(b) authorized a superior court judge to discharge an entire grand jury panel in his discretion. This section requires him to find cause for discharging either a panel or individual jurors. The kinds of sufficient cause are set out in the subsection.

The procedural provisions of subsection (d) have never been codified before.

Subsection (f) for the first time grants the judge explicit authority to give a written charge to the grand jury. It also specifies that at subsequent sessions after the installation of nine new members the judge need not charge the grand jurors further.

Subsection (g) states the underlying purposes of that part of § 9-22(b) which authorized the judge to order the grand jurors assembled at any time for the purpose of hearing his charge.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" in subsection (g).

The 1977 amendment, effective July 1, 1978, added the second sentence in subsection (a).

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Noncompliance with Directory Procedure Does Not Void Indictment. — Noncompliance with a procedure merely directory for the preparation of the jury list does not void a bill of indictment returned by a grand jury drawn from a jury box so composed. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969), cert. denied, 396 U.S. 1024, 90 S. Ct. 599, 24 L. Ed. 2d 518 (1970).

Always 18 Grand Jurors Serving. — Nine grand jurors are drawn in January of each year and nine grand jurors are drawn in July of each year, but there are always 18 grand jurors serving. State v. Ray, 274 N.C. 556, 164 S.E.2d 457 (1968).

Qualifications Judged at Time of Service. — The fact that a grand juror was a minor when his name was put on the jury list is immaterial if he was of age at the time he served. State v. Perry, 122 N.C. 1018, 29 S.E. 384 (1898).

Grand Juror Also Member of Petit Jury. — The fact that a member of the grand jury which returned a true bill for perjury was one of the petit jury that tried the issues in an action wherein it was charged the perjury was committed, is not good ground for abating or quashing the indictment. He was bound by his oath as a grand juror to communicate to his fellows the information he had acquired as a petit juror. State v. Wilcox, 104 N.C. 847, 10 S.E. 453 (1889).

Son of Prosecutor Member of Grand Jury. — The fact that the son of the prosecutor in an indictment for larceny was a member of the grand jury, and actively participated in finding the bill, did not vitiate the indictment, and it was error to quash it on that ground. State v. Sharp, 110 N.C. 604, 14 S.E. 504 (1892).

Foreman Interested in Prosecution. — A motion to quash a bill of indictment on the ground that the foreman of the grand jury was interested in the prosecution was denied when it appeared that the foreman took no part in passing upon the indictment and signed the bill under the direction of the grand jury and returned it in open court. State v. Pitt, 166 N.C. 268, 80 S.E. 1060 (1914).

Member of Grand Jury Summoned by Mistake. — While, generally, the provisions of the statute for drawing and summoning jurors are directory, the grand jury is illegally constituted when one whose name was not drawn from the boxes was summoned by mistake, and served by mistake. State v. Paramore, 146 N.C. 604, 60 S.E. 502 (1908).

Complete Exclusion of Class from Eligibility. — Even the complete exclusion, by State law, of a group or class of persons from eligibility for jury service will not make invalid an indictment by a grand jury, selected in accordance with such State law, so long as there is no reasonable basis for the conclusion that the ineligible group or class would bring to the

deliberations of the jury a point of view not otherwise represented upon it, at least where the defendant is not a member of the excluded group. State v. Knight, 269 N.C. 100, 152 S.E.2d 179 (1967).

Discrimination against Negroes in Selecting Jurors Forbidden. — The Fourteenth Amendment to the federal Constitution forbids any discrimination against Negroes in the selection of a grand jury, and the burden is on the defendants to establish the discrimination against their race. State v. Arnold, 258 N.C. 563, 129 S.E.2d 229 (1963), rev'd on other grounds, 376 U.S. 773, 84 S. Ct. 1032, 12 L. Ed. 2d 77 (1964).

See N.C. Const., Art. I, § 19, and the note thereto.

The selection of a legally constituted grand jury is a constitutionally protected right, and the indictment of a defendant by a grand jury from which members of his race have been systematically excluded is a denial of his right to equal protection of the laws. Parker v. Ross, 330 F. Supp. 13 (E.D.N.C. 1971), rev'd on other grounds, 470 F.2d 1092 (4th Cir. 1972).

And Is Not Waived by Guilty Plea. — Under North Carolina law, a guilty plea does not waive objections to racial exclusion in the selection of the grand jury if, before the plea of guilty, the defendant raises his objection in a motion to quash the indictment. Parker v. North Carolina, 397 U.S. 790, 90 S. Ct. 1458, 1474, 25 L. Ed. 2d 785 (1970).

The question of racial exclusion in the selection of a state grand jury is cognizable in federal habeas corpus, despite the fact that under former § 9-23 an objection to the composition of the grand jury was waived unless raised by motion to quash the indictment prior to the entry of the guilty plea. Parker v. Ross, 330 F. Supp. 13 (E.D.N.C. 1971), rev'd on other grounds, 470 F.2d 1092 (4th Cir. 1972).

Where there is no evidence that petitioner, after intelligent consultation with his attorney, had understandingly and knowingly waived the right of trial by an indictment returned by a constitutionally selected grand jury, there is no basis to support a finding that he has waived that right by his failure to enter a timely motion to quash the indictment. Parker v. Ross, 330 F. Supp. 13 (E.D.N.C. 1971), rev'd on other grounds, 470 F.2d 1092 (4th Cir. 1972).

§ 15A-623. Grand jury proceedings and operation in general. — (a) The finding of an indictment, the return of a presentment, and every other affirmative official action or decision of the grand jury requires the concurrence of at least 12 members of the grand jury.

(b) The foreman presides over all hearings and has the power to administer oaths or affirmations to all witnesses.

(c) The foreman must indicate on each bill of indictment or presentment the witness or witnesses sworn and examined before the grand jury. Failure to comply with this provision does not vitiate a bill of indictment or presentment.

(d) During the deliberations and voting of a grand jury, only the grand jurors may be present in the grand jury room. During its other proceedings, the following persons, in addition to a witness being examined, may, as the occasion requires, also be present:

(1) An interpreter, if needed.

(2) A law-enforcement officer holding a witness in custody.

Any person other than a witness who is permitted in the grand jury room must first take an oath before the grand jury that he will keep secret all matters before it within his knowledge.

(e) Grand jury proceedings are secret and, except as expressly provided in this Article, members of the grand jury and all persons present during its sessions shall keep its secrets and refrain from disclosing anything which transpires during any of its sessions.

(f) The presiding judge may direct that a bill of indictment be kept secret until the defendant is arrested or appears before the court. The clerk must seal the bill of indictment and no person including a witness may disclose the finding of the bill of indictment, or the proceedings leading to the finding, except when necessary for the issuance and execution of an order of arrest.

(g) Any grand juror or other person authorized to attend sessions of the grand jury and bound to keep its secrets who discloses, other than to his attorney, matters occurring before the grand jury other than in accordance with the provisions of this section is in contempt of court and subject to proceedings in accordance with law. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

In general the provisions of this section spell out procedural provisions that were observed through custom, common law, or provisions of Article 4 of Chapter 9 of the General Statutes. Among the new provisions are:

(1) Express permission for interpreters and law-enforcement officers keeping witnesses in custody to enter the grand jury room. The Commission quite deliberately decided against authorizing any bailiff or deputy sheriff attending the grand jury any authority to enter the grand jury room at any time the jurors are in session.

(2) Express direction to swear the nonwitnesses to secrecy.

(3) An express bar against disclosure.

(4) The procedure for sealing a bill of indictment until a defendant can be brought within the control or custody of the court.

The Commission's proposal allowed disclosure of grand jury proceedings in certain instances, e.g., a witness could disclose his own testimony or a court could order disclosure if a case involved alleged contempt or perjury before a grand jury. The General Assembly, however, was fearful of opening the door at all in a manner to enhance the use of the grand jury as an investigative tool of the prosecutor's office, and rewrote subsection (e). It is not clear to what extent, if at all, a court could invoke the common law to override the statutory command, though if a defendant's constitutional rights were compromised by the statutory bar it seems obvious that the statute should be disregarded.

The Commission debated the idea of allowing the solicitor in the grand jury room to examine witnesses at least when investigations were being undertaken. It finally decided in all cases to preserve the present arrangement whereby all questioning is by the jurors — and unrecorded.

Cross Reference. — See also § 15A-644 and the note thereto.

Editor's Note. — For note dealing with a witness' access to his own grand jury testimony, see 13 Wake Forest L. Rev. 216 (1977).

Failure to Mark Names of Witnesses on Bill. — Former § 9-27, providing that the foreman of the grand jury shall mark on the indictment the names of the witnesses sworn and examined before the jury, was directory merely, and the omission of the foreman to comply therewith was no ground for quashing the bill, where the proof was that the witnesses were sworn. State v. Hines, 84 N.C. 810 (1881).

The statute requiring the foreman of the grand jury, when the oath is administered by him, to mark on the bill the names of the witnesses sworn and examined before the jury is directory, and the fact that it does not appear by endorsement on a bill that the witness had been sworn and examined is no ground for quashing the indictment or arresting the judgment. State v. Hollingsworth, 100 N.C. 535, 6 S.E. 417 (1888).

The statutory requirement that the foreman of the grand jury shall mark on the bill the names of the witnesses sworn and examined before the grand jury is directory and not mandatory, and the mere absence of such an endorsement is not sufficient to overcome the presumption of validity of the indictment arising from its return by the grand jury as "a true bill." State v. Tudor, 14 N.C. App. 526, 188 S.E.2d 583 (1972).

The provision of the statute that the foreman of the grand jury shall mark on the indictment the names of the witnesses sworn and examined before the jury, is directory merely, and the omission of the foreman to comply therewith is no ground for quashing the bill, where the proof is that the witnesses were sworn. State v. Hines, 84 N.C. 810 (1881). See State v. Avant, 202 N.C. 680, 163 S.E. 806 (1932); State v. Lancaster, 210 N.C. 584, 187 S.E. 802 (1936); State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963).

The mere absence of an endorsement on a bill of indictment indicating that the witnesses were duly examined is not sufficient to overcome the presumption of the validity of the indictment arising from its return by the grand jury as "a true bill." State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963).

No endorsement on a bill of indictment by the grand jury is necessary. The record that it was presented by the grand jury is sufficient in the absence of evidence to impeach it. State v. Sultan, 142 N.C. 569, 54 S.E. 841 (1906), overruling State v. McBroom, 127 N.C. 528, 37 S.E. 193 (1900).

Witnesses Sworn by Clerk. — The statute, authorizing the foreman of the grand jury to swear witnesses to be examined before the jury is directory merely. The fact that witnesses are sworn by the clerk of court rather than by the foreman is not grounds for arresting judgment or quashing an indictment. State v. Allen, 83 N.C. 680 (1880); State v. White, 88 N.C. 698 (1883).

Return of New Bill after Quashing of Original without Reexamination of Witnesses. — Where an indictment upon which witnesses had been examined was returned by the grand jury "a true bill," and quashed because it did not sufficiently charge the offense intended, and thereupon a new bill for the offense was sent and returned into court, "a true bill," without a reexamination of the witnesses, this bill should be quashed. State v. Ivey, 100 N.C. 539, 5 S.E. 407 (1888).

§ 15A-624. Grand jury the judge of facts; judge the source of legal advice. — (a) The grand jury is the exclusive judge of the facts with respect to any matter before it.

(b) The legal advisor of the grand jury is the presiding or convening judge. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

Subsection (a) states the common law followed in North Carolina. Subsection (b) reflects a policy decision of the Commission. In many jurisdictions the prosecuting attorney may advise the grand jury on matters of law, but these of course are jurisdictions in which the prosecutor routinely enters the grand jury room to examine the witnesses.

§ 15A-625: Reserved for future codification purposes.

OFFICIAL COMMENTARY

For comment on the section here deleted, see the commentary under § 15A-1053.

§ 15A-626. Who may call witnesses before grand jury; no right to appear without consent of prosecutor or judge. — (a) Except as provided in this section, no person has a right to call a witness or appear as a witness in a grand jury proceeding.

(b) In proceedings upon bills of indictment submitted by the prosecutor to the grand jury, the clerk must call as witnesses the persons whose names are listed on the bills by the prosecutor. If the grand jury desires to hear any witness not named on the bill under consideration, it must through its foreman request the prosecutor to call the witness. The prosecutor in his discretion may call, or refuse to call, the witness.

(c) In considering any matter before it a grand jury may swear and hear the testimony of a member of the grand jury.

(d) Any person not called as a witness who desires to testify before the grand jury concerning a criminal matter which may properly be considered by the grand jury must apply to the district attorney or to a superior court judge. The judge or the district attorney in his discretion may call the witness to appear before the grand jury.

(e) An official who is required or authorized to call a witness before the grand jury does so by issuing a subpoena for the witness or by causing one to be issued. If the official is assured that the witness will appear when requested without issuance of a subpoena, he may call the witness simply by notifying him of the time and place his presence is requested before the grand jury. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

This section is a key one in placing restrictions on any independent powers the grand jury may possess. The grand jury may not call its own witnesses; in fact, even volunteer witnesses may not appear before the grand jury without the permission of the solicitor or the judge.

As originally drafted this section stated that a grand jury investigating a matter expressly referred to it by a solicitor or a judge had the right to secure all necessary witnesses; otherwise, it was within the discretion of the judge or the solicitor. The General Assembly deleted these provisions and in fact left no specific provision for the jurors to request that witnesses be called. Nevertheless, from the overall context of the section it is clear that either a judge or a solicitor would have the discretion to call, or refuse to call, any person as a witness upon the request of the grand jurors.

Subsection (e) authorizes witnesses to be called without the formality of a subpoena when it is clear that the witness will come at the time requested.

Editor's Note. — The 1975 amendment substituted "district attorney" for "district solicitor" and "prosecutor" for "solicitor" wherever they appeared in this section.

§ 15A-627. Submission of bill of indictment to grand jury by prosecutor. — (a) When a defendant has been bound over for trial in the superior court upon any charge in the original jurisdiction of such court, the prosecutor, unless he dismisses the charge under the terms of Article 50 of this Chapter, Voluntary Dismissal by the State, or proceeds upon a bill of information, must submit a bill of indictment charging the offense to the grand jury for its consideration.

(b) A prosecutor may submit a bill of indictment charging an offense within the original jurisdiction of the superior court. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

Subsection (a) codifies existing practice. The Commission determined that it was not necessary to complicate this section by setting time limits in which the solicitor must act. It was believed that the rights granted defendants elsewhere to assure speedy trials would be sufficient to cover this matter.

Subsection (b) originally restricted the power of solicitors to submit a bill of indictment to the grand jury on a charge as to which a district court judge had found no probable cause without the written consent of a superior court judge. As amended, it merely states the solicitor's unrestricted common-law power to submit a bill of indictment within the jurisdictional limits of § 7A-271(a).

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" wherever it appeared in this section.

§ 15A-628. Functions of grand jury; record to be kept by clerk. — (a) A grand jury:

(1) Must return a bill submitted to it by the prosecutor as a true bill of indictment if it finds from the evidence probable cause for the charge made.

(2) Must return a bill submitted to it by the prosecutor as not a true bill of indictment if it fails to find probable cause for the charge made. Upon returning a bill of indictment as not a true bill, the grand jury may request the prosecutor to submit a bill of indictment as to a lesser included or related offense.

(3) May return the bill to the court with an indication that the grand jury has not been able to act upon it because of the unavailability of witnesses.

(4) May investigate any offense as to which no bill of indictment has been submitted to it by the prosecutor and issue a presentment accusing a named person or named persons with one or more criminal offenses if it has found probable cause for the charges made. An investigation may be initiated upon the concurrence of 12 members of the grand jury itself or upon the request of the presiding or convening judge or the prosecutor.

(5) Must inspect the jail and may inspect other county offices or agencies and must report the results of its inspections to the court.

(b) In proceeding under subsection (a), the grand jury may consider any offense which may be prosecuted in the courts of the county, or in the courts of the judicial district when there has been a waiver of venue in accordance with Article 3 of this Chapter, Venue.

(c) Bills of indictment submitted by the prosecutor to the grand jury, whether found to be true bills or not, must be returned by the foreman of the grand jury to the presiding judge in open court. Presentments must also be returned by the foreman of the grand jury to the presiding judge in open court.

(d) The clerk must keep a permanent record of all matters returned by the grand jury to the judge under the provisions of this section. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

An early draft of this section within the Commission permitted the grand jury to issue critical reports of public officials following investigations of them or their offices. This was coupled with some fairly elaborate additional sections allowing officials to see critical reports and defend themselves against any false charges before the reports could be made public. Reports about public agencies that were not critical of identifiable persons were also permitted. The Commission finally decided that the grand jury is an unwieldy investigative body; there is simply too much danger that through ignorance of budgetary and other restraints it could by general or specific criticism unfairly ruin the career of conscientious public officials who are doing the best that can be expected. The draft reflected the Commission's policy choice: The grand jury's investigations may only result in indictments (with the cooperation of the solicitor) or presentments. The section as introduced did not explicitly prohibit reports; it said they were not necessary. The tenor of the entire Article, though, was such that the courts would undoubtedly rule out of order any report of the grand jury that criticized any identifiable person unless that report was accompanied with an indictment or presentment against the person. These careful limitations of the grand jury's powers, however, were thrown awry by amendatory language of the General Assembly in subdivision (a)(5), which requires the grand jury to inspect the jail, in keeping with the provisions of § 9-26, and to permit inspection of "other county offices or agencies"; as for reports, if inspections are made, the jury must report to the court.

This leaves the question of critical reports of county officials and employees not specifically settled, but would probably authorize any criticism that was a necessary part of the report. Critical reports of other persons would apparently, now that the statute has been amended to the point that it is ambiguous on the question, be a question of decision under North Carolina's common law.

A new feature of the section is in subdivision (a)(3), providing that a grand jury may return a bill of indictment without acting upon it if witnesses are unavailable.

Subsection (c) as introduced provided that its procedure applied in capital cases as well as noncapital cases. This was designed to abolish the custom now followed that all the grand

jurors must come into open court upon the return of an indictment in a capital case. The General Assembly removed that specification, but did not address the question whether the old procedure should be retained in capital cases. One minor change might be noted: The foreman must now return indictments and presentments to the court; it has been customary in noncapital cases to send them to the judge by a bailiff or deputy sheriff assigned to the grand jury.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" wherever it appeared in this section.

The grand jury does not have authority to compel the county commissioners to repair county buildings. Opinion of Attorney General to Mr. R. Wendel Hutchins, County Attorney, Plymouth, N.C., 46 N.C.A.G. 221 (1977).

Indictment to Be Returned in Open Court. — It is the returning of the bill of indictment, publicly, in open court and its being there recorded, that makes it effectual. State v. Cox, 28 N.C. 440 (1846).

It is not mandatory that the foreman personally deliver bills of indictment to the court. State v. Reep, 12 N.C. App. 125, 182 S.E.2d 623 (1971).

A bill of indictment was not improperly delivered to the court where the foreman delivered it to the officer serving the grand jury, and the officer gave the indictment to the solicitor who carried it into the courtroom. State v. Reep, 12 N.C. App. 125, 182 S.E.2d 623 (1971).

Minutes of Court as Evidence of Compliance. — The minutes of the court show that statutory requirements as to return of an indictment in a capital case in open court were strictly complied with. State v. Childs, 269 N.C. 307, 152 S.E.2d 453 (1967), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2278, 29 L. Ed. 2d 859 (1971).

Defendant is not entitled to be present in court, either in person or by his attorney, when the indictments are returned as true bills by the grand jury, and his motion to quash the indictments because neither he nor his attorney was present in court when the indictments were returned was properly overruled. State v. Childs, 269 N.C. 307, 152 S.E.2d 453 (1967), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2278, 29 L. Ed. 2d 859 (1971), citing State v. Stanley, 227 N.C. 650, 44 S.E.2d 196 (1947).

§ 15A-629. Procedure upon finding of not a true bill; release of defendant, etc.; institution of new charge. — (a) Upon the return of a bill of indictment as not a true bill, the presiding judge must immediately examine the case records to determine if the defendant is in custody or subject to bail or conditions of pretrial release. If so, except as provided in subsection (b), the judge must immediately order release from custody, exoneration of bail, or release from conditions of pretrial release, as the case may be.

(b) Upon the return of a bill of indictment as not a true bill but with a request that the prosecutor submit a bill of indictment to a lesser included or related offense, the judge may defer the action required in subsection (a) for a reasonable period, not to extend past the end of that session of superior court, to allow the institution of the new charge. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

This section contains a new provision. It authorizes the judge to defer a defendant's release from custody or bail obligations until new process, or a new indictment, may be secured when the jury finds not a true bill to the offense charged but recommends prosecution for a lesser included or related offense. (See the commentary to § 15A-956.) The General Assembly removed a provision from this section which restricted the solicitor's discretionary power to submit a new bill of indictment upon the same charge to the same or a new grand jury following the return of a bill as not a true bill.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" wherever it appeared in this section.

§ 15A-630. Notice to defendant of true bill of indictment. — Upon the return of a bill of indictment as a true bill the presiding judge must immediately cause notice of the indictment to be mailed or otherwise given to the defendant unless he is then represented by counsel of record. The notice must inform the defendant of the time limitations upon his right to discovery under Article 48 of this Chapter, Discovery in the Superior Court, and a copy of the indictment must be attached to the notice. If the judge directs that the indictment be sealed as provided in G.S. 15A-623(f), he may defer the giving of notice under this section for a reasonable length of time. (1973, c. 1286, s. 1; 1975, 2nd Sess., c. 983, s. 143.)

OFFICIAL COMMENTARY

In its provisions as to timeliness of discovery requests, the Commission started the clock running for most defendants when the probable-cause hearing is held or waived. But, defendants not then represented by counsel, or for whom the probable-cause hearing is bypassed, require a different starting point. The Commission determined that at or shortly after the issuance of an indictment was the appropriate time, and this necessitated giving those defendants notice of the indictment. This section is drafted to conform with the provisions of § 15A-902(d).

Editor's Note. — The 1975, 2nd Sess., amendment rewrote this section.

§§ 15A-631 to 15A-640: Reserved for future codification purposes.

ARTICLE 32.

Indictment and Related Instruments.

§ 15A-641. Indictment and related instruments; definitions of indictment, information, and presentment. — (a) An indictment is a written accusation by a grand jury, filed with a superior court, charging a person with the commission of one or more criminal offenses.

(b) An information is a written accusation by a prosecutor, filed with a superior court, charging a person represented by counsel with the commission of one or more criminal offenses.

(c) A presentment is a written accusation by a grand jury, made on its own motion and filed with a superior court, charging a person, or two or more persons jointly, with the commission of one or more criminal offenses. A presentment does not institute criminal proceedings against any person, but the district attorney is obligated to investigate the factual background of every presentment returned in his district and to submit bills of indictment to the grand jury dealing with the subject matter of any presentments when it is appropriate to do so. (1797, c. 474, s. 3, P. R.; R. C., c. 35, s. 6; 1879, c. 12; Code, s. 1175; Rev., s. 3240; C. S., s. 4607; 1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

This section is intended to set out the North Carolina common law relating to the definitions of indictment, information, and presentment. One change was made in conformity with the commission's decision to require a separate pleading for each defendant. Indictments and informations may charge only a single person. Presentments, as they are not pleadings, may charge two or more persons jointly.

Cross References. — As to indictment for murder, see § 15-144. As to indictment for perjury, see § 15-145. As to indictment for subornation of perjury, see § 15-146. As to manner of alleging joint ownership of property, see § 15-148. As to description in bill for larceny of money, see § 15-149. As to description in bill for embezzlement, see § 15-150. As to indictment alleging intent to defraud, and indictment for larceny and receiving stolen goods, see § 15-151. For provision that indictment shall not be quashed for informality, see § 15-153.

Editor's Note. — The 1975 amendment substituted "district attorney" for "district solicitor" and "prosecutor" for "solicitor" wherever they appeared in this section.

There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity. McClure v. State, 267 N.C. 212, 148 S.E.2d 15 (1966); State v. Cassada, 6 N.C. App. 629, 170 S.E.2d 575 (1969).

When the court sentenced petitioner, who had been indicted for a violation of § 14-26 (carnal knowledge of female virgins between 12 and 16 years of age), to imprisonment for a term of not less than 12 nor more than 15 years upon his plea of guilty to a violation of § 14-22 (assault with intent to commit rape) when there was no formal and sufficient accusation against him for the offense to which he pleaded guilty, it would seem to be without precedent, and the sentence of imprisonment was a nullity, and violates petitioner's rights as guaranteed by N.C. Const., Art. I, § 19, and by § 1 of the Fourteenth Amendment to the United States Constitution and must be vacated in post-conviction proceedings. McClure v. State, 267 N.C. 212, 148 S.E.2d 15 (1966).

"Presentment". — A presentment is an accusation of crime made by a grand jury on its own motion upon its own knowledge or observation, or upon information from others without any bill of indictment. State v. Elledge, 13 N.C. App. 462, 186 S.E.2d 192 (1972).

Trials upon presentments have been abolished, and a presentment amounts to nothing more than an instruction by the grand jury to the public prosecuting attorney to frame a bill of indictment. State v. Elledge, 13 N.C. App. 462, 186 S.E.2d 192 (1972).

The experience of early days proved the practice of trying criminal cases upon the presentments of grand jurors to be wholly impracticable. As a consequence, the General Assembly of 1797 outlawed the practice by a statute. Since the adoption of the act of 1797, a presentment is regarded as nothing more than an instruction by the grand jury to the public prosecuting attorney for framing a bill of indictment for submission to them. State v. Thomas, 236 N.C. 454, 73 S.E.2d 283 (1952).

§ 15A-642. Prosecutions originating in superior court to be upon indictment or information; waiver of indictment. — (a) Prosecutions originating in the superior court must be upon pleadings as provided in Article 49 of this Chapter, Pleadings and Joinder.

(b) Indictment may not be waived in a capital case or in a case in which the defendant is not represented by counsel.

(c) Waiver of indictment must be in writing and signed by the defendant and his attorney. The waiver must be attached to or executed upon the bill of information. (1907, c. 71; C. S., s. 4610; 1951, c. 726, ss. 1, 2; 1971, c. 377, s. 30.1; 1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section simplifies somewhat the waiver provisions in § 15-140 and § 15-140.1. The provisions of § 15-140.2 were omitted as unnecessary.

Prerequisites for Waiver. — A defendant can waive a bill of indictment in a felony case only when represented by counsel and when both the defendant and his counsel sign a written waiver of indictment. State v. Hayes, 261 N.C. 648, 135 S.E.2d 653 (1964); State v. Daniel, 19 N.C. App. 313, 198 S.E.2d 464 (1973).

"Represented by Counsel". — The provision that a defendant can waive a bill of indictment in a felony case only when represented by counsel, and when both defendant and his counsel sign a written waiver of indictment, presupposes counsel selected and employed by the defendant himself or assigned to him by the judge, and certainly does not include counsel assigned by the prosecuting attorney. State v. Hayes, 261 N.C. 648, 135 S.E.2d 653 (1964).

Waiver of Finding of Indictment Includes Waiver of Return. — The waiver of the finding of a bill of indictment also includes the waiver of the return. State v. Hodge, 267 N.C. 238, 147 S.E.2d 881 (1966).

New Indictment Not Required for Lesser Included Offense. — It is not necessary that accused be tried under a new indictment charging him with assault with intent to commit rape, since assault with intent to commit rape is a lesser included offense of rape and accused therefore could be tried on the original indictment. Godlock v. Ross, 259 F. Supp. 659 (E.D.N.C. 1966).

§ 15A-643. Joinder of offenses and defendants and consolidation of indictments and informations. — The rules with respect to joinder of offenses and defendants and the consolidation of charges in indictments and informations are provided in Article 49 of this Chapter, Pleadings and Joinder. (1917, c. 168; C. S., s. 4622; 1921, c. 100; 1973, c. 1286, s. 1.)

§ 15A-644. Form and content of indictment, information or presentment. — (a) An indictment must contain:

(1) The name of the superior court in which it is filed;

(2) The title of the action;

(3) Criminal charges pleaded as provided in Article 49 of this Chapter, Pleadings and Joinder;

(4) The signature of the prosecutor, but its omission is not a fatal defect; and

(5) The signature of the foreman or acting foreman of the grand jury attesting the concurrence of 12 or more grand jurors in the finding of a true bill of indictment.

(b) An information must contain everything required of an indictment in subsection (a) except that the accusation is that of the prosecutor and the provisions of subdivision (a)(5) do not apply. The information must also contain or have attached the waiver of indictment pursuant to G.S. 15A-642(c).

(c) A presentment must contain everything required of an indictment in subsection (a) except that the provisions of subdivisions (a)(4) and (5) do not apply and the foreman must by his signature attest the concurrence of 12 or more grand jurors in the presentment. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

Cross Reference. — See also § 15A-623 and the note thereto.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" wherever it appeared in this section.

The office of an indictment is to inform the defendant of the charge against him with sufficient certainty to enable him to prepare his defense. State v. Gates, 107 N.C. 832, 12 S.E. 319 (1890).

If an indictment charges the offense in a plain, intelligible and explicit manner and contains averments sufficient to enable the court to proceed to judgment, and to bar a subsequent prosecution for the same offense, it is sufficient. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

Power of Legislature. — The legislature has the undoubted right to modify old forms of bills of indictment, or establish new ones, provided the form established is sufficient to apprise the defendant with reasonable certainty of the nature of the crime of which he stands charged. State v. Harris, 145 N.C. 456, 59 S.E. 115 (1907).

Refinements Abolished. — The technical and useless refinements of the common law, formerly required in drawing bills of indictment in criminal cases, have been all abolished by

statute. State v. Hawley, 186 N.C. 433, 119 S.E. 888 (1923). See also State v. Morrison, 202 N.C. 60, 161 S.E. 725 (1932).

Language of Statute Sufficient. — An indictment for a statutory offense is sufficient as a general rule when it charges the offense in the language of the statute. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

Statement of Facts and Circumstances. — In every indictment, the facts and circumstances must be stated with such certainty that the defendant may judge whether they constitute an indictable offense or not. State v. Lewis, 93 N.C. 581 (1885). Thus where an indictment sets forth the substance of the offense charged in a plain, intelligible and explicit manner, with such fullness that the court can see that it is charged, and it gives the defendant such information as is necessary to enable him to make defense on the trial and in case of a subsequent prosecution, it is sufficient. State v. Murphy, 101 N.C. 697, 8 S.E. 142 (1888).

Signing Not Required under Former Law. — It has been often held that an indictment need not necessarily be signed by anyone. State v. Cox, 28 N.C. 440 (1846); State v. Mace, 86 N.C. 668 (1882); State v. Pitt, 166 N.C. 268, 80 S.E. 1060 (1914).

No endorsement by the foreman or otherwise was essential to the validity of an indictment which had been duly returned into court by the grand jury under former § 15-141 and entered upon its records. State v. Avant, 202 N.C. 680, 163 S.E. 806 (1932).

Lack of Endorsement on Indictment Held Not to Support Motion to Quash. — When a bill of indictment in a capital case had been returned in open court by a majority of the grand jury as a true bill, and the action of the grand jury was duly recorded in the court's records, the lack of endorsement on the bill would not support a motion to quash, under former § 15-141. State v. Cox, 280 N.C. 689, 187 S.E.2d 1 (1972).

Signature of Solicitor Not Essential. — It is regular and orderly for the bill to be signed by the solicitor, but such signing is not essential to its validity. State v. Cox, 28 N.C. 440 (1846); State v. Mace, 86 N.C. 668 (1882); State v. Arnold, 107 N.C. 861, 11 S.E. 990 (1890).

Omission of Caption Does Not Vitiate Indictment. — While every indictment properly should have a caption, it is no part of the indictment, and its omission is no ground for arresting judgment. State v. Wasden, 4 N.C. 596 (1816); State v. Brickell, 8 N.C. 354 (1821); State v. Lane, 26 N.C. 113 (1843); State v. Dula, 61 N.C. 437 (1868); State v. Arnold, 107 N.C. 861, 11 S.E. 990 (1890).

Mistake in Caption. — A misrecital of the county in the caption is not ground for arrest of judgment. State v. Sprinkle, 65 N.C. 463 (1871); State v. Arnold, 107 N.C. 861, 11 S.E. 990 (1890).

An indictment for burglary is fatally defective if it fails to identify the premises broken and entered with sufficient certainty to enable the defendant to prepare his defense and to offer him protection from another prosecution for the same incident. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

It is not required that the indictment for first-degree burglary describe the property which the defendant intended to steal, or that which he did steal. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

In an indictment for burglary the felony intended need not be set out as fully and specifically as would be required in an indictment for the actual commission of that felony. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

The indictment for burglary must specify the particular felony which the defendant is alleged to have intended to commit at the time of the breaking and entering, and it is not sufficient to charge generally an intent to commit an unspecified felony. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

Kidnapping. — An indictment charging that defendant "unlawfully, did feloniously and forcibly kidnap" a person named is not defective or violative of North Carolina Const., Art. I, §§ 22 and 23 for failure to charge additionally that the victim was forcibly carried away against her will. State v. Norwood, 289 N.C. 424 222 S.E.2d 253 (1976).

Quoted in State v. Ellis, 32 N.C. App. 226, 231 S.E.2d 285 (1977).

§ 15A-645. Allegations of previous convictions. — Trial upon indictments and informations involving allegation of previous convictions is subject to the provisions of G.S. 15A-928. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

See the commentary under § 15A-928.

§ 15A-646. Superseding indictments and informations. — If at any time before entry of a plea of guilty to an indictment or information, or commencement of a trial thereof, another indictment or information is filed in the same court charging the defendant with an offense charged or attempted to be charged in the first instrument, the first one is, with respect to the offense, superseded by the second and, upon the defendant's arraignment upon the second indictment or information, the count of the first instrument charging the offense must be dismissed by the superior court judge. The first instrument is not, however, superseded with respect to any count contained therein which charged an offense not charged in the second indictment or information. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

The provisions of this section are based on a section in the New York Criminal Procedure Law. This section must be compared with Article 3, Venue. If a crime chargeable in two or more counties is charged in one county, the county in which the charge is first laid becomes the county with exclusive venue. See § 15A-132. This section does not change that rule; it applies to superseding indictments and informations filed in the same court.

ARTICLE 33.

§§ 15A-647 to 15A-673: Reserved for future codification purposes.

ARTICLE 34.

§§ 15A-674 to 15A-700: Reserved for future codification purposes.

SUBCHAPTER VII. SPEEDY TRIAL; ATTENDANCE OF DEFENDANTS.

ARTICLE 35.

Speedy Trial.

Editor's Note. — The "Official Commentary" under this Article has been omitted in light of the extensive rewriting of this Article by Session Laws 1977, c. 787, s. 1.

§ 15A-701. Time limits and exclusions. — (a) The trial of the defendant charged with a criminal offense shall begin within the time limits specified below:

(1) Within 90 days from the date the defendant is arrested, served with criminal process, waives an indictment or is notified pursuant to G.S. 15A-630 that an indictment has been filed with the superior court against him, whichever occurs last;

(2) Within 90 days of the giving of notice of appeal in a misdemeanor case for a trial de novo in the superior court;

(3) When a charge is dismissed, other than under G.S. 15A-703, and the defendant is afterwards charged with the same offense or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, then within 90 days from the date that the defendant was arrested, served with criminal process, waived an indictment, or was notified pursuant to G.S. 15A-630 that an indictment has been filed

with the superior court against him, whichever occurs last, for the original charge;

(4) When the defendant is to be tried again following a declaration by the trial judge of a mistrial, then within 60 days of that declaration; or

(5) Within 60 days from the date the action occasioning the new trial becomes final when the defendant is to be tried again following an appeal or collateral attack.

(a1) Notwithstanding the provisions of G.S. 15A-701(a) the trial of a defendant charged with a criminal offense who is arrested, served with criminal process, waives an indictment or is notified pursuant to G.S. 15A-630 that an indictment has been filed against him, on or after October 1, 1978, and before October 1, 1980, shall begin within the time limits specified below:

(1) Within 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is notified pursuant to G.S. 15A-630 that an indictment has been filed against him, whichever occurs last;

(2) Within 120 days of the giving of notice of appeal in a misdemeanor case for a trial de novo in the superior court;

(3) When a charge is dismissed, other than under G.S. 15A-703, and the defendant is afterwards charged with the same offense or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, then within 120 days from the date that the defendant was arrested, served with criminal process, waived an indictment, or was notified pursuant to G.S. 15A-630 that an indictment has been filed with the superior court against him, whichever occurs last, for the original charge;

(4) When the defendant is to be tried again following a declaration by the trial judge of a mistrial, then within 120 days of that declaration; or

(5) Within 120 days from the date the action occasioning the new trial becomes final when the defendant is to be tried again following an appeal or collateral attack.

(b) The following periods shall be excluded in computing the time within which the trial of a criminal offense must begin:

(1) Any period of delay resulting from other proceedings concerning the defendant including, but not limited to, delays resulting from

a. A mental or physical examination of the defendant, or a hearing on his mental or physical incapacity;

b. Trials with respect to other charges against the defendant;

c. Interlocutory appeals; or

d. Hearings on pretrial motions or the granting or denial of such motions;

(2) Any period of delay during which the prosecution is deferred by the prosecutor pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct;

(3) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness for the defendant or the State. For the purpose of this subdivision, a defendant or an essential witness shall be considered

a. Absent when his whereabouts are unknown and he is attempting to avoid apprehension or prosecution or when his whereabouts cannot be determined by due diligence; and

b. Unavailable when his whereabouts are known but his presence for testifying at the trial cannot be obtained by due diligence or he resists appearing at or being returned for trial;

(4) Any period of delay resulting from the fact that the defendant is mentally incapacitated or physically unable to stand trial;

(5) When a charge is dismissed by the prosecutor under the authority of G.S. 15A-931 and afterwards a new indictment or information is filed against the same defendant or the same defendant is arrested or served with criminal process for the same offense, or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, any period of delay from the date the initial charge was dismissed to the date the time limits for trial under this section would have commenced to run as to the subsequent charge;

(6) A period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted;

(7) Any period of delay resulting from a continuance granted by any judge if the judge granting the continuance finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial and sets forth in writing in the record of the case the reasons for so finding.

The factors, among others, which a judge shall consider in determining whether to grant a continuance are as follows:

a. Whether the failure to grant a continuance would be likely to result in a miscarriage of justice;

b. Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the time limits established by this section; and

c. Whether delay after the grand jury proceedings have begun, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the State;

(8) Any period of delay occasioned by the venue of the defendant's case being within a county where due to limited number of court sessions scheduled for the county, the time limitations of this section cannot reasonably be met;

(9) A period of delay resulting from the defendant's being in the custody of a penal or other institution of a jurisdiction other than the jurisdiction in which the criminal offense is to be tried;

(10) A period of delay when the defendant or his attorney has an obligation of service to the State of North Carolina or to the United States Government and the court, with the consent of both the defendant and the State, continues the case for a period of time consistent with that obligation.

(c) If trial does not begin within the time limitations specified in this section because the defendant entered a plea of guilty or no contest which was subsequently withdrawn to any or all charges, the applicable period of time limits as specified in this section shall begin to run on the day the order permitting withdrawal of the plea of guilty or no contest becomes final. (1973, c. 1286, s. 1; 1977, c. 787, s. 1.)

Revision of Article. — Session Laws 1977, c. 787, s. 1, revised and rewrote this Article, substituting present §§ 15A-701 to 15A-704 for former §§ 15A-701 to 15A-706. No attempt has been made to point out the changes effected by the revision, but, where appropriate, the historical citations to the former sections have been added to corresponding sections of the Article as revised.

Editor's Note. — Session Laws 1977, c. 787, s. 2, provides: "This act shall apply to any person who is arrested, served with criminal process, waives an indictment, or is notified pursuant to G.S. 15A-630 that an indictment has been filed

with superior court against him, on or after Oct. 1, 1978."

Session Laws 1977, c. 787, s. 3, provides: "Subsection (a1) of G.S. 15A-701 is repealed effective July 1, 1980."

Fundamental Law. — The right of an accused to have a speedy trial is part of the fundamental law of this State. State v. Dietz, 27 N.C. App. 296, 219 S.E.2d 256 (1975), rev'd on other grounds, 289 N.C. 488, 223 S.E.2d 357 (1976).

Delay in Bringing Charges. — For case involving delay in bringing charges, as opposed to delay in bringing defendant to trial once charges are made, see State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

§ 15A-702. Counties with limited court sessions. — (a) If the venue of the defendant's case lies within a county where, due to the limited number of court sessions scheduled for the county, the applicable time limit specified by G.S. 15A-701 has not been met, the defendant may file a motion for prompt trial with (i) a superior court judge presiding over a mixed or criminal session within the same judicial district where the defendant is charged with an offense within the original jurisdiction of the superior court or with a misdemeanor docketed in the superior court for trial de novo; or (ii) a district court judge presiding in the county in which the venue of the case lies, or in the event that there is no district court judge presiding in that county, in the judicial district embracing the county in which the venue lies where the defendant is charged with a misdemeanor pending in district court.

(b) The judge with whom the petition for prompt trial is filed may order the defendant's case be brought to trial within not less than 30 days.

(c) A defendant who files a petition for prompt trial under this section accepts venue anywhere within the judicial district and may not continue or delay his case except on the basis of matters which arise after he files the petition and which he or his counsel could not have reasonably anticipated. The defendant may withdraw the petition for prompt trial only on order of the court, for good cause shown or with the consent of the prosecutor. (1868-9, c. 116, s. 33; Code, s. 1658; Rev., s. 3155; 1913, c. 2; C. S., s. 4521; 1973, c. 1286, s. 1; 1977, c. 787, s. 1.)

§ 15A-703. Sanctions. — If a defendant is not brought to trial within the time limits required by G.S. 15A-701 or within the time prescribed by the judge in his order for prompt trial under G.S. 15A-702(b), the charge shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting that motion but the State shall have the burden of going forward with evidence in connection with excluding periods from computation of time in determining whether or not the time limitations under this Article have been complied with. In determining whether to order the charge's dismissal with or without prejudice, the court shall consider, among other matters, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; the impact of a re-prosecution on the administration of this Article and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of the plea of guilty or no contest shall constitute a waiver of the right to dismissal under this section. A dismissal with prejudice shall bar further prosecution of the defendant for the same offense or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan; a dismissal without prejudice shall not bar further prosecution. (1973, c. 1286, s. 1; 1977, c. 787, s. 1.)

§ 15A-704. No bar to claim of denial of speedy trial. — No provision of this Article shall be interpreted as a bar to any claim of denial of a speedy trial as required by the Sixth Amendment to the Constitution of the United States. (1973, c. 1286, s. 1; 1977, c. 787, s. 1.)

§§ 15A-705 to 15A-710: Reserved for future codification purposes.

ARTICLE 36.

Special Criminal Process for Attendance of Defendants.

OFFICIAL COMMENTARY

There are included here provisions with regard to securing the presence of the defendant for trial when he is confined in a State or federal institution. In addition, in sections 16 and 22 of the act inserting this Chapter, there are sections which will transfer to Subchapter VII the provisions of the Uniform Criminal Extradition Act and the Interstate Agreement on Detainers.

§ 15A-711. Securing attendance of criminal defendants confined in institutions within the State; requiring prosecutor to proceed. — (a) When a criminal defendant is confined in a penal or other institution under the control of the State or any of its subdivisions and his presence is required for trial, the solicitor may make written request to the custodian of the institution for temporary release of the defendant to the custody of an appropriate law-enforcement officer who must produce him at the trial. The period of the temporary release may not exceed 60 days. The request of the prosecutor is sufficient authorization for the release, and must be honored, except as otherwise provided in this section.

(b) If the defendant whose presence is sought is confined pursuant to another criminal proceeding in a different judicial district, the defendant and the prosecutor prosecuting the other criminal action must be given reasonable notice and opportunity to object to the temporary release. Objections must be heard by a superior court judge having authority to act in criminal cases in the district in which the defendant is confined, and he must make appropriate orders as to the precedence of the actions.

(c) A defendant who is confined in an institution in this State pursuant to a criminal proceeding and who has other criminal charges pending against him may, by written request filed with the clerk of the court where the other charges are pending, require the prosecutor prosecuting such charges to proceed pursuant to this section. A copy of the request must be served upon the prosecutor in the manner provided by the Rules of Civil Procedure, G.S. 1A-1, Rule 5(b). If the prosecutor does not proceed pursuant to subsection (a) within six months from the date the request is filed with the clerk, the charges must be dismissed.

(d) Detainer.

(1) When a criminal defendant is imprisoned in this State pursuant to prior criminal proceedings, the clerk upon request of the prosecutor, must transmit to the custodian of the institution in which he is imprisoned, a copy of the charges filed against the defendant and a detainer directing that the prisoner be held to answer to the charges made against him. The detainer must contain a notice of the prisoner's right to proceed pursuant to G.S. 15A-711(c) and his right to a speedy trial pursuant to Article 35 of this Chapter, Speedy Trial.

(2) Upon receipt of the charges and the detainer, the custodian must immediately inform the prisoner of its receipt and furnish him copies of the charges and the detainer, must explain to him his right to proceed pursuant to G.S. 15A-711(c) and his right to a speedy trial under Article 35 of this Chapter, Speedy Trial.

(3) The custodian must notify the clerk who transmitted the detainer of the defendant's impending release at least 30 days prior to the date of release. The notice must be given immediately if the detainer is received less than 30 days prior to the date of release. The clerk must direct the sheriff to take custody of the defendant and produce him for trial. The custodian must release the defendant to the custody of the sheriff, but

may not hold the defendant in confinement beyond the date on which he is eligible for release.

(4) A detainer may be withdrawn upon request of the prosecutor, and the clerk must notify the custodian, who must notify the defendant. (1949, c. 303; 1953, c. 603; 1957, c. 349, s. 10; c. 1067, ss. 1, 2; 1967, c. 996, ss. 13, 15; 1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

Rather than requiring the solicitor to go through the traditional, and cumbersome, "habeas corpus ad prosequendum," the Commission here provides for a simple request by the solicitor, made directly to the official having custody of the defendant. In case of a problem with regard to a defendant whose presence is desired by two solicitors, subsection (b) provides for a judge of superior court to settle the matter.

The right of the defendant to require the solicitor to proceed pursuant to this section should be read in conjunction with Article 35, Speedy Trial.

Notwithstanding the right of the defendant to a speedy trial, and his right to require the solicitor to proceed, there will doubtless remain occasions for the placing of a detainer, so that the defendant will be released to a law-enforcement officer, to be held for trial. Thus subsection (d) provides for the placing of a detainer, with notice to the defendant, but also provides that the detainer will not prolong his period of confinement in the institution in which he has been imprisoned.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" wherever it appeared in this section.

§§ 15A-712 to 15A-720: Reserved for future codification purposes.

ARTICLE 37.

Uniform Criminal Extradition Act.

OFFICIAL COMMENTARY

Transferred by section 16 of the act from its previous location in the General Statutes, Article 8 of Chapter 15.

§ 15A-721. Definitions. — Where appearing in this Article the term "Governor" includes any person performing the functions of Governor by authority of the law of this State. The term "executive authority" includes the Governor, and any person performing the functions of governor in a state other than this State. The term "state," referring to a state other than this State, includes any other state or territory, organized or unorganized, of the United States of America. (1937, c. 273, s. 1; 1973, c. 1286, s. 16.)

Editor's Note. — Sections 15A-721 through 15A-750 were originally codified as §§ 15-55 through 15-84. They were transferred to their present location by Session Laws 1973, c. 1286, s. 16.

§ 15A-722. Duty of Governor as to fugitives from justice of other states. — Subject to the provisions of this Article, the provisions of the Constitution

of the United States controlling, and any and all acts of Congress enacted in pursuance thereof, it is the duty of the Governor of this State to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony or other crime, who has fled from justice and is found in this State. (1937, c. 273, s. 2; 1973, c. 1286, s. 16.)

Requirements of Agents' Commission Form. — See opinion of Attorney General to Mrs. Claire Nickels, Office of the Governor, 40 N.C.A.G. 169 (1970).

§ 15A-723. Form of demand for extradition. — No demand for the extradition of a person charged with crime in another state shall be recognized by the Governor unless in writing alleging, except in cases arising under G.S. 15A-726, that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, and accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereupon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand. (1937, c. 273, s. 3; 1973, c. 1286, s. 16.)

§ 15A-724. Governor may cause investigation to be made. — When a demand shall be made upon the Governor of this State by the executive authority of another state for the surrender of a person so charged with crime, the Governor may call upon the Attorney General or any prosecuting officer in this State to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered. (1937, c. 273, s. 4; 1973, c. 1286, s. 16.)

§ 15A-725. Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion. — When it is desired to have returned to this State a person charged in this State with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the Governor of this State may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this State as soon as the prosecution in this State is terminated.

The Governor of this State may also surrender on demand of the executive authority of any other state any person in this State who is charged in the manner provided in G.S. 15A-743 with having violated the laws of the state whose executive authority is making the demand, even though such person left the demanding state involuntarily. (1937, c. 273, s. 5; 1973, c. 1286, s. 16.)

§ 15A-726. Extradition of persons not present in demanding state at time of commission of crime. — The Governor of this State may also surrender, on demand of the executive authority of any other state, any person in this State charged in such other state in the manner provided in G.S. 15A-723 with committing an act in this State, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, and the

provisions of this Article, not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom. (1937, c. 273, s. 6; 1973, c. 1286, s. 16.)

§ 15A-727. Issue of Governor's warrant of arrest; its recitals. — If the Governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the State seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance. (1937, c. 273, s. 7; 1973, c. 1286, s. 16.)

§ 15A-728. Manner and place of execution of warrant. — Such warrant shall authorize the peace officer or other person to whom directed to arrest the accused at any time and any place where he may be found within the State, and to command the aid of all peace officers or other persons in the execution of the warrant, and to deliver the accused, subject to the provisions of this Article, to the duly authorized agent of the demanding state. (1937, c. 273, s. 8; 1973, c. 1286, s. 16.)

§ 15A-729. Authority of arresting officer. — Every such peace officer or other person empowered to make the arrest shall have the same authority, in arresting the accused, to command assistance therein as peace officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance. (1937, c. 273, s. 9; 1973, c. 1286, s. 16.)

§ 15A-730. Rights of accused person; application for writ of habeas corpus. — No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this State, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state. (1937, c. 273, s. 10; 1973, c. 1286, s. 16.)

§ 15A-731. Penalty for noncompliance with § 15A-730. — Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the Governor's warrant, in willful disobedience to G.S. 15A-730, shall be guilty of a misdemeanor and, on conviction, shall be fined not more than one thousand dollars ($1,000) or be imprisoned not more than six months, or both. (1937, c. 273, s. 11; 1973, c. 1286, s. 16.)

§ 15A-732. Confinement in jail when necessary. — The officer or person executing the Governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered, may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such officer or person being chargeable with the expense of keeping.

The officer or agent of a demanding state to whom a prisoner may have been delivered following extradition proceedings in another state, or to whom a prisoner may have been delivered after waiving extradition in such other state, and who is passing through this State with such a prisoner for the purpose of immediately returning such prisoner to the demanding state may, when

necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or agent having charge of him is ready to proceed on his route, such officer or agent, however, being chargeable with the expense of keeping: Provided, however, that such officer or agent shall produce and show to the keeper of such jail satisfactory written evidence of the fact that he is actually transporting such prisoner to the demanding state after a requisition by the executive authority of such demanding state. Such prisoner shall not be entitled to demand a new requisition while in this State. (1937, c. 273, s. 12; 1973, c. 1286, s. 16.)

§ 15A-733. Arrest prior to requisition. — Whenever any person within this State shall be charged on the oath of any credible person before any judge or magistrate of this State with the commission of any crime in any other state and, except in cases arising under G.S. 15A-726, with having fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, or whenever complaint shall have been made before any judge or magistrate in this State, setting forth on the affidavit of any credible person in another state that a crime has been committed in such other state, and that the accused has been charged in such state with the commission of the crime, and, except in cases arising under G.S. 15A-726, has fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, and is believed to be in this State, the judge or magistrate shall issue a warrant directed to any peace officer commanding him to apprehend the person named therein, wherever he may be found in this State, and to bring him before the same or any other judge, magistrate or court who or which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit, and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant. (1937, c. 273, s. 13; 1973, c. 1286, s. 16.)

§ 15A-734. Arrest without a warrant. — The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant, upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed, and complaint must be made against him under oath setting forth the ground for the arrest as in G.S. 15A-733; and thereafter his answer shall be heard as if he had been arrested on a warrant. (1937, c. 273, s. 14; 1973, c. 1286, s. 16.)

§ 15A-735. Commitment to await requisition; bail. — If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged and, except in cases arising under G.S. 15A-726, that he has fled from justice, the judge or magistrate must, by a warrant reciting the accusation, commit him to the county jail for such a time, not exceeding 30 days and specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the Governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused give bail as provided in G.S. 15A-736, or until he shall be legally discharged. (1937, c. 273, s. 15; 1973, c. 1286, s. 16.)

§ 15A-736. Bail in certain cases; conditions of bond. — Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a judge or magistrate in this State may admit the person arrested to bail by bond,

with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time specified in such bond, and for his surrender, to be arrested upon the warrant of the Governor of this State. (1937, c. 273, s. 16; 1973, c. 1286, s. 16.)

§ 15A-737. Extension of time of commitment; adjournment. — If the accused is not arrested under warrant of the Governor by the expiration of the time specified in the warrant or bond, a judge or magistrate may discharge him or may recommit him for a further period not to exceed 60 days, or a judge or magistrate may again take bail for his appearance and surrender, as provided in G.S. 15A-736, but within a period not to exceed 60 days after the date of such new bond. (1937, c. 273, s. 17; 1973, c. 1286, s. 16.)

§ 15A-738. Forfeiture of bail. — If the prisoner is admitted to bail and fails to appear and surrender himself according to the conditions of his bond, the judge, or magistrate by proper order, shall declare the bond forfeited and order his immediate arrest without warrant if he be within this State. Recovery may be had on such bond in the name of the State as in the case of other bonds given by the accused in criminal proceedings within this State. (1937, c. 273, s. 18; 1973, c. 1286, s. 16.)

§ 15A-739. Persons under criminal prosecution in this State at time of requisition. — If a criminal prosecution has been instituted against such person under the laws of this State and is still pending, the Governor, in his discretion, either may surrender him on demand of the executive authority of another state or hold him until he has been tried and discharged or convicted and punished in this State. (1937, c. 273, s. 19; 1973, c. 1286, s. 16.)

§ 15A-740. Guilt or innocence of accused, when inquired into. — The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the Governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided shall have been presented to the Governor, except as it may be involved in identifying the person held as the person charged with the crime. (1937, c. 273, s. 20; 1973, c. 1286, s. 16.)

Applied in Ewing v. Waldrop, 397 F. Supp. 509 (W.D.N.C. 1975).

§ 15A-741. Governor may recall warrant or issue alias. — The Governor may recall his warrant of arrest or may issue another warrant whenever he deems proper. (1937, c. 273, s. 21; 1973, c. 1286, s. 16.)

§ 15A-742. Fugitives from this State; duty of governors. — Whenever the Governor of this State shall demand a person charged with a crime or with escaping from confinement or breaking the terms of his bail, probation or parole in this State from the executive authority of any other state, or from the chief justice or an associate justice of the Supreme Court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this State, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this State in which the offense was committed. (1937, c. 273, s. 22; 1973, c. 1286, s. 16.)

§ 15A-743. Application for issuance of requisition; by whom made; contents. — (a) When the return to this State of a person charged with crime in this State is required, the prosecuting attorney shall present to the Governor his written application for a requisition for the return of the person charged,

in which application shall be stated the name of the person so charged, the crime charged against him, the approximate time, place and circumstances of its commission, the state in which he is believed to be, including the location of the accused therein, at the time the application is made and certifying that, in the opinion of the said prosecuting attorney, the ends of justice require the arrest and return of the accused to this State for trial and that the proceeding is not instituted to enforce a private claim.

(b) When the return to this State is required of a person who has been convicted of a crime in this State and has escaped from confinement or broken the terms of his bail, probation or parole, the prosecuting attorney of the county in which the offense was committed, the parole board, or the Director of Prisons or sheriff of the county from which escape was made, shall present to the Governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole, the state in which he is believed to be, including the location of the person therein at the time application is made.

(c) The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The prosecuting officer, parole board, warden or sheriff may also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application. One copy of the application, with the action of the Governor indicated by endorsement thereon, and one of the certified copies of the indictment, complaint, information and affidavits or of the judgment of conviction or of the sentence shall be filed in the office of the Secretary of State to remain of record in that office. The other copies of all papers shall be forwarded with the Governor's requisition. (1937, c. 273, s. 23; 1973, c. 1286, s. 16; 1975, c. 132.)

Editor's Note. — The 1975 amendment substituted "Director of Prisons" for "warden of the institution" preceding "or sheriff" and deleted a comma following "county" the second time that word appears near the middle of subsection (b).

§ 15A-744. Costs and expenses. — Subject to the requirements, restrictions and conditions hereinafter set forth in this section, if the crime shall be a felony, the reimbursements for expenses shall be paid out of the State treasury on the certificate of the Governor and warrant of the Auditor, as provided by this section. In all other cases, such expenses or reimbursements shall be paid out of the county treasury of the county wherein the crime is alleged to have been committed according to such regulations as the board of county commissioners may promulgate. In all cases, the expenses, for which repayment or reimbursement may be claimed, shall consist of the reasonable and necessary travel expense and subsistence costs of the extradition agent or fugitive officer, as well as the fugitive, together with such legal fees as were paid to the officials of the state on whose governor the requisition is made. The person or persons designated to return the fugitive shall not be allowed, paid or reimbursed for any expenses in connection with any requisition or extradition proceeding unless the expenses are itemized, the statement of same be sworn to under oath, and shall not then be paid or reimbursed unless a receipt is obtained showing the amount, the purpose for which said item or sum was expended, the place, date and to whom paid, and said receipt or receipts attached to said sworn statement and filed with the Governor. The Governor shall have the authority, upon investigation, to increase or decrease any item or expenses shown in said sworn

statement, or to include items of expenses omitted by mistake or inadvertence. The decision or determination of the Governor as to the correct amount to be paid for such expenses or reimbursements shall be final. When it is deemed necessary for more than one agent, extradition agent, fugitive officer or person, to be designated to return a fugitive from another state to this State, the solicitor or prosecuting officer shall file with his written application to the Governor of this State an affidavit setting forth in detail the grounds or reasons why it is necessary to have more than one extradition agent, fugitive officer or person to be so designated. Among other things, and not by way of limitation, the affidavit shall set forth whether or not the alleged fugitive is a dangerous person, his previous criminal record if any, and any record of said fugitive on file with the Federal Bureau of Investigation or with the prison authorities of this State. As a further ground or reason for more than one extradition agent or fugitive officer to be designated, it may be shown in said affidavit the number of fugitives to be returned to this State and any other grounds or reasons for which more than one extradition agent or fugitive officer is desired. If the Governor finds or determines from his own investigation and from the information made available to him that more than one extradition agent or fugitive officer is necessary for the return of a fugitive or fugitives to this State, he may designate more than one extradition agent or fugitive officer for such purpose. All travel for which expenses or reimbursements are paid or allowed under this section shall be by the nearest, direct, convenient route of travel. If the extradition agent or agents or person or persons designated to return a fugitive or fugitives from another state to this State shall elect to travel by automobile, a sum not exceeding seven cents (7¢) per mile may be allowed in lieu of all travel expense, and which shall be paid upon a basis of mileage for the complete trip. The Governor may promulgate executive orders, rules and regulations governing travel, forms of statements, receipts or any other matter or objective provided for in this section. The Governor may delegate any or all of the duties, powers and responsibilities conferred upon him by this section to any executive agent or executive clerk on his staff or in his office, and such executive agent or executive clerk, when properly authorized, may perform any or all of the duties, powers and responsibilities conferred upon the Governor. Provided that if the fugitive from justice is an alleged felon, and he be returned without the service of extradition papers by the sheriff or the agent of the sheriff of the county in which the felony was alleged to have been committed, the expense of said return shall be borne by the State of North Carolina under the rules and regulations made and promulgated by the Governor of North Carolina or the executive agent or the executive clerk to whom the said Governor may have delegated his duties under this section. (1937, c. 273, s. 24; 1953, c. 1203; 1955, c. 289; 1973, c. 1286, s. 16.)

§ 15A-745. Immunity from service of process in certain civil actions. — A person brought into this State by, or after waiver of, extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceedings to answer which he is being or has been returned until he has been convicted in the criminal proceeding or, if acquitted, until he has had reasonable opportunity to return to the state from which he was extradited. (1937, c. 273, s. 25; 1973, c. 1286, s. 16.)

§ 15A-746. Written waiver of extradition proceedings. — Any person arrested in this State charged with having committed any crime in another state or alleged to have escaped from confinement, or broken the terms of his bail, probation or parole may waive the issuance and service of the warrant provided for in G.S. 15A-727 and 15A-728 and all other procedure incidental to extradition proceedings, by executing or subscribing in the presence of a judge of any court

of record within this State or a clerk of the superior court a writing which states that he consents to return to the demanding state: Provided, however, that before such waiver shall be executed or subscribed by such person it shall be the duty of such judge or clerk of superior court to inform such person of his rights to the issuance and service of a warrant of extradition and to obtain a writ of habeas corpus as provided for in G.S. 15A-730.

If and when such consent has been duly executed it shall forthwith be forwarded to the office of the Governor of this State and filed therein. The judge or clerk of superior court shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to such agent or agents a copy of such consent: Provided, however, that nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure or to limit the powers, rights or duties of the officers of the demanding state or of this State. (1937, c. 273, s. 25a; 1959, c. 271; 1973, c. 1286, s. 16.)

Waiver May Not Be Made before Magistrate. — See opinion of Attorney General to Mr. E. Maurice Braswell, 42 N.C.A.G. 267 (1973).

§ 15A-747. Nonwaiver by this State. — Nothing in this Article contained shall be deemed to constitute a waiver by this State of its right, power or privilege to try such demanded person for crime committed within this State, or of its right, power or privilege to regain custody of such person by extradition proceedings or otherwise for the purpose of trial, sentence or punishment for any crime committed within this State, nor shall any proceedings had under this Article which result in, or fail to result in, extradition be deemed a waiver by this State of any of its rights, privileges or jurisdiction in any way whatsoever. (1937, c. 273, s. 25b; 1973, c. 1286, s. 16.)

§ 15A-748. No right of asylum; no immunity from other criminal prosecution while in this State. — After a person has been brought back to this State by, or after waiver of, extradition proceedings, he may be tried in this State for other crimes which he may be charged with having committed here as well as that specified in the requisition for his extradition. (1937, c. 273, s. 26; 1973, c. 1286, s. 16.)

§ 15A-749. Interpretation. — The provisions of this Article shall be so interpreted and construed as to effectuate its general purposes to make uniform the law of those states which enact it. (1937, c. 273, s. 27; 1973, c. 1286, s. 16.)

§ 15A-750. Short title. — This Article may be cited as the Uniform Criminal Extradition Act. (1937, c. 273, s. 30; 1973, c. 1286, s. 16.)

§§ 15A-751 to 15A-760: Reserved for future codification purposes.

ARTICLE 38.

Interstate Agreement on Detainers.

OFFICIAL COMMENTARY

Transferred by Section 22 of the act from its previous location in the General Statutes, Article 10 of Chapter 148.

§ 15A-761. Agreement on Detainers entered into; form and contents. — This Agreement on Detainers is hereby enacted into law and entered into by this State with all other jurisdictions legally joining therein in the form substantially as follows: The contracting states solemnly agree:

Article I

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

Article II

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to Article III hereof or at the time that a request for custody or availability is initiated pursuant to Article IV hereof.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to Article III or Article IV hereof.

Article III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: Provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden,

commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

Article IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: Provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request: And provided further that there shall be a period of 30 days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the

prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceeding made possible by this Article, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Article V

(a) In response to a request made under Article III or Article IV hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article III of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required,

the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

Article VI

(a) In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

Article VII

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

Article VIII

This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

Article IX

This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters. (1965, c. 295, s. 1; 1973, c. 1286, s. 22.)

Editor's Note. — Sections 15A-761 through 15A-767 were originally codified as §§ 148-89 through 148-95. They were transferred to their present position by Session Laws 1973, c. 1286, s. 22.

Good Cause for Continuance. — Where the State had some, but not all, of its witnesses available, and where it was approximately six years after the crime for which defendant was apprehended, there was "good cause" within the meaning of Article IV(c) of this Section to extend the date of defendant's trial beyond the 120-day period. State v. Collins, 29 N.C. App. 478, 224 S.E.2d 647 (1976).

"Untried Indictment, Information or Complaint". — Where a fugitive warrant was not based upon a warrant charging the offense of escape, but was to secure the return of the defendant to serve the unexpired portion of sentences already imposed, the defendant had no "untried indictment, information or complaint" pending against him. State v. Pfeifer, 11 N.C. App. 183, 180 S.E.2d 469 (1971).

The defendant cannot complain of delay in his trial when caused by his own motion. State v. George, 271 N.C. 438, 156 S.E.2d 845 (1967).

Inability of Jury to Agree on Verdict. — Article III(a) of this section requires that the defendant be brought to trial within 180 days after he has given the appropriate notice to the solicitor. The State, of course, cannot control the fact that a jury is unable to agree upon a verdict and is not chargeable with responsibility under these conditions. State v. George, 271 N.C. 438, 156 S.E.2d 845 (1967).

Applicability of Article IV(c). — Article IV(c), requiring a prisoner to be tried within 120 days after his arrival in North Carolina, can be invoked only when the prisoner has been returned to the State at the request of the solicitor. It does not apply where the prisoner was brought back to North Carolina upon his own request and not that of the solicitor. State v. George, 271 N.C. 438, 156 S.E.2d 845 (1967).

§ 15A-762. Meaning of "appropriate court". — The phrase "appropriate court" as used in the Agreement on Detainers shall, with reference to the courts of this State, mean court of record with criminal jurisdiction. (1965, c. 295, s. 2; 1973, c. 1286, s. 22.)

§ 15A-763. Cooperation in enforcement. — All courts, departments, agencies, officers and employees of this State and its political subdivisions are hereby directed to enforce the Agreement on Detainers and to cooperate with one another and with other party states in enforcing the agreement and effectuating its purpose. (1965, c. 295, s. 3; 1973, c. 1286, s. 22.)

§ 15A-764. Escape from temporary custody. — Any prisoner released to temporary custody under the provisions of the Agreement on Detainers from a place of imprisonment in North Carolina who shall escape or attempt to escape from such temporary custody, whether within or without the borders of this State, shall be dealt with in the same manner as if the escape or attempt to escape were from the original place of imprisonment. (1965, c. 295, s. 4; 1973, c. 1286, s. 22.)

§ 15A-765. Authority and duty of official in charge of institution. — It shall be lawful and mandatory upon the warden or other official in charge of a penal or correctional institution in this State to give over the person of any inmate thereof whenever so required by the operation of the Agreement on Detainers. (1965, c. 295, s. 5; 1973, c. 1286, s. 22.)

§ 15A-766. Designation of central administrator of and information agent for agreement. — The Governor is hereby authorized and empowered to designate the officer who shall serve as central administrator of and information agent for the Agreement on Detainers, pursuant to the provisions of Article VII of the agreement. (1965, c. 295, s. 6; 1973, c. 1286, s. 22.)

§ 15A-767. Distribution of copies of Article. — Copies of this Article shall, upon its approval, be transmitted to the governor of each state, the Attorney General and the Administrator of General Services of the United States, and the Council of State Governments. (1965, c. 295, s. 7; 1973, c. 1286, s. 22.)

§§ 15A-768 to 15A-770: Reserved for future codification purposes.

ARTICLE 39.

Other Special Process for Attendance of Defendants.

OFFICIAL COMMENTARY

Since corporations are amenable to the criminal law, it was thought convenient to set out this system of service of criminal process and appearance. The section is similar to New York Criminal Procedure Law, § 600.10.

§ 15A-771. Securing attendance of defendants confined in federal prisons. — (a) A defendant against whom a criminal action is pending in this State, and who is confined in a federal prison or custody either within or outside the State, may, with the consent of the Attorney General of the United States, be produced in such court for the purpose of criminal prosecution, pursuant to the provisions of:

(1) Section 4085 of Title 18 of the United States Code; or

(2) Subsection (b) of this section.

(b) When such a defendant is in federal custody as specified in subsection (a), a superior court may, upon application of the prosecutor, issue a certificate, addressed to the Attorney General of the United States, certifying the charges and the court in which they are pending, and that attendance of the defendant in such court for the purpose of criminal prosecution thereon is necessary in the interest of justice, and requesting the Attorney General of the United States to cause such defendant to be produced in such court, under custody of a federal public servant, upon a designated date and for a period of time necessary to complete the prosecution. Upon issuing such a certificate, the court may deliver it, or cause or authorize it to be delivered, together with a certified copy of the charges upon which it is based, to the Attorney General of the United States or to his representative authorized to entertain the request. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" in subsection (b).

§ 15A-772. Securing attendance of defendants who are outside the United States. — (a) When a criminal action for an offense committed in this State is pending in a criminal court of this State against a defendant who is in a foreign country with which the United States has an extradition treaty, and when the offense charged is one which is declared in such treaty to be an extraditable one, the prosecutor may make an application to the Governor, requesting him to make

an application to the President of the United States to institute extradition proceedings for the return of the defendant to this country and State for the purpose of prosecution of such action. The prosecutor's application must comply with rules, regulations, and guidelines established by the Governor for such applications and must be accompanied by all the charges, affidavits, and other documents required thereby.

(b) Upon receipt of the prosecutor's application, the Governor, if satisfied that the defendant is in the foreign country in question, that the offense charged is an extraditable one pursuant to the treaty in question, and that there are no factors or impediments which in law preclude such an extradition, may in his discretion make an application, addressed to the Secretary of State of the United States, requesting that the President of the United States institute extradition proceedings for the return of the defendant from such foreign country. The Governor's application must comply with applicable treaties and acts of Congress and with rules, regulations, and guidelines established by the Secretary of State for such applications and must be accompanied by all the charges, affidavits, and other documents required thereby.

(c) The provisions of this section apply equally to extradition or attempted extradition of a person who is a fugitive following the entry of a judgment of conviction against him in a criminal court of this State. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" wherever it appeared in this section.

§ 15A-773. Securing attendance of organizations; appearance. — (a) The court attendance of an organization for purposes of commencing or prosecuting a criminal action against it may be accomplished by:

(1) Issuance and service of a criminal summons; or

(2) Issuance of an information and waiver of indictment by an authorized officer or agent of the organization and by counsel for the organization, as provided in G.S. 15A-642(c); or

(3) Service of the notice of the indictment, as provided in G.S. 15A-630.

The criminal summons or notice of indictment must be directed to the organization, and must be served by delivery to an officer, director, managing or general agent, cashier or assistant cashier of the organization, or to any other agent of the organization authorized by appointment or by law to receive service of process.

(b) At all stages of a criminal action, an organization may appear by counsel or agent having authority to transact the business of the organization.

(c) For purposes of this section, "organization" means corporation, unincorporated association, partnership, body politic, consortium, or other group, entity, or organization. (1973, c. 1286, s. 1; 1977, c. 557.)

Editor's Note. — The 1977 amendment, in subsection (a), substituted "an organization" for "a corporation" in the first sentence, designated "the issuance and service of a criminal summons" as subdivision (1), added "or" to the end of that subdivision, added subdivisions (2) and (3), and in the second sentence, inserted "or notice of indictment," substituted "organization, and must be served by delivery to" for "corporation, and must be served upon the corporation by delivery thereof," and substituted "of the organization" for "of such corporation" in two places. The amendment also substituted "an organization" for "a corporate defendant" and "the organization" for "the corporation" in subsection (b) and added subsection (c).

ARTICLE 40.

§§ 15A-774 to 15A-786: Reserved for future codification purposes.

ARTICLE 41.

§§ 15A-787 to 15A-800: Reserved for future codification purposes.

SUBCHAPTER VIII. ATTENDANCE OF WITNESSES; DEPOSITIONS.

ARTICLE 42.

Attendance of Witnesses Generally.

OFFICIAL COMMENTARY

This Article provides generally for the bringing of witnesses or their testimony before the court. In addition to the provisions for subpoenas, material witness orders, and the like set out here, other sections of the Act (Section 9) will transfer the Uniform Act to Secure Attendance of Witnesses from without a State in Criminal Proceedings to a location in Article 43.

§ 15A-801. Subpoena for witness. — The presence of a person as a witness in a criminal proceeding may be obtained by subpoena, which must be issued and served in the manner provided in Rule 45 of the Rules of Civil Procedure, G.S. 1A-1. (1973, c. 1286, s. 1; 1975, c. 166, s. 15.)

Editor's Note. — The 1975 amendment substituted "G.S. 1A-1" for "G.S. 1-1A" at the end of the section.

§ 15A-802. Subpoena for the production of documentary evidence. — The production of records, books, papers, documents, or tangible things in a criminal proceeding may be obtained by subpoena which must be issued and served in the manner provided in Rule 45 of the Rules of Civil Procedure, G.S. 1A-1. (1973, c. 1286, s. 1; 1975, c. 166, s. 15.)

Editor's Note. — The 1975 amendment substituted "G.S. 1A-1" for "G.S. 1-1A" at the end of the section.

Documents Relating to Offer of Reward. — This section governs motions to produce documents relating to the offer of a reward. State v. Bowden, 290 N.C. 702, 228 S.E.2d 414 (1976).

§ 15A-803. Attendance of witnesses. — (a) Material Witness Order Authorized. — A judge may issue an order assuring the attendance of a material witness at a criminal proceeding. This material witness order may be issued when there are reasonable grounds to believe that the person whom the State or a defendant desires to call as a witness in a pending criminal proceeding possesses information material to the determination of the proceeding and may not be amenable or responsive to a subpoena at a time when his attendance will be sought.

(b) When Order Issued. — A material witness order may be issued by a judge of superior court at any time after the initiation of criminal proceedings. A judge of district court may issue a material witness order only at the time that a defendant is bound over to superior court at a probable-cause hearing.

(c) How Long Effective. — A material witness order remains in effect during

the period indicated in the order by the issuing judge unless it is sooner modified or vacated by a judge of superior court. In no event may a material witness order which provides for incarceration of the material witness be issued for a period longer than 20 days, but upon review a superior court judge in his discretion may renew an order one or more times for periods not to exceed five days each.

(d) Procedure. — A material witness order may be obtained upon motion supported by affidavit showing cause for its issuance. The witness must be given reasonable notice, opportunity to be heard and present evidence, and the right of representation by counsel at a hearing on the motion. Counsel for a material witness may be appointed and compensated in the same manner as counsel for an indigent defendant. The order must be based on findings of fact supporting its issuance.

(e) Order. — If the court makes a material witness order:

(1) It may direct release of the witness in the same manner that a defendant may be released under G.S. 15A-534.

(2) It may direct the detention of the witness.

(f) Modification or Vacation. — A material witness order may be modified or vacated by a judge of superior court upon a showing of new or changed facts or circumstances by the witness, the State, or any defendant.

(g) Securing Attendance or Custody of Material Witness. — The witness may be required to attend the hearing by subpoena, or if the court considers it necessary, by order for arrest. An order for arrest also may be issued if it becomes necessary to take the witness into custody after issuance of a material witness order. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

Former statutes provided for a witness to be placed under bond at a preliminary hearing (§ 15-97), and for him to be placed in jail if he failed to post bond (§ 15-127). This section specifies the grounds for the entry of a new "material witness order" under which a witness can be held in custody, and provides for bail.

§ 15A-804. Voluntary protective custody. — (a) Upon request of a witness, a judge of superior court may determine whether he is a material witness, and may order his protective custody. The order may provide for confinement, custody in other than a penal institution, release to the custody of a law-enforcement officer or other person, or other provisions appropriate to the circumstances.

(b) A person having custody of the witness may not release him without his consent unless directed to do so by a superior court judge, or unless the order so provides.

(c) The issuance of either a material witness order or an order for voluntary protective custody does not preclude the issuance of the other order.

(d) An order for voluntary protective custody may be modified or vacated as appropriate by a superior court judge upon the request of the witness or upon the court's own motion. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

Although it may seem farfetched in North Carolina, the basis for this section sprang from the fear that members of organized crime might attempt to obtain the release of a witness who would prefer to remain in custody.

§ 15A-805. Securing attendance of witnesses confined in institutions within the State. — (a) Upon motion of the State or any defendant, the judge of a court in which a criminal proceeding is pending must, for good cause shown, enter an order requiring that any person confined in an institution in this State be produced and compelled to attend as a witness in the action or proceeding.

(b) If the witness is confined pursuant to another pending criminal proceeding, and the judge determines that the production of the witness would result in an unreasonable interference with the conduct of the prior proceeding, he may deny the order. If an order for production is issued, a judge or justice of the appellate division of the General Court of Justice may, upon application of a defendant or prosecutor in the other district for good cause shown, vacate the order for production.

(c) The costs of production of the witness are assessed as are other witness fees. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

This section replaces the old "habeas corpus ad testificandum" with a simple motion and order for the production of a prisoner (or other person confined in an institution). If a conflict arises between two cases, and it cannot be resolved at the trial level, provision is made for resort to the appellate division. The statutes in Article 8, Chapter 17 of the General Statutes are left untouched because of their preexisting applicability to other proceedings.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" in subsection (b).

§§ 15A-806 to 15A-810: Reserved for future codification purposes.

ARTICLE 43.

Uniform Act to Secure Attendance of Witnesses from without a State in Criminal Proceedings.

OFFICIAL COMMENTARY

Transferred by section 9 of the act from its previous location in Article 9 of Chapter 8 of the General Statutes.

§ 15A-811. Definitions. — The word "state" shall include any territory of the United States and District of Columbia.

The word "summons" shall include a subpoena, order or other notice requiring the appearance of a witness.

"Witness" as used in this Article shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding. (1937, c. 217, s. 1; 1973, c. 1286, s. 9.)

Editor's Note. — Sections 15A-811 through 15A-816 were originally codified as §§ 8-65 through 8-70. They were transferred to their present position by Session Laws 1973, c. 1286, s. 9, effective July 1, 1975.

Cited in State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

§ 15A-812. Summoning witness in this State to testify in another state. — If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this State certifies, under the seal of such court, that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this State is a material witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, and of any other state through which the witness may be required to pass by ordinary course of travel, will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence, at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing, being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.

If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of ten cents (10¢) a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollars ($5.00) for each day that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this State. (1937, c. 217, s. 2; 1973, c. 1286, s. 9.)

Applied in State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

§ 15A-813. Witness from another state summoned to testify in this State. — If a person in any state which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence in this State, is a material witness in a prosecution pending in a court of record in this State, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court, stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this State to assure his attendance in this State. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in this State he shall be tendered the sum of ten cents (10¢) a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending, and five dollars ($5.00) for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this State a longer period of time than the period mentioned in the certificate unless otherwise ordered by the court. If such witness, after coming into this State, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this State. (1937, c. 217, s. 3; 1973, c. 1286, s. 9.)

Applied in State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

§ 15A-814. Exemption from arrest and service of process. — If a person comes into this State in obedience to a summons directing him to attend and testify in this State he shall not, while in this State pursuant to such summons, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this State under the summons.

If a person passes through this State while going to another state in obedience to a summons to attend and testify in that state, or while returning therefrom, he shall not while so passing through this State be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this State under the summons. (1937, c. 217, s. 4; 1973, c. 1286, s. 9.)

§ 15A-815. Uniformity of interpretation. — This Article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it. (1937, c. 217, s. 5; 1973, c. 1286, s. 9.)

§ 15A-816. Title of Article. — This Article may be cited as "Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings." (1937, c. 217, s. 6; 1973, c. 1286, s. 9.)

§§ 15A-817 to 15A-820: Reserved for future codification purposes.

ARTICLE 44.

Securing Attendance of Prisoners as Witnesses.

OFFICIAL COMMENTARY

The three sections in this Article provide for exchange of prisoners as witnesses between North Carolina and other states and the federal authorities. The three sections are based on New York Criminal Procedure Law, §§ 650.10 and 650.30.

§ 15A-821. Securing attendance of prisoner in this State as witness in proceeding outside the State. — (a) If a judge of a court of general jurisdiction in any other state, which by its laws has made provision for commanding a prisoner within that state to attend and testify in this State, certifies under the seal of that court that there is a criminal prosecution pending in the court or that a grand jury investigation has commenced, and that a person confined in an institution under the control of the State Department of Correction of North Carolina, other than a person confined as criminally insane, is a material witness in the prosecution or investigation and that his presence is required for a specified number of days, upon presentment of the certificate to a superior court

judge in the judicial district where the person is confined, upon notice to the Attorney General, the judge must fix a time and place for a hearing and order the person having custody of the prisoner to produce him at the hearing.

(b) If at the hearing the judge determines that the prisoner is a material and necessary witness in the requesting state, the judge must order that the prisoner attend in the court where the prosecution or investigation is pending, upon such terms and conditions as the judge prescribes, including among other things, provision for the return of the prisoner at the conclusion of his testimony, proper safeguard for his custody, and proper financial reimbursement or other payment, including payment in advance, by the demanding jurisdiction for all expenses incurred in the production and return of the prisoner.

(c) The Attorney General may, as agent for the State of North Carolina, enter into such agreements with the demanding jurisdiction as necessary to ensure proper compliance with the order of the court. (1973, c. 1286, s. 1.)

§ 15A-822. Securing attendance of prisoner outside the State as witness in proceeding in the State. — (a) When

(1) A criminal action or proceeding is pending in a court of this State, and

(2) There is reasonable cause to believe that a person confined in a correctional institution or prison of another state, other than a person confined as mentally ill, possesses information material to such criminal action or proceeding, and

(3) The attendance of the person as a witness in such proceeding is desired by a party thereto, and

(4) The state in which such person is confined possesses a statute equivalent to G.S. 15A-821, the court in which such proceeding is pending may issue a certificate under the seal of the court, certifying all such facts and certifying that the attendance of the person as a witness in such court is required for a specified number of days.

(b) The certificate may be issued upon application of either the State or a defendant setting forth the facts specified in subsection (a).

(c) Upon issuing such a certificate, the court may cause it to be delivered to a court of such other state which is authorized to initiate or undertake action for the delivery of such prisoners to this State as witnesses. (1973, c. 1286, s. 1.)

§ 15A-823. Securing attendance of prisoner in federal institution as witness in proceeding in the State. — (a) When

(1) A criminal proceeding is pending in a court of this State; and

(2) There is reasonable cause to believe that a person confined in a federal prison or other federal custody, either within or outside this State, possesses information material to such criminal proceeding; and

(3) His attendance as a witness in such action or proceeding is desired by a party thereto, the court may issue a certificate, known as a writ of habeas corpus ad testificandum, addressed to the Attorney General of the United States certifying all such facts and requesting the Attorney General of the United States to cause the attendance of such person as a witness in such court for a specified number of days under custody of a federal public servant.

(b) The certificate may be issued upon application of either the State or a defendant, setting forth the facts specified in subsection (a).

(c) Upon issuing the certificate, the court may cause it to be delivered to the Attorney General of the United States or to his representative authorized to entertain the request. (1973, c. 1286, s. 1.)

ARTICLE 45.

Depositions.

§§ 15A-824 to 15A-849: Reserved for future codification purposes.

OFFICIAL COMMENTARY

The General Assembly deleted proposed provisions relating to depositions and reserved this Article for future codification. The deletion leaves present deposition law unchanged.

ARTICLE 46.

§§ 15A-850 to 15A-875: Reserved for future codification purposes.

ARTICLE 47.

§§ 15A-876 to 15A-900: Reserved for future codification purposes.

SUBCHAPTER IX. PRETRIAL PROCEDURE.

ARTICLE 48.

Discovery in the Superior Court.

OFFICIAL COMMENTARY

The Commission recommended this Article dealing with reciprocal discovery in the belief that jury trials will be more orderly and that ultimately truth will more likely prevail if the parties are prepared to meet the case that the other side will present. Trial by ambush has been generally eliminated, with beneficial effects, in civil cases, and the Commission believed this philosophy should also extend to criminal cases. Another important benefit of liberal discovery is to enhance the likelihood of honorable and realistic plea negotiations, avoiding trial altogether.

Some persons have protested that discovery in criminal cases may lead defendants and unscrupulous counsel to fabricate defenses custom-tailored to the disclosed weaknesses of the State's case, but the Commission did not believe this risk was great enough to warrant avoidance of the benefits of discovery. There are other methods which may be utilized to prevent abuse of discovery by unscrupulous persons.

Until recently it was widely claimed that discovery of the defendant's case on the part of the State was a violation of the privilege against self-incrimination. These claims have been largely silenced by Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970), upholding a statute requiring the defendant to give notice of alibi. The Commission considered making the State's right to discovery independent of whether the defendant requested discovery, but finally settled upon a reciprocal right to the State on a category-by-category basis. The Commission decided this would be the wisest way to introduce discovery by the State into the law of North Carolina; there was no thought that the reciprocity feature was constitutionally necessary.

The Commission consulted a number of discovery provisions in formulating its proposals, including Article 240 of the New York Criminal Procedure Law and A.B.A. Project on Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial (1970). The model used in drafting, however, was Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts, Rule 16 (January 1970).

Editor's Note. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-901. Application of Article. — This Article applies to cases within the original jurisdiction of the superior court. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

As cases in district court are tried before the judge, and usually on a fairly expeditious basis, the Commission decided there was no need at present to provide for discovery procedures prior to trial in district court. As misdemeanors tried in superior court on trial de novo have already had a full trial in district court, there is little reason for requiring discovery after that trial and prior to the new trial in superior court.

This Article, then, applies to felonies and misdemeanors in the original jurisdiction of the superior court. The statute concerning this jurisdiction is not in Chapter 15A. Section 7A-271, governing the superior court's criminal jurisdiction, is not affected by this Article.

Purpose of Rules of Discovery. — The rules of discovery contained in the Criminal Procedure Act were enacted by the General Assembly to ensure, insofar as possible, that defendants received a fair trial and not be taken by surprise. They were not enacted to serve as mandatory rules of exclusion for trivial defects in the State's mode of compliance. State v. Thomas, 291 N.C. 687, 231 S.W.2d 585 (1977).

Cited in State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976).

§ 15A-902. Discovery procedure. — (a) A party seeking discovery under this Article must, before filing any motion before a judge, request in writing that the other party comply voluntarily with the discovery request. Upon receiving a negative or unsatisfactory response, or upon the passage of seven days following the receipt of the request without response, the party requesting discovery may file a motion for discovery under the provisions of this Article concerning any matter as to which voluntary discovery was not made pursuant to request.

(b) To the extent that discovery authorized in this Article is voluntarily made in response to a request, the discovery is deemed to have been made under an order of the court for the purposes of this Article.

(c) A motion for discovery under this Article must be heard before a superior court judge.

(d) If a defendant is represented by counsel, he may as a matter of right request voluntary discovery from the State under subsection (a) above not later than the tenth working day after either the probable-cause hearing or the date he waives the hearing. If a defendant is not represented by counsel, or is indicted or consents to the filing of a bill of information before he has been afforded or waived a probable-cause hearing, he may as a matter of right request voluntary discovery from the State under subsection (a) above not later than the tenth working day after

(1) The defendant's consent to be tried upon a bill of information, or the service of notice upon him that a true bill of indictment has been found by the grand jury, or

(2) The appointment of counsel — whichever is later.

For the purposes of this subsection a defendant is represented by counsel only

if counsel was retained by or appointed for him prior to or during a probable-cause hearing or prior to execution by him of a waiver of a probable-cause hearing.

(e) The State may as a matter of right request voluntary discovery from the defendant, when authorized under this Article, at any time not later than the tenth working day after disclosure by the State with respect to the category of discovery in question.

(f) A motion for discovery made at any time prior to trial may be entertained if the parties so stipulate or if the judge for good cause shown determines that the motion should be allowed in whole or in part. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

The Commission contemplated that after the parties become accustomed to discovery procedures they will be followed voluntarily without the necessity of motions before the judge. To facilitate this practice, the section requires that a party seeking discovery first request voluntary discovery. That the request be in writing is simply to make sure there is something tangible in the record if questions arise later. The written request need not be elaborate, but of course should be dated.

If the other party complies with a request for voluntary discovery, the request and the compliance will for the later procedural provisions of the Article be treated as if effected upon motion and order of the court.

The reference in subsection (c) is to trigger the special definition of superior court judge contained in § 15A-101(10).

Because the request for voluntary discovery must precede any motion for discovery by at least seven days, subsections (d) and (e) in setting out the time limits for discovery speak of the period during which a party "may as a matter of right request voluntary discovery . . . ." If a defendant has counsel the period in which discovery can be requested as a matter of right is 10 working days following the holding, or waiver, of the probable-cause hearing. If he does not have counsel or is charged in the superior court before a probable-cause hearing is held or waived, the time is extended to a later period as noted in this section. In implementing this later time period, the complementary provisions of § 15A-630 should be noted.

Cited in State v. Morrow, 31 N.C. App. 654, 230 S.E.2d 568 (1976); State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977).

§ 15A-903. Disclosure of evidence by the State — information subject to disclosure. — (a) Statement of Defendant. — Upon motion of a defendant, the court must order the prosecutor:

(1) To permit the defendant to inspect and copy or photograph any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the State the existence of which is known or by the exercise of due diligence may become known to the prosecutor; and

(2) To divulge, in written or recorded form, the substance of any oral statement made by the defendant which the State intends to offer in evidence at the trial.

(b) Statement of a Codefendant. — Upon motion of a defendant, the court must order the prosecutor:

(1) To permit the defendant to inspect and copy or photograph any written or recorded statement of a codefendant which the State intends to offer in evidence at their joint trial; and

(2) To divulge, in written or recorded form, the substance of any oral statement made by a codefendant which the State intends to offer in evidence at their joint trial.

(c) Defendant's Prior Record. — Upon motion of the defendant, the court must order the State to furnish to the defendant a copy of his prior criminal record, if any, as is available to the prosecutor.

(d) Documents and Tangible Objects. — Upon motion of the defendant, the court must order the solicitor to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the State and which are material to the preparation of his defense, are intended for use by the State as evidence at the trial, or were obtained from or belong to the defendant.

(e) Reports of Examinations and Tests. — Upon motion of a defendant, the court must order the prosecutor to provide a copy of or to permit the defendant to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor. In addition, upon motion of a defendant, the court must order the prosecutor to permit the defendant to inspect, examine, and test, subject to appropriate safeguards, any physical evidence, or a sample of it, available to the prosecutor if the State intends to offer the evidence, or tests or experiments made in connection with the evidence, as an exhibit or evidence in the case. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

Departing from the statutory breakdown, there are seven different categories of discovery of the State's case available to the defendant. They are:

(1) Written or recorded statements made by the defendant in the State's control. This type of statement is subject to discovery even if the State does not intend to offer it in evidence.

(2) Oral statements made by the defendant which the State intends to offer in evidence.

(3) Written, recorded, or oral statements of a codefendant which the State intends to offer at their joint trial.

(4) The prior criminal record of the defendant available to the solicitor. This criterion of availability is less stringent than the one used in several other subsections: "the existence of which is known or by the exercise of due diligence may become known to the solicitor." The subsection thus does not require the solicitor to take extreme pains to search out the criminal record of the defendant from all possible sources, but any sort of record that is normally or easily available to him must be produced. Several defense attorneys on the Commission commented that it is often difficult to find out from the defendant the full particulars of his criminal history, and a number of law-enforcement agencies will not provide criminal histories to defense counsel.

(5) Books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, and tangible objects in the control of the State and which are:

a. Material to the preparation of the defense; or

b. Intended for use by the State as evidence; or

c. Were obtained from or belong to the defendant.

(6) Results or reports of physical or mental examinations or of tests, measurements, or experiments made in connection with the case and in the control of the State.

(7) Physical evidence, or a sample of it, available to the solicitor if the State intends to offer the evidence as an exhibit or evidence in the case, or if the State intends to introduce at trial the results of tests or experiments made in connection with the physical evidence. This provision is similar to that in present § 15-155.4 and § 15-155.5, except that it does not go as far as those sections. Those sections, which are scheduled for deletion under this proposal, also allow the defendant to interview prospective expert witnesses of the State.

The discovery provisions as introduced in the General Assembly contained a requirement for discovery of the names and addresses of witnesses the State intended to call plus their criminal records. Because witnesses may easily be subject to harassment or intimidation, a

special provision was inserted, in addition to the general one set out in § 15A-908, to empower the judge to deny disclosure or take other appropriate protective measures. The whole proposal was controversial enough, though, that the General Assembly resolved the matter by deleting it.

The Commission followed the draft of the proposed amendment to Rule 16 and provided only for discovery of the State's case upon request of the defendant. The American Bar Association Standards would require the State to disclose virtually all of the information covered by this discovery Article automatically, whether requested or not. See A.B.A. Project on Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial, § 2.1 (1970). In certain instances, of course, the State may be under an obligation to disclose information discoverable under this Article whether there is a request or not. See Giles v. Maryland, 386 U.S. 66, 87 S. Ct. 793, 17 L. Ed. 2d 737 (1967); Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The Commission grappled with the question whether to attempt to codify Giles and Brady and finally decided to leave this matter to case law development. Parenthetically, it should be noted that § 15A-975 does require the State to disclose certain types of evidence if it wants to force a motion to suppress prior to trial, but there is no penalty attached to the failure to do so other than loss of this advantage.

Another issue concerned the extent to which the solicitor would be chargeable with knowledge of information in police files. The Commission finally decided not to go beyond the language copied from the proposed amendment to Rule 16, and leave further ramifications of the matter to case law. See Moore v. Illinois, 408 U.S. 786, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1972).

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" wherever it appeared in this section.

The common law recognizes no right to discovery in criminal cases. State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972); State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974), cert. denied, 423 U.S. 1080, 96 S.Ct. 868, 47 L. Ed. 2d 91 (1976); State v. Spaulding, 288 N.C. 397, 219 S.E.2d 178 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

No right of discovery in criminal cases existed at common law. State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976); State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977).

Right Given by Former Statute in Certain Circumstances. — Former § 15-155.4 provided for pretrial investigation in criminal cases in certain limited circumstances. State v. Blue, 20 N.C. App. 386, 201 S.E.2d 548 (1974).

Former § 15-155.4 provided that the defense counsel, by showing good cause and adhering to the established time limitations, could inspect specific exhibits and examine expert witnesses. But where notes sought by defendant did not fall within either of these latter categories, resolution of this question was not controlled by the statute. State v. Blue, 20 N.C. App. 386, 201 S.E.2d 548 (1974).

Under former § 15-155.4, an accused was entitled to the benefits provided therein when either he or his counsel (1) had made written request to the State's counsel that the State produce for defendant's inspection, examination, copying and testing sufficiently in advance of the trial to permit him to prepare his defense, (2) a specifically identified exhibit to be used in the trial of the case, and (3) said request had been denied or gone unanswered for more than 15 days. State v. Macon, 276 N.C. 466, 173 S.E.2d 286 (1970); State v. Mason, 17 N.C. App. 44, 193 S.E.2d 324 (1972).

Pursuant to former § 15-155.4 the solicitor in a criminal trial was obligated to furnish certain specifically identified exhibits to the defendant to better enable him to prepare his defense. State v. McDonald, 11 N.C. App. 497, 181 S.E.2d 744 (1971); State v. Summrell, 13 N.C. App. 1, 185 S.E.2d 241 (1971).

A refusal to grant a pretrial motion for discovery is not reversible error unless the movant shows that evidence favorable to him was suppressed. State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975), cert. denied, U.S. , 97 S. Ct. 2971, 53 L. Ed. 2d 1091 (1977).

The purpose of former § 15-155.4 was to enable a defendant to guard against surprise documents and surprise expert witnesses. State v. Peele, 281 N.C. 253, 188 S.E.2d 326 (1972); State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975), cert. denied, U.S. , 97 S. Ct. 2971, 53 L. Ed. 2d 1091 (1977).

The expressed and clear purpose of former § 15-155.4 was to give to the defendant's counsel notice of such matters in sufficient time to avoid his being taken by surprise. State v. Carey, 285 N.C. 509, 206 S.E.2d 222 (1974), death sentence vacated, U.S. , 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

Defendant is not entitled to the granting of his motion for a fishing expedition. State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972); State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976).

Former § 15-155.4 did not contemplate anything resembling the demand embraced in a motion for discovery of "any and all evidence in the possession of or known to the State of North Carolina favorable to or tending to favor the defendant." State v. Gaines, 283 N.C. 33, 194 S.E.2d 839 (1973).

Former § 15-155.4 did not contemplate that the solicitor be required to furnish defendant the names and addresses of all witnesses known to the State who might offer testimony favorable to defendant, and copies of written statements or transcripts of oral statements made by any witness. State v. Peele, 281 N.C. 253, 188 S.E.2d 326 (1972).

Nor to receive the work product of police or State investigators. State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972); State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976).

There is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case. State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972); State v. Blue, 20 N.C. App. 386, 201 S.E.2d 548 (1974).

Where defendant "slept on his rights" under former § 15-155.4, the trial court did not abuse its discretion in denying defendant's motion for a continuance. State v. Elam, 19 N.C. App. 451, 199 S.E.2d 45 (1973).

Inspection of Pretrial Statement. — Defendants' constitutionally protected rights of confrontation, due process, and equal protection were violated by the denial of their request to inspect what they contended was a written pretrial out-of-court statement by the State's witness. State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976).

Scope of Subsection (a). — The requirement in G.S. 15A-903(a) that the State furnish to the defense copies of statements of the defendant which the State intends to offer at trial does not extend to remarks or conversation by the defendant to or in the presence of witnesses who are subsequently interviewed by persons acting on behalf of the State. Opinion of Attorney General to Mr. Anthony Brannon, 45 N.C.A.G. 60 (1975).

State Not Required to Introduce Writings in Precise Form Inspected by Defense. — While this section requires the State, upon proper motion, to divulge certain writings or documents, there is nothing that requires the State to offer the writings into evidence at trial in the precise form that they were in when inspected by defense counsel. State v. Williams, 29 N.C. App. 319, 224 S.E.2d 250 (1976).

List of State Witnesses. — Neither this section nor common law requires the State to furnish a defendant with the names and addresses of all the witnesses the State intends to call. State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976).

No right to discover the names and addresses of State's witnesses exists by statute in this State. Neither former § 15-155.4 nor this section requires the State to furnish the accused with a list of witnesses who are to testify against him. State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977).

In the absence of a statute requiring the State to furnish it, the defendant in a criminal case is not entitled to a list of the State's witnesses who are to testify against him. State v. Spaulding, 288 N.C. 397, 219 S.E.2d 178 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

Absent a statutory requirement, the defendant in a criminal case is not entitled to a list of witnesses who are to testify against him, and neither former § 15-155.4 nor this section requires this. State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

It was never the intention of the General Assembly when it enacted Article 48 of the Criminal Procedure Act to require the district attorney to furnish the names and addresses of witnesses the State intended to call. It follows that trial judges should not encourage, by court order, what the legislature specifically rejected during consideration of the legislation. State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977).

Procedure Where State Calls Witness Not on List Furnished by Order of Court. — Where the State has substantially complied with the order of the court to furnish the names and addresses of the State's witnesses and where such a list has been furnished and the State subsequently seeks to call a witness not on that list, the court will look to see whether the district attorney acted in bad faith, and whether the defendant was prejudiced thereby. State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977).

Applied in State v. Dollar, 292 N.C. 344, 233 S.E.2d 521 (1977).

Stated in State v. Jeeter, 32 N.C. App. 131, 230 S.E.2d 783 (1977).

Cited in State v. Britt, 291 N.C. 528, 231 S.E.2d 644 (1977); State v. Thomas, 291 N.C. 687, 231 S.E.2d 585 (1977).

§ 15A-904. Disclosure of evidence by the State — certain reports not subject to disclosure. — (a) Except as provided in G.S. 15A-903(a), (b), (c) and (e), this Article does not require the production of reports, memoranda, or other internal documents made by the prosecutor, law-enforcement officers, or other

persons acting on behalf of the State in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State.

(b) Nothing in this section prohibits a prosecutor from making voluntary disclosures in the interest of justice. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

This section is included to emphasize the general rule that the work product or investigative files of the solicitor, law-enforcement agencies, and others helping prepare the case are not open to discovery. Subsection (b) is added to indicate that a solicitor in his discretion may make fuller disclosure than is required if he believes this would assist in plea negotiations, otherwise speed the disposition of the case, or be in the interests of justice.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" wherever it appeared in this section.

§ 15A-905. Disclosure of evidence by the defendant — information subject to disclosure. — (a) Documents and Tangible Objects. — If the court grants any relief sought by the defendant under G.S. 15A-903(d), the court must, upon motion of the State, order the defendant to permit the State to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the defendant and which the defendant intends to introduce in evidence at the trial.

(b) Reports of Examinations and Tests. — If the court grants any relief sought by the defendant under G.S. 15A-903(e), the court must, upon motion of the State, order the defendant to permit the State to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession and control of the defendant which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial, when the results or reports relate to his testimony. In addition, upon motion of a prosecutor, the court must order the defendant to permit the prosecutor to inspect, examine, and test, subject to appropriate safeguards, any physical evidence or a sample of it available to the defendant if the defendant intends to offer such evidence, or tests or experiments made in connection with such evidence, as an exhibit or evidence in the case. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

Based on the breakdown of categories in the commentary to § 15A-903, there are three categories of discovery available to the State if the defense has sought discovery with respect to a similar category. The statute lumps two of these categories together, so the State may seek discovery as follows:

(1) If the defendant seeks discovery as to books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, or tangible objects, then the State may seek discovery as to any or all of these items which the defendant intends to introduce as evidence.

(2) If the defendant seeks discovery as to results or reports of the tests noted previously or seeks discovery as to physical evidence, then the State may seek discovery as to results or reports of physical or mental examinations or of

tests, measurements, or experiments made in connection with the case, in the control of the defendant, and which:

a. The defendant intends to introduce into evidence; or

b. Were prepared by a witness whom the defendant intends to call.

(3) If the defendant seeks discovery as to results or reports of the tests noted previously or seeks discovery as to physical evidence, then the State may seek discovery as to any physical evidence, or a sample of it, available to the defendant if the defendant intends to offer it as an exhibit or evidence, or results or reports of tests or experiments made in connection with the evidence.

To balance the deletion of discovery of the names and addresses of State's witnesses, the General Assembly deleted from this section a proposal allowing the State to seek the names and addresses of defense witnesses.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" in subsection (b).

§ 15A-906. Disclosure of evidence by the defendant — certain evidence not subject to disclosure. — Except as provided in G.S. 15A-905(b) this Article does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by prosecution or defense witnesses, or by prospective prosecution witnesses or defense witnesses, to the defendant, his agents, or attorneys. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section is substantially similar in its purpose to § 15A-904.

§ 15A-907. Continuing duty to disclose. — If a party, subject to compliance with an order issued pursuant to this Article, discovers prior to or during trial additional evidence or decides to use additional evidence, and the evidence is or may be subject to discovery or inspection under this Article, he must promptly notify the attorney for the other party of the existence of the additional evidence. (1973, c. 1286, s. 1; 1975, c. 166, s. 16.)

OFFICIAL COMMENTARY

This important provision requires a party subject to a discovery request or order to disclose all additional information of the type requested or ordered that comes to his attention after first compliance with the discovery provisions of this Article.

The phrase "or the name of each additional witness" was left in this section inadvertently. It was not omitted when discovery of the names and addresses of witnesses was stripped from the bill.

Editor's Note. — The 1975 amendment deleted "or the name of each additional witness" at the end of the section.

Remedy for Failure to Comply Within Discretion of Trial Court. — Although it does appear that the prosecution failed to comply with this section, it does not follow that the court was thereby required to prohibit the State from introducing the evidence which it had failed to disclose or that defendant is entitled to a new

trial because the court permitted introduction of such evidence. Which of the several remedies available under § 15A-910(a) should be applied in a particular case is a matter within the trial court's sound discretion. State v. Kessack, 32 N.C. App. 536, 232 S.E.2d 859 (1977).

Applied in State v. Morrow, 31 N.C. App. 654, 230 S.E.2d 568 (1976).

Cited in State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977); State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977).

§ 15A-908. Regulation of discovery — protective orders. — (a) Upon written motion of a party and a finding of good cause, the court may at any time order that discovery or inspection be denied, restricted, or deferred, or may make other appropriate orders.

(b) The court may permit a party seeking relief under subsection (a) to submit supporting affidavits or statements to the court for in camera inspection. If thereafter the court enters an order granting relief under subsection (a), the material submitted in camera must be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section gives a superior court judge broad scope to deny, restrict, or defer discovery or to make other appropriate orders of a protective nature for good cause shown. Because sources for believing that harm may occur if full discovery is granted are often confidential, the section provides for submitting supporting affidavits or statements to the court for in camera inspection, and for sealing the material submitted.

§ 15A-909. Regulation of discovery — time, place, and manner of discovery and inspection. — An order of the court granting relief under this Article must specify the time, place, and manner of making the discovery and inspection permitted and may prescribe appropriate terms and conditions. (1973, c. 1286, s. 1.)

§ 15A-910. Regulation of discovery — failure to comply. — If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may

(1) Order the party to permit the discovery or inspection, or
(2) Grant a continuance or recess, or
(3) Prohibit the party from introducing evidence not disclosed, or
(4) Enter other appropriate orders. (1973, c. 1286, s. 1; 1975, c. 166, s. 17.)

OFFICIAL COMMENTARY

Subsection (a) gives the judge broad and flexible powers to rectify the situation if a party fails to comply with discovery orders or provisions of the discovery Article.

Subsections (b) and (c) are meaningless, as the General Assembly elsewhere deleted the right of discovery of the names and addresses of witnesses.

Editor's Note. — The 1975 amendment deleted former subsections (b) and (c), which provided remedies where a party called a witness other than a rebuttal witness without first giving notice to the other party of the name of the witness.

Particular Remedy Within Discretion of Trial Court. — Which of the several remedies available under this section should be applied in a particular case is a matter within the trial

court's sound discretion. State v. Morrow, 31 N.C. App. 654, 230 S.E.2d 568 (1976); State v. Kessack, 32 N.C. App. 536, 232 S.E.2d 859 (1977).

Imposition of the sanctions found in subsections (a)(1) through (a)(4) rests entirely within the discretion of the trial judge. State v. Thomas, 291 N.C. 687, 231 S.E.2d 585 (1977).

Regulation of discovery and failure to comply determinations are within the sound discretion of the trial court. The court has broad and flexible powers to rectify the situation if a party fails to comply with discovery orders or provisions of the discovery article. State v. Artis, 31 N.C. App. 193, 228 S.E.2d 768 (1976).

The exclusion of evidence for the reason that the party offering it has failed to comply with statutes granting the right of discovery, or with an order of the court issued pursuant thereto, rests in the discretion of the trial court. State v. Dollar, 292 N.C. 344, 233 S.E.2d 521 (1977).

Where a discovery order to supply defendant with certain information had been issued and the State had purported to comply with it, and no evidence of bad faith on the part of the State was shown, permitting witnesses whose names the State had failed to supply to defendant to testify and accepting photographs into evidence which also had not been supplied to defendant, were matters within the discretion of the trial judge, not reviewable on appeal in the absence of a showing of an abuse of discretion. State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

And not reviewable on appeal in the absence of a showing of abuse. State v. Morrow, 31 N.C. App. 654, 230 S.E.2d 568 (1976); State v. Thomas, 291 N.C. 687, 231 S.E.2d 585 (1977).

Trial Judge Should Not Encourage by Court Order Requirement That State Furnish Witness List. — It was never the intention of the General Assembly when it enacted Article 48 of the Criminal Procedure Act to require the district attorney to furnish the names and addresses of witnesses the State intended to call. It follows that trial judges should not encourage, by court order, what the legislature specifically rejected during consideration of the legislation. State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977).

Cited in State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977).

§§ 15A-911 to 15A-920: Reserved for future codification purposes.

ARTICLE 49.

Pleadings and Joinder.

OFFICIAL COMMENTARY

North Carolina has previously allowed just four "pleadings" for the prosecution of criminal cases: warrants and criminal summonses in misdemeanor cases and informations and indictments in felony cases. To this could be added the "citation" in traffic cases — actually just an unsworn warrant form. The term "pleadings" has been used infrequently in criminal cases.

The Commission makes no change in the two pleadings used in felony cases. It is in misdemeanor cases that it recommends some change in the pleadings used. A second look will reveal that the real change is substantially less than that suggested by a first glance.

The traditional warrant for arrest in North Carolina has contained an affidavit which in fact was not more than a conclusory charge of the crime — in effect a pleading. A review of North Carolina cases will reveal that questions of validity of the warrant have most frequently focused on this "sufficiency of the pleading" aspect of the warrant.

The case of Whiteley v. Warden of Wyo. State Penitentiary, 401 U.S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971), made it clear that such a conclusory charge without more did not provide a magistrate with sufficient facts to support a finding of probable cause, and that there would have to be a showing of more facts. However, it should be noted that that additional showing of facts showing probable cause has no direct bearing on the "pleading" function of the warrant. We still need a "charge" of the crime, and for that reason the warrant format adopted in this statute contains both the traditional "charge" of the crime and provisions for the supplemental information necessary to satisfy Whiteley. See Article 17, Criminal Process.

The Commission followed the concept of trying to put together process from similar components, varying the forms of process only when appropriate. Thus the warrant for arrest contains the statement of the crime based upon a showing of probable cause and an order for arrest. § 15A-304. The criminal summons contains the statement of the crime, showing of probable cause, and order to appear. § 15A-303. When arrest is without a warrant, the magistrate, at the initial appearance, is directed to determine probable cause and if it is present to prepare a statement of the crime and enter an

order of commitment or bail. § 15A-511. If the crime is within the magistrate's jurisdiction for trial, he is directed to prepare a statement of the crime.

This "statement of the crime" is the same in each of these. It is essentially similar to the old warrant procedure and will serve as the "pleading" for the prosecution of misdemeanor cases — just as the indictment serves as the "pleading" in felony cases.

It should be noted that the citation (§ 15A-302) requires only that the crime be "identified," less than is required in the other processes. This is a reasonable difference, since it will be prepared by an officer on the scene. It still may be used as the pleading, but rather than get into sufficiency of the pleading in such a case the Commission simply gives the defendant the right to object and require a more formal pleading. § 15A-922(c).

The "statement of charges" is new. Being able to use the warrant as the pleading has worked well in this State, and saved much solicitorial manpower as compared to jurisdictions which require the drafting of a new misdemeanor pleading in each instance. It was felt that there is some loss in trying to "amend" the warrant, and sometimes issue a new warrant, when what is desired is a correct statement of the charges — a proper pleading. Since the warrant exists primarily as authority to arrest, there is some inconsistency of basic purpose and there is frequently a problem in getting all appropriate changes written in. Thus the "statement of charges" is created, as a new pleading, to be used when there is some problem with the original process as a pleading. As such it takes the place of amending the warrant (or amending other process which may also be used as the pleading). When filed prior to arraignment, it also may charge additional crimes. That simple idea requires some complexity for statement in statutory form, but that is the underlying idea in § 15A-922. It should be relatively easy to prepare a statement of charges; a form should be sufficient in many cases.

Editor's Note. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-921. Pleadings in criminal cases. — Subject to the provisions of this Article, the following may serve as pleadings of the State in criminal cases:

(1) Citation.
(2) Criminal summons.
(3) Warrant for arrest.
(4) Magistrate's order pursuant to G.S. 15A-511 after arrest without warrant.
(5) Statement of charges.
(6) Information.
(7) Indictment. (1973, c. 1286, s. 1; 1975, c. 166, s. 18.)

Editor's Note. — The 1975 amendment substituted "G.S. 15A-511" for "G.S. 15A-511(c)" in subdivision (4).

§ 15A-922. Use of pleadings in misdemeanor cases generally. — (a) Process as Pleadings. — The citation, criminal summons, warrant for arrest, or magistrate's order serves as the pleading of the State for a misdemeanor prosecuted in the district court, unless the prosecutor files a statement of charges, or there is objection to trial on a citation. When a statement of charges is filed it supersedes all previous pleadings of the State and constitutes the pleading of the State.

(b) Statement of Charges.

(1) A statement of charges is a criminal pleading which charges a misdemeanor. It must be signed by the prosecutor who files it.
(2) Upon appropriate motion, a defendant is entitled to a period of at least three working days for the preparation of his defense after a statement of charges is filed, or the time the defendant is first notified of the

statement of charges, whichever is later, unless the judge finds that the statement of charges makes no material change in the pleadings and that no additional time is necessary.

(3) If the judge rules that the pleadings charging a misdemeanor are insufficient and a prosecutor is permitted to file a statement of charges pursuant to subsection (e), the order of the judge must allow the prosecutor three working days, unless the judge determines that a longer period is justified, in which to file the statement of charges, and must provide that the charges will be dismissed if the statement of charges is not filed within the period allowed.

(c) Objection to Trial on Citation. — A defendant charged in a citation with a criminal offense may by appropriate motion require that the offense be charged in a new pleading. The prosecutor must then file a statement of charges unless it appears that a criminal summons or a warrant for arrest should be secured in order to insure the attendance of the defendant, and in addition serve as the new pleading.

(d) Statement of Charges upon Determination of Prosecutor. — The prosecutor may file a statement of charges upon his own determination at any time prior to arraignment in the district court. It may charge the same offenses as the citation, criminal summons, warrant for arrest, or magistrate's order or additional or different offenses.

(e) Objection to Sufficiency of Criminal Summons; Warrant for Arrest or Magistrate's Order as Pleading. — If the defendant by appropriate motion objects to the sufficiency of a criminal summons, warrant for arrest, or magistrate's order as a pleading, at the time of or after arraignment in the district court or upon trial de novo in the superior court, and the judge rules that the pleading is insufficient, the prosecutor may file a statement of charges, but a statement of charges filed pursuant to this authorization may not change the nature of the offense.

(f) Amendment of Pleadings prior to or after Final Judgment. — A statement of charges, criminal summons, warrant for arrest, or magistrate's order may be amended at any time prior to or after final judgment when the amendment does not change the nature of the offense charged.

(g) Pleadings When Misdemeanor Prosecution Initiated in Superior Court. — When the prosecution of a misdemeanor is initiated in the superior court as permitted by G.S. 7A-271, the prosecution must be upon information or indictment.

(h) Allegations in Superior Court of prior Convictions. — When charges in the district court involve allegations or prior convictions and there is an appeal to the superior court for trial de novo, a statement of charges must be filed in the superior court to charge the offense in the manner provided in G.S. 15A-928. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" wherever it appeared in this section.

Prerequisites of Valid Warrant. — A valid warrant of arrest must be based on an examination of the complainant under oath; it must identify the person charged; it must contain directly or by proper reference at least a defective statement of the crime charged; and it must be directed to a lawful officer or to a class of officers commanding the arrest of the accused. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Effect of Defects in Warrant. — Defects, if any, in the warrant affect its validity as a basis for a criminal prosecution on the charge set forth in the affidavit as well as its validity as a basis for a legal arrest. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Warrants Were Insufficient to Be Treated as an Information. — Neither of the instruments purporting to be warrants in this case was sufficient to be treated as an information under the provisions of former § 15-140. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Defective Warrants. — The warrant in the instant case was fatally defective and void because of the combination of failing to identify the assaulted officer by name in the affidavit and failing to order the defendant arrested in the

order of arrest. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Where, in the order of arrest portion of the purported warrant, the person ordered arrested was "Dempsey Roy Smith" and not the defendant, "Dempsey Roy Powell," the instrument did not meet the requirement that it be directed to a lawful officer commanding the arrest of the accused. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

An instrument setting forth the charge of assault by the use of the words "assault on an officer" to identify the person assaulted was not sufficient to charge the offense of assault. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 143 (1971).

A "North Carolina uniform traffic ticket" setting forth the charge of resisting arrest by using only the two words "resist arrest" was not sufficient to charge the offense. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Verdict and judgment were vacated because the warrant was fatally defective. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

But this did not bar further prosecution of defendant if the solicitor deemed it advisable. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

§ 15A-923. Use of pleadings in felony cases and misdemeanor cases initiated in the superior court division. — (a) Prosecution on Information or Indictment. — The pleading in felony cases and misdemeanor cases initiated in the superior court division must be a bill of indictment, unless there is a waiver of the bill of indictment as provided in G.S. 15A-642. If there is a waiver, the pleading must be an information. A presentment by the grand jury may not serve as the pleading in a criminal case.

(b) Form of Information or Indictment. — An information and a bill of indictment charge the crime or crimes in the same manner. An information has entered upon it or attached to it the defendant's written waiver of a bill of indictment. The bill of indictment has entered upon it the finding of the grand jury that it is a true bill.

(c) Waiver of Indictment. — The defendant may waive a bill of indictment as provided in G.S. 15A-642.

(d) Amendment of Information. — An information may be amended only with the consent of the defendant.

(e) No Amendment of Indictment. — A bill of indictment may not be amended. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section provides for the use of informations and indictments in felony cases and in misdemeanor cases initiated in the superior court. The pleading provisions set out here must be read in conjunction with the provisions for the grand jury (Article 31) and the indictment (Article 32).

Trials upon presentments have been abolished, and a presentment amounts to nothing more than an instruction by the grand jury to the public prosecuting attorney to frame a bill of indictment. State v. Elledge, 13 N.C. App. 462, 186 S.E.2d 192 (1972).

The experience of early days proved the practice of trying criminal cases upon the presentments of grand jurors to be wholly impracticable. As a consequence, the General Assembly of 1797 outlawed the practice by a statute. Since the adoption of the act of 1797, a presentment is regarded as nothing more than an instruction by the grand jury to the public prosecuting attorney for framing a bill of indictment for submission to them. State v. Thomas, 236 N.C. 454, 73 S.E.2d 283 (1952).

Person Charged with Misdemeanor Cannot Be Tried Initially in Superior Court except upon Indictment. — Under former § 15-137 and N. C. Const., Art. I, § 22, a person charged with the commission of a misdemeanor cannot be tried initially in the superior court except upon an indictment found by a grand jury, unless he waives indictment in accordance with regulations prescribed by the legislature. State v. Norman, 237 N.C. 205, 74 S.E.2d 602 (1953).

Trial in the superior court upon the original warrant is a nullity where there has been no conviction by an inferior court having

jurisdiction. State v. Evans, 262 N.C. 492, 137 S.E.2d 811 (1964).

Where the defendant pleads not guilty to a misdemeanor, the requirements for a waiver of indictment and for trial upon an information signed by the solicitor are the same as in noncapital felony cases. State v. Bethea, 272 N.C. 521, 158 S.E.2d 591 (1968).

When the offense charged is a misdemeanor and defendant's plea is not guilty, the requirements for a waiver of indictment and trial upon an information signed by the solicitor are the same as in "noncapital" felony cases. State v. Snipes, 16 N.C. App. 416, 192 S.E.2d 62 (1972).

§ 15A-924. Contents of pleadings; duplicity; alleging and proving previous convictions; failure to charge crime; surplusage. — (a) A criminal pleading must contain:

(1) The name or other identification of the defendant but the name of the defendant need not be repeated in each count unless required for clarity.

(2) A separate count addressed to each offense charged, but allegations in one count may be incorporated by reference in another count.

(3) A statement or cross reference in each count indicating that the offense charged therein was committed in a designated county.

(4) A statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date, or during a designated period of time. Error as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice.

(5) A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation. When the pleading is a criminal summons, warrant for arrest, or magistrate's order, or statement of charges based thereon, both the statement of the crime and any information showing probable cause which was considered by the judicial official and which has been furnished to the defendant must be used in determining whether the pleading is sufficient to meet the foregoing requirement.

(6) For each count a citation of any applicable statute, rule, regulation, ordinance, or other provision of law alleged therein to have been violated. Error in the citation or its omission is not ground for dismissal of the charges or for reversal of a conviction.

(b) If any count of an indictment or information charges more than one offense, the defendant may by timely filing of a motion require the State to elect and state a single offense alleged in the count upon which the State will proceed to trial. A count may be dismissed for duplicity if the State fails to make timely election.

(c) In trials in superior court, allegations of previous convictions are subject to the provisions of G.S. 15A-928.

(d) In alleging and proving a prior conviction, it is sufficient to state that the defendant was at a certain time and place convicted of the previous offense, without otherwise fully alleging all the elements. A duly certified transcript of the record of a prior conviction is, upon proof of the identity of the person of the defendant, sufficient evidence of a prior conviction. If the surname of a defendant charged is identical to the surname of a defendant previously convicted and there is identity with respect to one given name, or two initials, or two initials corresponding with the first letters of given names, between the two defendants, and there is no evidence that would indicate the two defendants are not one and the same, the identity of name is prima facie evidence that the

two defendants are the same person. Proof of previous convictions under G.S. 20-138 and 20-139 may be made in accordance with G.S. 8-35.1.

(e) Upon motion of a defendant under G.S. 15A-952(b) the court must dismiss the charges contained in a pleading which fails to charge the defendant with a crime in the manner required by subsection (a), unless the failure is with regard to a matter as to which an amendment is allowable.

(f) Upon motion of a defendant under G.S. 15A-952(b) the court may strike inflammatory or prejudicial surplusage from the pleading. (1973, c. 1286, s. 1; 1975, c. 642, s. 2.)

OFFICIAL COMMENTARY

This section states the basic rules for pleading in criminal cases. Much here is familiar, but there are changes, including provisions permitting allegations in one count to be incorporated by reference in another. The pleading rule, requiring factual (but not evidentiary) allegations to support each element, is in accord with traditional ideas, see State v. Greer, 238 N.C. 325, 77 S.E.2d 917 (1953), and provides a concise statutory statement. There are sections in Chapter 15 of the General Statutes providing what is sufficient to charge certain crimes, but it was thought better to leave those as they are at present. At such time as there is substantive revision, further simplification can be made in pleading.

Cross Reference. — As to alleging and proving prior convictions, see also § 15A-928.

Editor's Note. — The 1975 amendment, added the last sentence of subsection (d).

No Presumption of Prior Conviction. — Where the indictment does not charge a previous conviction it will be presumed that the defendant has not heretofore been convicted of the offense charged. State v. Clark, 183 N.C. 733, 110 S.E. 641 (1922).

Time and place of conviction of prior offense must be alleged. State v. Lawrence, 264 N.C. 220, 141 S.E.2d 264 (1965).

It is necessary also to allege in the indictment facts showing that at a certain time and place the defendant was convicted of the previous offense or offenses. State v. Bennett, 271 N.C. 423, 156 S.E.2d 725 (1967).

More Formal Proof of Prior Conviction Required than for Showing Lawful Custody. — A more formal proof is required to show a prior conviction than is required for merely showing lawful custody. State v. Chapman, 20 N.C. App. 456, 201 S.E.2d 579 (1974).

Certified Transcript of Record Is Sufficient Evidence of Prior Conviction. — Where a person is charged in a bill of indictment with an offense which, on conviction thereof, is punishable with a greater penalty than on the first conviction and the indictment properly alleges a prior conviction, that a transcript of the record of the first conviction, duly certified, is, upon proof of the identity of the person of the offender, sufficient evidence of the first conviction. State v. Walls, 4 N.C. App. 661, 167 S.E.2d 547 (1969).

The record itself in the former action, being in existence, is the only evidence admissible to prove its contents. Jones v. Jones, 241 N.C. 291, 85 S.E.2d 156 (1954); State v. Michaels, 11 N.C. App. 110, 180 S.E.2d 442 (1971).

Admission of Secondary Evidence. — In order to admit secondary evidence of the contents of a court record, it is necessary that the foundation be laid by showing the original record has been destroyed or lost. Jones v. Jones, 241 N.C. 291, 85 S.E.2d 156 (1954); State v. Michaels, 11 N.C. App. 110, 180 S.E.2d 442 (1971).

Use of only the commitments issued as the result of prior convictions of escape for the purpose of establishing the prior conviction or convictions was error, since a transcript of the record of the prior conviction or convictions, i.e., a certified copy of the judgment or judgments, is required. State v. Chapman, 20 N.C. App. 456, 201 S.E.2d 579 (1974).

Admission of Motor Vehicle Department records as evidence in a "second offense" case constituted prejudicial error. State v. Mabry, 18 N.C. App. 492, 197 S.E.2d 44 (1973).

Admission of Authenticity of Record Is Not Admission that Defendant was Person Convicted. — The admission of the authenticity of the record of an inferior court introduced by the solicitor is not an admission by the defendant that he had been theretofore convicted of a similar offense, even though the record shows a conviction of a similar offense, there being no admission by defendant that he was the person referred to in the record and an instruction assuming that defendant had made such

admission must be held for error. State v. Powell, 254 N.C. 231, 118 S.E.2d 617 (1961).

Separate Offenses in Same Count. — In a prosecution for felonious sale and delivery of marijuana, and felonious possession of marijuana with intent to sell, the fact that the State included in the same count as a single offense both sale and delivery, even though the two acts could have been charged as separate offenses, was not prejudicial to the defendant. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

§ 15A-925. Bill of particulars. — (a) Upon motion of a defendant under G.S. 15A-952, the court in which a charge is pending may order the State to file a bill of particulars with the court and to serve a copy upon the defendant.

(b) A motion for a bill of particulars must request and specify items of factual information desired by the defendant which pertain to the charge and which are not recited in the pleading, and must allege that the defendant cannot adequately prepare or conduct his defense without such information.

(c) If any or all of the items of information requested are necessary to enable the defendant adequately to prepare or conduct his defense, the court must order the State to file and serve a bill of particulars. Nothing contained in this section authorizes an order for a bill of particulars which requires the State to recite matters of evidence.

(d) The bill of particulars must be filed with the court and must recite every item of information required in the order. A copy must be served upon the defendant, or his attorney. The proceedings are stayed pending the filing and service.

(e) A bill of particulars may not supply an omission or cure a defect in a criminal pleading. The evidence of the State, as to those matters within the scope of the motion, is limited to the items set out in the bill of particulars. The court may permit amendment of a bill of particulars at any time prior to trial. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section generally reflects former practice, but sets out more detail than did § 15-143.

In General. — This provision as to a bill of particulars had prevailed previously as to civil proceedings, and was by statute made expressly applicable to criminal cases, to which the court had applied it in State v. Brady, 107 N.C. 822, 12 S.E. 325 (1890); State v. Stephens, 170 N.C. 745, 87 S.E. 131 (1915).

Purpose of Section. — Former § 15-143, similar to this section, intended to make all indictments alike in regard to dispensing with the insertion of the means and methods by which any offense was committed. State v. Stephens, 170 N.C. 745, 87 S.E. 131 (1915).

When Applicable. — Former § 15-143 applied only when further information, not required to be set out in the indictment, was desired. State v. Thornton, 251 N.C. 658, 111 S.E.2d 901 (1960); State v. Ingram, 271 N.C. 538, 157 S.E.2d 119 (1967).

Unless the exact time and place of the alleged occurrence are essential elements of the offense itself, a defendant may obtain further information in respect thereto by motion for a bill of particulars. State v. Eason, 242 N.C. 59, 86 S.E.2d 774 (1955).

Details Not Now Charged in Indictment. — It is no longer charged whether a murder was committed with a knife or a pistol, nor the length and breadth and depth of a wound, and the same is true as to all other offenses. In lieu of this, we have adopted a statute which provides for a bill of particulars. State v. Stephens, 170 N.C. 745, 87 S.E. 131 (1915).

Remedy by Motion for Bill of Particulars and Not by Motion to Quash. — Where the criminal indictment sufficiently charges all the elements of the offense but is not as definite as the defendant may desire, the defendant's remedy is by motion for a bill of particulars, and not by a motion to quash. State v. Everhardt, 203

N.C. 610, 166 S.E. 738 (1932); State v. Knight, 261 N.C. 17, 134 S.E.2d 101 (1964).

Or by Motion in Arrest of Judgment. — An indictment charging defendant disjunctively with murder committed with malice, premeditation, and deliberation and with murder committed in the perpetration of a robbery, is not void for uncertainty, since either charge constitutes murder in the first degree, and defendant's remedy, if he desires more specific information is by motion for a bill of particulars, and a motion in arrest of judgment after a verdict of guilty of murder in the first degree is properly denied. State v. Puckett, 211 N.C. 66, 189 S.E. 183 (1937).

Where the defendant thinks that an indictment fails to impart information sufficiently specific as to the nature of the charge, he may before trial move the court to order that a bill of particulars be filed, and the court will not arrest the judgment after verdict where he attempts to reserve his fire until he takes first the chance of acquittal. State v. Shade, 115 N.C. 757, 20 S.E. 537 (1894); State v. Corbin, 157 N.C. 619, 72 S.E. 1071 (1911).

The function of a bill of particulars is (1) to inform the defense of the specific occurrences intended to be investigated on the trial, and (2) to limit the course of the evidence to the particular scope of inquiry. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967); State v. Spence, 271 N.C. 23, 155 S.E.2d 802 (1967); State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976).

The function of a bill of particulars is to inform the defendant of the nature of the evidence which the State proposes to offer. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967); State v. Cameron, 283, N.C. 191, 195 S.E.2d 481 (1973); State v. Martin, 21 N.C. App. 645, 205 S.E.2d 583 (1974); State v. Covington, 290 N.C. 313, 226 S.E.2d 629 (1976).

The whole object of a bill of particulars is to enable the defendant to properly prepare his defense in cases where the bill of indictment, though correct in form and sufficient to apprise the defendant, in general terms, of the "accusation" against him, is yet so indefinite in its statements as to the particular charge or occurrence referred to that it does not afford defendant a fair opportunity to procure his witnesses or prepare his defense. State v. Seaboard Air Line Ry., 149 N.C. 508, 62 S.E. 1088 (1908).

The purpose of a bill of particulars is to give an accused notice of the specific charge or charges against him and to apprise him of the particular transactions which are to be brought in question on the trial. State v. Johnson, 30 N.C. App. 376, 226 S.E.2d 876 (1976).

Waiver of Right to Bill of Particulars. — Where a bank employee is charged with the indictable offense of making false entries upon the books of the bank in fraud or deceit of "other persons to the jurors unknown," the defendant should make his motion to the discretion of the trial judge for a bill of particulars requiring the name of these unknown persons, and his failure to do so will be deemed a waiver of his right. State v. Hedgecock, 185 N.C. 714, 117 S.E. 47 (1923).

Motion for Bill of Particulars Properly Denied. — The defendant was in no way prejudiced by the denial of his motion for a bill of particulars where his statements to the officers as to how, when, and under what circumstances he killed the deceased were in accord with the theory of the trial in the court below. State v. Scales, 242 N.C. 400, 87 S.E.2d 916 (1955).

The defendant was in effect furnished a bill of particulars where the warrant or indictment described the liquor as "nontaxpaid liquor," since the descriptive words identified the liquor. State v. Tillery, 243 N.C. 706, 92 S.E.2d 64 (1956).

Where defense counsel had been furnished copies of the officers' reports and the reports of the autopsies, had been permitted to interrogate the State's key witness, and was present when the defendant made admissions to investigating officers, and the State introduced nothing which should have been of surprise to the defendant, the court's refusal to order any additional bill of particulars was not error. State v. Porth, 269 N.C. 329, 153 S.E.2d 10 (1967).

Where defendant was given (1) the time of the alleged offense, (2) the specific location of the alleged offense, (3) the quantity of the controlled substance, and (4) the names of the prospective witnesses for the State, and counsel and his law partner were present at a preceding trial where the witnesses stated that their testimony against defendant would be substantially the same as their previous testimony, the information thus provided defendant was adequate, and there was no abuse of discretion in the denial of his motion for a bill of particulars. State v. Martin, 21 N.C. App. 645, 205 S.E.2d 583 (1974).

A bill of particulars is not a part of the indictment, nor a substitute therefor, nor an amendment thereto. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967).

The "particulars" authorized are not a part of the indictment. State v. Thornton, 251 N.C. 658, 111 S.E.2d 901 (1960).

What Bill Will Not Supply. — A bill of particulars will not supply any matter required to be charged in the indictment as an ingredient of the offense. State v. Long, 143 N.C. 670, 57 S.E. 349 (1907). See also State v. Johnson, 220 N.C. 773, 18 S.E.2d 358 (1942) (dissenting opinion); State v. Thornton, 251 N.C. 658, 111 S.E.2d 901 (1960); State v. Banks, 263 N.C. 784, 140 S.E.2d 318 (1965).

The function of a bill of particulars is to provide further information not required to be

set out in the bill of indictment, but never to supply matter required to be charged as an essential ingredient of the offense. State v. Gibbs, 234 N.C. 259, 66 S.E.2d 883 (1951).

A bill of particulars cannot supply a deficiency in an indictment when the language of the indictment fails to adequately charge the essential concomitants of the offense. State v. Cole, 202 N.C. 592, 163 S.E. 594 (1932). See also State v. Wilson, 218 N.C. 769, 12 S.E.2d 654 (1941); State v. Cox, 244 N.C. 57, 92 S.E.2d 413 (1956).

A defect in a warrant is not cured by a bill of particulars. State v. Banks, 263 N.C. 784, 140 S.E.2d 318 (1965).

A fatal defect in an indictment is not cured by the statute which enables the defendant to call for a bill of particulars. The "particulars" authorized are not a part of the indictment. A bill of particulars will not supply any matter which the indictment must contain. State v. Greer, 238 N.C. 325, 77 S.E.2d 917 (1953).

Former § 15-143 did not cure a defect in the bill of indictment. State v. Ingram, 271 N.C. 538, 157 S.E.2d 119 (1967).

An accused is not entitled to require the State to elect, by a bill of particulars, which witness's version of the events it will present. State v. Johnson, 30 N.C. App. 376, 226 S.E.2d 876 (1976).

An accused is not entitled to require the State to resolve discrepancies in its evidence in advance by a bill of particulars. State v. Johnson, 30 N.C. App. 376, 226 S.E.2d 876 (1976).

An accused is not entitled to an order requiring the State to recite matters of evidence in a bill of particulars. State v. Johnson, 30 N.C. App. 376, 226 S.E.2d 876 (1976).

Defendant was not entitled to have the State specify in the bill of particulars the precise place from where defendant obtained or produced the pistol with which he shot the deceased. State v. Johnson, 30 N.C. App. 376, 226 S.E.2d 876 (1976).

State Confined to Particulars Stated. — The granting of a bill of particulars on an indictment for a criminal offense is primarily to inform the accused of the charges against him, and secondarily to inform the court; and while this is not strictly a part of the indictment, its effect is to confine the State in its evidence to the particulars stated. It is reversible error to the prejudice of the defendant's rights for the court to admit, over his objection, evidence as to other criminal offenses not included in the bill to show the scienter or quo animo in relation to the particulars enumerated and coming within the scope of those generally charged in the indictment. State v. Wadford, 194 N.C. 336, 139 S.E. 608 (1927).

When a bill of particulars is furnished, it limits the evidence to the transactions or items therein stated. State v. Knight, 261 N.C. 17, 134 S.E.2d 101 (1964).

Amendment of Bill. — A bill of particulars, being no part of the indictment, is not subject to demurrer, and may be amended at any time, with permission of the court, on such terms or under such conditions as are just. State v. Wadford, 194 N.C. 336, 139 S.E. 608 (1927).

A bill of particulars filed by order of court in a criminal action is not regarded as a part of the indictment, and with the court's permission may be amended at any time, and is not subject to demurrer, the office of such bill being to advise the court and the accused of specific occurrences for investigation. State v. Beal, 199 N.C. 278, 154 S.E. 604 (1930).

Indictment for First-Degree Murder. — If a defendant is charged with murder in the first degree by bill of indictment drawn under § 15-144, and desires to know whether the State relies on proof that the killing was done with premeditation and deliberation, or in the perpetration or attempt to perpetrate a robbery, he should apply for a bill of particulars as provided in this section. State v. Haynes, 276 N.C. 150, 171 S.E.2d 435 (1970).

Indictment for Perjury. — Where the defendant in an action for perjury is in ignorance of the particulars of the offense charged, his remedy is by application to the court for a bill of particulars. State v. Hawley, 186 N.C. 433, 119 S.E. 888 (1923).

Indictment for Malfeasance of Bank Officer. — It is within the sound discretion of the trial judge to try, separately or collectively, the defendant, indicted under the provisions of § 14-254, for some or all offenses committed by a series of checks on the bank, whereby he had unlawfully "abstracted" the funds of the bank; and where the indictment is sufficient for conviction, the defendant's remedy is by requesting a bill of particulars when he reasonably so desires. State v. Switzer, 187 N.C. 88, 121 S.E. 43 (1924).

Granting or Denial of Motion Within Trial Court's Discretion. — The granting of a bill of particulars lies largely within the trial judge's discretion. State v. Covington, 290 N.C. 313, 226 S.E.2d 629 (1976).

The granting or denial of motions for a bill of particulars is within the discretion of the court. State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976).

And not subject to review except for palpable and gross abuse of discretion. State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976); State v. Wilson, 30 N.C. App. 149, 226 S.E.2d 518 (1976).

Cited in State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976); State v. McKenna, 289 N.C. 668, 224 S.E.2d 537, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

§ 15A-926. Joinder of offenses and defendants. — (a) Joinder of Offenses. — Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. Each offense must be stated in a separate count as required by G.S. 15A-924.

(b) Separate Pleadings for Each Defendant and Joinder of Defendants for Trial. —

(1) Each defendant must be charged in a separate pleading.

(2) Upon written motion of the prosecutor, charges against two or more defendants may be joined for trial:

a. When each of the defendants is charged with accountability for each offense; or

b. When, even if all of the defendants are not charged with accountability for each offense, the several offenses charged:

1. Were part of a common scheme or plan; or

2. Were part of the same act or transaction; or

3. Were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

(c) Failure to Join Related Offenses. —

(1) When a defendant has been charged with two or more offenses joinable under subsection (a) his timely motion to join them for trial must be granted unless the court determines that because the prosecutor does not have sufficient evidence to warrant trying some of the offenses at that time or if, for some other reason, the ends of justice would be defeated if the motion were granted. A defendant's failure to make this motion constitutes a waiver of any right of joinder of offenses joinable under subsection (a) with which the defendant knew he was charged.

(2) A defendant who has been tried for one offense may thereafter move to dismiss a charge of a joinable offense. The motion to dismiss must be made prior to the second trial, and must be granted unless

a. A motion for joinder of these offenses was previously denied, or

b. The court finds that the right of joinder has been waived, or

c. The court finds that because the prosecutor did not have sufficient evidence to warrant trying this offense at the time of the first trial, or because of some other reason, the ends of justice would be defeated if the motion were granted.

(3) The right to joinder under this subsection is not applicable when the defendant has pleaded guilty or no contest to the previous charge. (1973, c. 1286, s. 1; 1975, c. 166, ss. 19, 27.)

OFFICIAL COMMENTARY

Sections 15A-926 and 15A-927 are based generally upon the A.B.A. Standards Relating to Joinder and Severance. There are differences. The more familiar North Carolina statement with regard to transactions is retained, joinder for trial for defendants (not pleading joinder of defendants) is covered, and some changes are made in terminology.

Subsection (a) is similar to the former North Carolina statute in that it authorizes joinder on a transactional basis (§ 15-152) and adds the "common scheme or plan" statement from the Federal Rule 8(a). The Commission has eliminated provisions for joinder of offenses on the basis that they are of the same or similar character without any transactional connection. Such joinder contained in present statutes and the A.B.A. Standards would permit the joinder of entirely unrelated crimes in one charge and for trial.

Although some case law in North Carolina and the A.B.A. Standards would permit the joinder of defendants in pleadings, the Commission feels that the interests of the defendant and the ease of keeping court records will be served by requiring that each defendant be charged in a separate pleading, as has been the general custom. That is required by the last sentence of

subsection (b). Thus "joinder of defendants for trial" refers to what frequently has been called "consolidation" for trial. The grounds for joinder of defendants for trial should be self-explanatory. The Commission felt it unnecessary to include provisions from the A.B.A. Standards which would have provided for joinder of defendants on the basis of conspiracy.

When there are several offenses arising out of the same transaction or scheme, as defined in the statute, a question is presented as to whether the offenses may be tried ad seriatim, or whether there is any compulsion for the State to proceed with all pending charges. The Supreme Court of the United States has touched on this problem with the doctrine of "collateral estoppel" in Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), and the North Carolina Supreme Court has applied jeopardy rules in State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972). Subject to these more basic requirements, subsection (c) provides that as a procedural matter offenses related in the somewhat more broad basis described in the statute must be tried together, absent some reason for separate trial.

I. General Consideration.
II. Illustrative Cases.
A. Joinder of Offenses.
B. Joinder of Defendants for Trial.

I. GENERAL CONSIDERATION.

Cross Reference. — As to joinder of counts in indictments for violation of laws regulating intoxicating liquors, see § 18A-12.

Editor's Note. — The 1975 amendment inserted "or for trial" near the beginning of the first sentence of subsection (a) and substituted "prosecutor" for "solicitor" in subdivision (2) of subsection (b) and in subdivisions (1) and (2) of subsection (c).

For note as to general verdict rendered on indictment charging mutually exclusive crimes, see 36 N.C.L. Rev. 84 (1957).

In General. — The court is expressly authorized by statute in this State to order the consolidation for trial of two or more indictments in which the defendant or defendants are charged with crimes of the same class, which are so connected in time or place that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others. State v. White, 256 N.C. 244, 123 S.E.2d 483 (1962); State v. Hamilton, 264 N.C. 277, 141 S.E.2d 506 (1965), cert. denied, 384 U.S. 1020, 86 S. Ct. 1936, 16 L. Ed. 2d 1044 (1966); State v. Parker, 271 N.C. 414, 156 S.E.2d 677 (1967); State v. Conrad, 4 N.C. App. 50, 165 S.E.2d 771 (1969); State v. Mourning, 4 N.C. App. 569, 167 S.E.2d 501 (1969); State v. Wright, 18 N.C. App. 76, 195 S.E.2d 801 (1973); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975), cert. denied, U.S. , 97 S. Ct. 2971, 53 L. Ed. 2d 1091 (1977), decided under former § 15-152.

The trial court is authorized to order that prosecutions of several defendants for offenses growing out of the same transaction be consolidated for trial. State v. Mourning, 4 N.C. App. 569, 167 S.E.2d 501 (1969).

When two or more indictments are founded on one criminal transaction, the statute contemplates that the court will consolidate them for trial. State v. Fox, 277 N.C. 1, 175 S.E.2d 561 (1970).

Where two defendants are charged in separate bills of indictment with identical crimes, and the offenses charged are so connected and tied together in time, place, and circumstances as to make one continuous criminal episode, in such cases there is statutory authority for a consolidation. State v. Walker, 6 N.C. App. 447, 170 S.E.2d 627 (1969).

When a defendant is charged with crimes of the same class and the offenses are not so separate in time or place and not so distinct in circumstances as to render a consolidation unjust and prejudicial, consolidation is authorized in the discretion of the court. State v. Anderson, 281 N.C. 261, 188 S.E.2d 336 (1972).

Where the offenses charged were so connected and tied together in time, place, and circumstances as to make one continuous criminal episode, the trial court did not err in consolidating the prosecutions for trial. State v. McCall, 12 N.C. App. 85, 182 S.E.2d 617 (1971).

Where defendants were charged in separate bills of indictment with identical crimes, and the offenses charged were of the same class, related to the same crime, and were so connected in time and place that most of the evidence at the trial upon one of the indictments would be competent and admissible at the trial on the other, the trial judge was authorized, in his discretion, to order their consolidation for trial. State v. Bass, 280 N.C. 435, 186 S.E.2d 384 (1972).

Former § 15-152 authorized the consolidation for trial of separate charges against two or more defendants when the offenses charged were of the same class and were so connected in time or place that most of the evidence at trial upon one of the charges would be admissible at a trial on the others. State v. Salem, 17 N.C. App. 269, 193 S.E.2d 755 (1973).

The court is authorized to order the consolidation for trial of two or more indictments, in which the defendant or defendants are charged with crimes of the same class, which are so connected in time or place that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others. State v. Norton, 222 N.C. 418, 23 S.E.2d 301 (1942).

The trial judge is authorized to order consolidation for trial of two or more charges in which defendant is charged with crimes of the same class. State v. Franks, 20 N.C. App. 160, 200 S.E.2d 828 (1973).

The charges were properly consolidated for trial where the acts constituting the offenses were connected as a continuing transaction. State v. Carson, 20 N.C. App. 211, 200 S.E.2d 831 (1973).

The trial judge may consolidate for trial two or more indictments in which the defendant is charged with crimes of the same class and the crimes are so connected in time or place that evidence at the trial of one indictment will be competent at the trial of the other. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

Consolidation of cases for trial is generally proper when the offenses charged are of the same class and are so connected in time and place that evidence at trial upon one indictment would be competent and admissible on the other. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976); State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976); State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976), cert. denied, 429 U.S. 1123, 97 S. Ct. 1160, 51 L. Ed. 2d 573 (1977); State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977).

Two acts constituting essential parts of a single transaction may be charged together as a single offense, and defendant is not entitled to complain that only one offense was charged even though each act would have been ground for a separate charge. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

The trial judge may, in his discretion, order the consolidation for trial of two or more indictments in which the defendants are charged with crimes of the same class when the crimes are so connected in time or place that evidence at trial of one of the indictments will be competent and admissible at the trial of the others. State v. Spaulding, 288 N.C. 397, 219 S.E.2d 178 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

Where there are two indictments in which both defendants are charged with the same crimes, then they may be consolidated for trial in the discretion of the court. State v. Mitchell, 288 N.C. 360, 218 S.E.2d 332 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1210 (1976).

Ordinarily, unless it is shown that irreparable prejudice will result therefrom, consolidation for trial rather than multiple individual trials is appropriate when two or more persons are indicted for the same criminal offense. State v. Autry, 27 N.C. App. 639, 219 S.E.2d 795 (1975); State v. Johnson, 29 N.C. App. 534, 225 S.E.2d 113 (1976).

Consolidation Is within Discretion of Court. — An order consolidating cases for trial is discretionary. State v. Conrad, 4 N.C. App. 50, 165 S.E.2d 771 (1969); State v. Feimster, 21 N.C. App. 602, 205 S.E.2d 602 (1974).

The motion by the State to consolidate four cases for trial and the opposing motion by the defendants for separate trials were addressed to the sound discretion of the presiding judge. State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967).

Where defendants were charged in separate bills of indictment with identical crimes, and the offenses charged were of the same class, related to the same crime, and were so connected in time and place that most of the evidence at the trial upon one of the indictments would be competent and admissible at the trial on the other, the trial judge was authorized, in his discretion, to order their consolidation for trial. State v. Bass, 280 N.C. 435, 186 S.E.2d 384 (1972).

When a defendant is charged with crimes of the same class and the offenses are not so separate in time or place and not so distinct in circumstances as to render a consolidation unjust and prejudicial, consolidation is authorized in the discretion of the court. State v. Anderson, 281 N.C. 261, 188 S.E.2d 336 (1972).

When two or more defendants are charged in separate bills of indictment with identical crimes and the offense charged against each is so connected in time and place as to constitute one continuous criminal offense, the trial court may order the cases consolidated for trial and his decision will not be disturbed in the absence of a showing of abuse of discretion. State v. Garcia, 16 N.C. App. 344, 192 S.E.2d 2 (1972).

Upon the consolidation and trial together over defendants' objection of two indictments, the first against all three of defendants for abduction of a 14-year-old girl, and the second against two of the three defendants for an assault with intent to commit rape upon the abducted child during the abduction, while a verdict of guilty on the first charge and a verdict of not guilty on the second would seem to render the exception to the consolidation reckless, the right to consolidate was in the sound discretion of the trial court. State v. Truelove, 224 N.C. 147, 29 S.E.2d 460 (1944).

The motion to consolidate is addressed to the sound discretion of the trial judge and his ruling will not be disturbed absent a showing of abuse of discretion. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

Whether defendants jointly indicted will be tried jointly or separately is in the sound discretion of the trial court, and, in the absence of a showing that a joint trial had deprived the movant of a fair trial, the exercise of the court's discretion will not be disturbed upon appeal. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976); State v. Slade, 291 N. C. 275, 229 S.E.2d 921 (1976).

The question of consolidation of indictments against defendants charged with committing similar offenses at the same time and place is addressed to the sound discretion of the trial court. State v. Samuel, 27 N.C. App. 562, 219 S.E.2d 526 (1975).

Motion for consolidation of cases for trial is addressed to the trial judge's sound discretion. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Whether defendants charged with committing identical offenses at the same time and place should be jointly or separately tried is within the sound discretion of the trial court, and in the absence of a showing that a joint trial deprived a defendant of a fair trial, the exercise of the court's discretion will not be disturbed on appeal. State v. Greene, 30 N.C. App. 507, 227 S.E.2d 154 (1976).

Ordinarily, motions to consolidate cases for trial are within the sound discretion of the trial judge. State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977); State v. Foster, 33 N.C. App. 145, 234 S.E.2d 443 (1977).

Consolidation is a discretionary matter with the trial judge. State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

Exercise of Discretion by Court. — Where a defendant is indicted in separate bills "for two or more transactions of the same class of crimes or offenses," the court may in its discretion consolidate the indictments for trial. In exercising discretion the presiding judge should consider whether the offenses alleged are so separate in time or place and so distinct in circumstances as to render a consolidation unjust and prejudicial to defendant. To save the time of the court is not, taken alone, sufficient predicate for consolidation. State v. White, 256 N.C. 244, 123 S.E.2d 483 (1962); State v. Mitchell, 17 N.C. App. 1, 193 S.E.2d 400 (1972).

The trial court did not abuse its discretion in permitting the State to consolidate for trial multiple charges against a defendant where, at the time the consolidation was ordered, the court accepted the State's theory that the defendant may have committed the several offenses as part of a single act. State v. Blizzard, 280 N.C. 11, 184 S.E.2d 851 (1971).

In ruling upon a motion for consolidation of charges, the trial judge should consider whether the accused can fairly be tried upon more than one charge at the same trial. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

Exercise of discretion by the trial judge in consolidating cases for trial will not be disturbed absent a showing that defendant has been deprived of a fair trial by the order of consolidation. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976); State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976), cert. denied, 429 U.S. 1123, 97 S. Ct. 1160, 51 L. Ed. 2d 573 (1977).

If consolidation of charges hinders or deprives the accused of his ability to present his defense, the cases should not be consolidated. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

Defendant's unsupported statement of possible prejudice is not sufficient to show abuse of discretion on the part of the trial judge in allowing a motion to consolidate charges for trial. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

The right or propriety of a severance rests on circumstances showing that a joint trial would be prejudicial and unfair, and in the absence of showing that defendant has been deprived of a fair trial, the exercise of the court's discretion will not be disturbed. State v. Foster, 33 N.C. App. 145, 234 S.E.2d 443 (1977).

The trial court may in its discretion order a joinder of defendants for trial as provided in subsection (b) unless there is a showing that a joint trial would be prejudicial and unfair, i.e., the existence of antagonistic defenses, or the admission of evidence which would be excluded on a separate trial, or the exclusion of evidence which would be admitted. State v. Foster, 33 N.C. App. 145, 234 S.E.2d 443 (1977).

Joinder of defendants may not be permitted where such joinder would not promote a fair determination of the guilt or innocence of one or more of the defendants. State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976).

Consolidation of Separate Indictments against Same Defendant. — Where separate indictments against the same defendant are consolidated, the counts in the separate bills will be treated as separate counts in one bill. State v. White, 256 N.C. 244, 123 S.E.2d 483 (1962).

In an indictment containing several counts, each count should be complete in itself. State v. Russell, 15 N.C. App. 594, 190 S.E.2d 414, aff'd, 282 N.C. 240, 192 S.E.2d 294 (1972).

Where the first count in each bill of indictment for forgery was complete and sufficient as it contained with exactitude the bank check involved, but the second count did not, it would have been preferable for the second count to have again set out in detail the particular check

involved; however, since the check was set out in detail in the first count and that was an integral part of the bill of indictment, the reference to the same check in the second count was sufficient. State v. Russell, 15 N.C. App. 594, 190 S.E.2d 414, aff'd, 282 N.C. 240, 192 S.E.2d 294 (1972).

Where the second count in each of two bills of indictment should be quashed for insufficiency, the judgment entered should not be arrested where two sufficient counts were consolidated with the two insufficient counts for judgment; either one of the two sufficient counts, upon defendant's pleas of guilty, would support the judgment entered. State v. Horton, 15 N.C. App. 604, 190 S.E.2d 274 (1972).

Three cases may be consolidated where three charges included in two bills of indictment were so connected as to make the three offenses one continuous criminal episode. State v. Patton, 5 N.C. App. 501, 168 S.E.2d 500 (1969).

Four Offenses May Be Consolidated. — Where four offenses constituted a continuing criminal episode and were so related in time and circumstance as to permit the admission in evidence of each in the trial of the others, under these circumstances, the consolidation of the cases for trial was within the sound discretion of the trial judge. State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, 49 L. Ed. 2d 1206 (1976).

Offenses of Same Class. — An indictment charging the defendant with "receiving stolen goods," etc., with evidence tending to show the receiving on several occasions, does not require the solicitor to select the count on which he would proceed, on defendant's motion, each offense being of the same class of crime. State v. Charles, 195 N.C. 868, 142 S.E. 486 (1928).

Transactions Occurring at Same Time and in Close Proximity. — Where two warrants and an indictment were consolidated for trial, there was no denial of petitioner's constitutional rights, since all the charges grew out of transactions occurring on the same evening in close proximity to each other. Doss v. North Carolina, 252 F. Supp. 298 (M.D.N.C. 1966).

Consolidation of Minor Offense and Capital Charge. — Ordinarily, unless the evidence showing guilt of a minor offense fits into the proof on the capital charge, the minor offenses should not be included. State v. Old, 272 N.C. 42, 157 S.E.2d 651 (1967).

Time for Making Order of Consolidation. — Where there are several charges against any person for the same act or for two or more transactions connected together, or for two or more transactions of the same class of offenses, which may be properly joined, the court will order them to be consolidated. This means, however, that the order of consolidation will be made in such cases when seasonably brought to the court's attention, and not at a time when the validity of the whole trial might seriously be threatened by the consolidation. State v. Dunston, 256 N.C. 203, 123 S.E.2d 480 (1962).

Where the record justifies the conclusion that after the jury had been impaneled and prosecution begun upon one bill of indictment other bills of indictment were consolidated for trial therewith, a new trial will be awarded even though the indictments might have been properly consolidated initially, since the defendant must be afforded opportunity to plead to the counts consolidated and to pass upon the impartiality of the jury upon such counts. State v. Dunston, 256 N.C. 203, 123 S.E.2d 480 (1962).

An order of consolidation in capital cases will be made when seasonably brought to the court's attention, and not at a time when the validity of the whole trial might be threatened by the consolidation. State v. Harris, 223 N.C. 697, 28 S.E.2d 232 (1943).

Motion to Consolidate Is Not an Assent to a Mistrial. — A motion to consolidate three capital cases in medias res pending the taking of testimony on the trial of one of them, is not an assent to a mistrial in order to effect a consolidation. State v. Harris, 223 N.C. 697, 28 S.E.2d 232 (1943).

General Verdict Covers Several Counts. — Where there are several counts in a criminal complaint (called indictment in this case), and each is for a distinct offense, a general verdict of guilty will apply to each, and a judgment rendered as to each count will be sustained for the separate offenses. State v. Mills, 181 N.C. 530, 106 S.E. 677 (1921).

Where there are several counts in a bill, and a general verdict of guilty is returned, if the verdict on any count is free from valid objection and has evidence tending to support it, the conviction and sentence for that offense will be upheld. State v. Austin, 241 N.C. 548, 85 S.E.2d 924 (1955).

Entering Judgment on Each Offense upon General Verdict of Guilty. — Where the trials of two separate criminal indictments are consolidated by the judge and tried together and a general verdict of guilty is returned by the jury, the verdict will apply to each indictment, and judgment pronounced on one of them, but execution suspended on terms agreed upon, and judgment and sentence entered as to the other, is not objectionable on the ground that only one judgment should have been entered, and held further, the sentences being concurrent, the defendant was not prejudiced. State v. Harvell, 199 N.C. 599, 155 S.E. 257 (1930).

Ordinarily where separate bills of indictment are returned and the bills are consolidated for trial, the counts contained in the respective bills will be treated as though they were separate counts in one bill, and where there are several counts and each count is for a distinct offense,

a general verdict of guilty will authorize the imposition of a judgment on each count. State v. Braxton, 230 N.C. 312, 52 S.E.2d 895 (1949); State v. Austin, 241 N.C. 548, 85 S.E.2d 924 (1955).

Where cases are consolidated for trial and there is a conviction or plea of guilty on several counts, the court may enter a judgment on each count and have the judgments run concurrently or consecutively as it may direct. But the court is not authorized by law to enter a judgment in gross in excess of the greatest statutory penalty applicable to any of the counts upon which there has been a conviction or plea of guilty. State v. Austin, 241 N.C. 548, 85 S.E.2d 924 (1955).

Consolidation Proper without Formal Written Motion. — Even in the absence of any formal written motion, the trial judge may direct that criminal cases be consolidated for trial where proper grounds for joinder exist and when to do so will promote the ends of justice and facilitate proper disposition of the cases on the docket before him. State v. Cottingham, 30 N.C. App. 67, 226 S.E.2d 387 (1976); State v. Pevia, 30 N.C. App. 79, 226 S.E.2d 394 (1976).

When Written Motion Required. — The district attorney's motion under § 15A-926(b), made at the beginning of trial, comes within the purview of § 15A-951(a) and is not required to be in writing. The language in § 15A-926(b), which states, "Upon written motion of the district attorney," applies only in those instances in which joinder of defendants is requested prior to trial. State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976).

Applied in State v. Covington, 290 N.C. 313, 226 S.E.2d 629 (1976); State v. Bryson, 30 N.C. App. 71, 226 S.E.2d 392 (1976).

Cited in State v. Majette, 30 N.C. App. 120, 226 S.E.2d 223 (1976); State v. Artis, 31 N.C. App. 193, 228 S.E.2d 768 (1976).

II. ILLUSTRATIVE CASES.

A. Joinder of Offenses.

Conspiracy. — It is permissible to join counts charging conspiracy and successive steps thereafter taken by the respective conspirators in executing the common design. State v. Anderson, 208 N.C. 771, 182 S.E. 643 (1935).

Murder of One Person and Assault upon Another. — Upon the trial under an indictment charging the prisoner with murder of M., it is reversible error to the defendant's prejudice for the trial court upon his own motion, after a substantial part of the evidence had been introduced to consolidate the action with another action under a separate indictment charging the prisoner with an assault with a deadly weapon upon D., the prisoner being afforded no opportunity to pass upon the impartiality of the jury upon the assault charge or an opportunity to plead to the charge. State v. Rice, 202 N.C. 411, 163 S.E. 112 (1932).

Conspiracy to Rob and Murder in Perpetration of Robbery. — It is not error for the trial court to refuse a separate trial on each two counts in an indictment charging defendants with conspiracy to rob and with murder committed in the attempt to perpetrate the robbery. State v. Green, 207 N.C. 369, 177 S.E. 120 (1934).

Murder and Burglary. — The facts required to convict defendant of murder would necessarily have convicted him of the burglary charged in the instant case. State v. Fox, 277 N.C. 1, 175 S.E.2d 561 (1970).

Murder of One Person and Kidnapping and Robbery of Another. — Where the State contended that the murder of one person, and the kidnapping and robbery of another person were all parts of a continuing program of action by the defendant covering a period of approximately three hours, evidence of the whole affair was pertinent to the several charges and there was no error in consolidating the charges for trial. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652 (1972), death sentence vacated, 409 U.S. 1004, 93 S. Ct. 453, 34 L. Ed. 2d 295 (1976).

Separate Charges of First-Degree Murder. — Defendant's unsupported contention that he was prejudiced by the consolidation for trial of separate charges of first-degree murder because without the consolidation he would have had the election of testifying in one case without being forced to testify in the other was not sufficient to show abuse of discretion by the trial judge where the charged crimes were continuing criminal acts which permit the admission in evidence of each in the trial of the other. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

Kidnapping and Assault. — Where the kidnapping and assault charges arose out of the same transaction and elements of the assault charge were essentials of the kidnapping charge, the consolidation of the assault and kidnapping charges was permissible. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1972).

Felonious Entry, Kidnapping, and Forcible Taking of Automobile. — The felonious entry into a dwelling house, the kidnapping of one of the occupants of the house, and the forcible taking of an automobile in which the perpetrators attempted to make their getaway were so connected and tied together as to make the three offenses one continuous criminal episode. The evidence of the whole affair was pertinent and necessary to establish the identity of the accused as one of the guilty parties. The three charges were properly consolidated and tried together. State v. Arsad, 269 N.C. 184, 152 S.E.2d 99 (1967).

Larceny, Rape and Kidnapping. — Consolidation of misdemeanor larceny with rape and kidnapping felonies is permissible where the three offenses were connected by time and circumstances and constitute a continuing criminal episode. State v. White, 22 N.C. App. 123, 205 S.E.2d 757 (1974).

Rape and Kidnapping. — The consolidation of indictments charging defendant with rape and kidnapping and based upon a single occurrence rests within the discretionary power of the trial court. State v. Turner, 268 N.C. 225, 150 S.E.2d 406 (1966).

Rape and Armed Robbery. — An indictment charging defendants with rape and an indictment charging defendants with armed robbery may be consolidated for trial when it appears that defendants stopped the car in which husband and wife were riding, forced them into the woods where each raped the wife while the other held a pistol on the husband, and that one of them committed robbery from the person of the husband while he was being held at the point of the pistol, since the crimes are so connected in time and place that the evidence on the trial of the one is competent and admissible on the trial of the other. State v. Morrow, 262 N.C. 592, 138 S.E.2d 245 (1964), aff'd, 264 N.C. 77, 140 S.E.2d 767 (1965).

Rape and Carnal Knowledge of Female. — A charge of rape and that of carnally knowing a female person between the ages of 12 and 16 years, under § 14-26, were properly joined in separate counts in one indictment, since they are related in character and grow out of the same transaction. State v. Hall, 214 N.C. 639, 200 S.E. 375 (1939).

Separate Acts of Rape. — Where the evidence tended to show that defendant was walking through woods with a girl and forced her to have sexual intercourse with him against her will, that on the same night, while defendant was still in company with the first girl, he met another girl in the company of two boys, and that after an altercation with the boys, they and the first girl left the second girl with defendant and that he forced her to have sexual intercourse with him against her will, the consolidation of the prosecutions for the purpose of trial was not error. State v. Chapman, 221 N.C. 157, 19 S.E.2d 250 (1942).

Separate Burglaries. — Where both burglaries and the confrontation with the police occurred within a two-hour time span, all the alleged offenses occurred in and around the same subdivision and the evidence indicated a common plan to burglarize homes of the neighborhood and escape by means of a stolen vehicle parked nearby, no showing has been made that a severance was necessary to insure a fair determination by the jury on each charge. State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

Burglary and Rape. — A motion, made before the introduction of any evidence, to require the State to elect between two separate counts in the bill of indictment, one charging burglary in the first degree and the other rape, is properly denied, the two offenses being of the same class, which may be joined in one indictment in separate counts, and it being within the sound discretion of the trial court as to whether he should compel an election between the counts and, if so, at what stage of the trial. State v. Smith, 201 N.C. 494, 160 S.E. 577 (1931).

Burglary and Larceny. — An indictment charged two offenses, (1) burglary in the first degree, and (2) larceny of money from the building allegedly feloniously broken into and entered, as alleged in the first count, but the bill was not defective. These two counts may be joined in one indictment in separate counts. State v. Childs, 269 N.C. 307, 152 S.E.2d 453 (1967), death sentence vacated, 403 U.S. 948, 91 S. Ct. 227, 29 L. Ed. 2d 859 (1971).

Housebreaking and Larceny. — When not subject to legal objection, a motion by the solicitor to consolidate two criminal actions for trial is addressed to the discretion of the trial judge, and where prosecutions for housebreaking and larceny on two occasions during the same night against two defendants are consolidated without objection, and the charges are so connected in time and place that evidence of guilt in one action is competent in the other, the order of the trial judge consolidating the actions will not be held for error on appeal. State v. Combs, 200 N.C. 671, 158 S.E. 252 (1931); State v. Spencer, 239 N.C. 604, 80 S.E.2d 670 (1954).

Larceny and receiving may be included in the same indictment, even though the charges are inconsistent and a defendant cannot be guilty of both. Doss v. North Carolina, 252 F. Supp. 298 (M.D.N.C. 1966).

When a defendant pleads guilty to the indictment, and a single judgment is pronounced thereon, it is regarded as immaterial whether the judgment is considered as relating to the larceny count or to the receiving count. It is only when there is some defect in either the larceny count or the receiving count that knowledge of which count the defendant is pleading guilty to is required. Doss v. North Carolina, 252 F. Supp. 298 (M.D.N.C. 1966).

See note to § 14-71.

Arson and House Burning. — Where the grand jury has found two separate indictments, one charging arson and the other the less offense of house burning, both arising from the same transaction, the two may be consolidated and a conviction of the less offense will be sustained on appeal. State v. Brown, 182 N.C. 761, 108 S.E. 349 (1921).

Assault upon Law Officer and Assault with Deadly Weapon. — The trial court did not err

in consolidating a charge of assault upon a law officer in the performance of his duty with three charges of assault with a deadly weapon with intent to kill inflicting serious injury where all of the alleged assaults occurred within a period of a few minutes at the same place. State v. Mitchell, 17 N.C. App. 1, 193 S.E.2d 400 (1972).

Obstructing Highway and Injury to Property. — It is not only proper but it is the duty of the court to consolidate cases where defendant is charged with obstructing a highway and with wanton injury to personal property by placing nails in the highway. State v. Malpass, 189 N.C. 349, 127 S.E. 248 (1925).

Delivering Liquor and Keeping for Sale. — Consolidation of charges of delivering and keeping for sale under the Turlington Act was proper. State v. Jarrett, 189 N.C. 516, 127 S.E. 590 (1925).

Unlawful Possession of Liquor and Reckless Driving and Speeding. — Where the evidence tended to show that defendant, the discovery of liquor on his premises being imminent, sped away in his car, leading the officers a chase at an illegal speed the court properly consolidated for trial a bill of indictment charging unlawful possession of nontaxpaid liquor and unlawful possession of such liquor for the purpose of sale with an indictment charging reckless driving and speeding. State v. Brown, 250 N.C. 209, 108 S.E.2d 233 (1959).

Offenses Related to Operation of Automobile. — A charge of reckless driving, of operating an automobile on the highway while under the influence of intoxicating liquor and of assault with an automobile may be properly joined in one indictment as separate counts charging distinct offenses of the same class growing out of the same transaction, and separate judgments may be entered upon the jury's verdict of guilty of reckless driving and assault. State v. Fields, 221 N.C. 182, 19 S.E.2d 486 (1942).

A "driving under the influence" misdemeanor charge and a manslaughter felony charge were based on the same transaction within the meaning of § 7A-271(a)(3), and therefore the superior court had jurisdiction of both charges and had the right to proceed to the trial on the misdemeanor charge under the joinder exception of § 7A-271, the "original jurisdiction" of the district court having been lost after nolle prosequi was entered as to the misdemeanor in that court. State v. Karbas, 28 N.C. App. 372, 221 S.E.2d 98, cert. denied, 289 N.C. 618, 223 S.E.2d 394 (1976).

Reckless Driving and Passing Standing School Bus. — Indictments charging defendant with reckless driving and with passing a standing school bus on the highway may be consolidated for trial. State v. Webb, 210 N.C. 350, 186 S.E. 241 (1936).

In a prosecution for felonious sale and delivery of marijuana, and felonious possession of marijuana with intent to sell, the fact that the State included in the same count as a single offense both sale and delivery, even though the two acts could have been charged as separate offenses, was not prejudicial to the defendant. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

Joinder of Charge of Possession of Heroin to Other Charges Not Prejudicial. — The Court of Appeals did not agree with defendant's argument that because a charge of possession of heroin carries a far greater "antisocial stigma," the defendant was prejudiced by joining it to other charges for trial. State v. Wooten, 20 N.C. App. 499, 201 S.E.2d 696 (1974).

Indictment Held Not to Violate Rule against Duplicity. — See State v. Gibson, 233 N.C. 691, 65 S.E.2d 508 (1951).

B. Joinder of Defendants for Trial.

Consolidation of Indictments Charging Defendants with Murder of Same Person on Same Date. — Indictment was returned against one defendant charging him with murder in the first degree of a named person and another indictment was returned against two other defendants charging them with murder in the first degree of the same person and on the same date. Since the State was relying upon the same set of facts at the same place and time as against each of the defendants, the trial court had authority to consolidate the indictments for trial. State v. Spencer, 239 N.C. 604, 80 S.E.2d 670 (1954).

There was no error in the denial of the motion of codefendant for a separate trial where the two defendants were duly charged in separate indictments with the same crime, the State proceeded upon the theory that the murder, with which they were charged, was committed in the course of a robbery committed by them jointly, their defenses were not antagonistic, each testified in support of their joint alibi and neither, in his testimony or other evidence, attempted to incriminate the other defendant. State v. Madden, 292 N.C. 114, 232 S.E.2d 656 (1977).

Where the three defendants were charged with and tried for a single, identical crime, the murder of the trooper, the theory of the prosecution in each case was that the three defendants, jointly, and pursuant to a common plan, robbed the bank, and, while fleeing from the scene of the robbery with its proceeds, shot and killed the trooper, and nothing whatever in the record indicated the slightest prejudice to the right of any of the defendants to a fair trial by reason of the consolidation of the cases per se, there was no error in consolidating the three cases for trial under subsection (b)(2). State v. Squire, 292 N.C. 494, 234 S.E.2d 563 (1977).

Indictments charging defendants as accessories before the fact in the slaying of the same person, the defendants being present together at the time of the offense, held to authorize the consolidation of the indictments for trial. State v. Parker, 271 N.C. 414, 156 S.E.2d 677 (1967).

Consolidated Trial of Two Defendants Charged with Possession of Heroin. — Two defendants, charged with identical offenses that were connected and tied together in time, place and circumstances, may be given a consolidated trial of cases charging them with possession of heroin. State v. Keitt, 19 N.C. App. 414, 199 S.E.2d 23 (1973), cert. denied, 415 U.S. 990, 94 S. Ct. 1589, 39 L. Ed. 2d 887 (1974).

Indictments Relating to Receiving of Stolen Goods Separately by Defendants at Different Times and Places. — Where two persons are charged in separate bills of indictment with receiving stolen goods knowing them to have been stolen, and there is no evidence tending to show there was a conspiracy between them, or between them and other parties, but the indictments relate to the receiving of goods separately by each defendant at different times and places, the consolidation of indictments for trial over objection of appealing defendant is prejudicial error. State v. Dyer, 239 N.C. 713, 80 S.E.2d 769 (1954).

§ 15A-927. Severance of offenses; objection to joinder of defendants for trial. — (a) Timeliness of Motion; Waiver; Double Jeopardy. —

(1) A defendant's motion for severance of offenses must be made before trial as provided in G.S. 15A-952, except as provided in G.S. 15A-953, and except that a motion for severance may be made before or at the close of the State's evidence if based upon a ground not previously known. Any right to severance is waived if the motion is not made at the appropriate time.

(2) If a defendant's pretrial motion for severance is overruled, he may renew the motion on the same grounds before or at the close of all the evidence. Any right to severance is waived by failure to renew the motion.

(3) Unless consented to by the defendant, a motion by the prosecutor for severance of offenses may be granted only prior to trial.

(4) If a motion for severance of offenses is granted during the trial, a motion by the defendant for a mistrial must be granted.

(b) Severance of Offenses. — The court, on motion of the prosecutor or on motion of the defendant, must grant a severance of offenses whenever:

(1) If before trial, it is found necessary to promote a fair determination of the defendant's guilt or innocence of each offense; or

(2) If during trial, upon motion of the defendant or motion of the prosecutor with the consent of the defendant, it is found necessary to achieve a fair determination of the defendant's guilt or innocence of each offense. The court must consider whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

(c) Objection to Joinder of Charges against Multiple Defendants for Trial; Severance. —

(1) When a defendant objects to joinder of charges against two or more defendants for trial because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court must require the prosecutor to select one of the following courses:

a. A joint trial at which the statement is not admitted into evidence; or

b. A joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted so that the statement will not prejudice him; or

c. A separate trial of the objecting defendant.

(2) The court, on motion of the prosecutor, or on motion of the defendant other than under subdivision (1) above must deny a joinder for trial or grant a severance of defendants whenever:

a. If before trial, it is found necessary to protect a defendant's right to a speedy trial, or it is found necessary to promote a fair determination of the guilt or innocence of one or more defendants; or

b. If during trial, upon motion of the defendant whose trial is to be severed, or motion of the prosecutor with the consent of the defendant whose trial is to be severed, it is found necessary to achieve a fair determination of the guilt or innocence of that defendant.

(3) The court may order the prosecutor to disclose, out of the presence of the jurors, any statements made by the defendants which he intends to introduce in evidence at the trial when that information would assist the court in ruling on an objection to joinder of defendants for trial or a motion for severance of defendants.

(d) Failure to Prove Grounds for Joinder of Defendants for Trial. — If a defendant moves for severance at the conclusion of the State's case or of all the evidence, and there is not sufficient evidence to support the allegation upon which the moving defendant was joined for trial with the other defendant or defendants, the court must grant a severance if, in view of this lack of evidence, severance is found necessary to achieve a fair determination of that defendant's guilt or innocence.

(e) Severance on Motion of Court. — The court may order a severance of offenses before trial or deny the joinder of defendants for trial if a severance or denial of joinder could be obtained on motion of a defendant or the prosecutor. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

Subject to the exceptions set out here, the making of a motion for severance is subject to the requirements of Article 52, Motions Practice.

Obviously if a defendant seeks severance of charges, the granting of that motion should not bar trial on the severed offenses. If the presence of the severed charges has already worked to the prejudice of the defendant, he should not have to go forward at that time, and provisions for mistrial have been added to the A.B.A. Standards.

Subsection (b) sets out the obvious grounds for severance. Of course severance during trial would require the consent of the defendant if there is to be further trial on those charges.

Subdivision (1) of subsection (c) contains provisions which meet the requirements of Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). This and other provisions of subsection (c) are from the A.B.A. Standards, with appropriate modification to reflect the concept of joinder for trial rather than pleading joinder. Prior to trial the defendant may object to joinder. Once the trial is begun it is more appropriate to speak in terms of "severance."

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" wherever it appeared in this section.

Prejudice to Defendant Shown. — Trial court's denial of defendant's motion for separate trial so prejudiced his defense as to amount to a denial of due process and his right to confrontation where defendant was precluded under the circumstances of the joint trial from introducing evidence of codefendant's out-of-court statement, which would have strengthened defendant's alibi defense. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, U.S. , 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Discretion of Trial Judge. — Ordinarily, motions for separate trial lie within the sound discretion of the trial judge. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, U.S. , 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Whether defendants should be tried jointly or separately is in the sound discretion of the trial court, and, in the absence of a showing that a joint trial has deprived the movant of a fair trial, the exercise of the court's discretion will not be disturbed upon appeal. State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976).

Applied in State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

Cited in State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976); State v. Hyatt, 32 N.C. App. 623, 233 S.E.2d 649 (1977).

§ 15A-928. Allegation and proof of previous convictions in superior court. — (a) When the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter, an indictment or information for the higher offense may not allege the previous conviction. If a reference to a previous conviction is contained in the statutory name or title of the offense, the name or title may not be used in the indictment or information, but an improvised name or title must be used which labels and distinguishes the offense without reference to a previous conviction.

(b) An indictment or information for the offense must be accompanied by a special indictment or information, filed with the principal pleading, charging that the defendant was previously convicted of a specified offense. At the prosecutor's option, the special indictment or information may be incorporated in the principal indictment as a separate count. Except as provided in subsection (c) below, the State may not refer to the special indictment or information during the trial nor adduce any evidence concerning the previous conviction alleged therein.

(c) After commencement of the trial and before the close of the State's case, the judge in the absence of the jury must arraign the defendant upon the special indictment or information, and must advise him that he may admit the previous conviction alleged, deny it, or remain silent. Depending upon the defendant's response, the trial of the case must then proceed as follows:

(1) If the defendant admits the previous conviction, that element of the offense charged in the indictment or information is established, no evidence in support thereof may be adduced by the State, and the judge must submit the case to the jury without reference thereto and as if the fact of such previous conviction were not an element of the offense. The court may not submit to the jury any lesser included offense which is distinguished from the offense charged solely by the fact that a previous conviction is not an element thereof.

(2) If the defendant denies the previous conviction or remains silent, the State may prove that element of the offense charged before the jury as a part of its case. This section applies only to proof of a prior conviction when it is an element of the crime charged, and does not prohibit the State from introducing proof of prior convictions when otherwise permitted under the rules of evidence.

(d) When a misdemeanor is tried de novo in superior court in which the fact of a previous conviction is an element of the offense affecting punishment, the State must replace the pleading in the case with superseding statements of charges separately alleging the substantive offense and the fact of any prior conviction, in accordance with the provisions of this section relating to indictments and informations. Any jury trial in superior court on the misdemeanor must be held in accordance with the provisions of subsections (b) and (c).

(e) Nothing contained in this section precludes the State from proving a prior conviction before a grand jury or relieves the State from the obligation or necessity of so doing in order to submit a legally sufficient case. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

When a defendant is tried for an offense carrying a higher statutory maximum punishment upon proof of prior convictions, there is no constitutional requirement that the

defendant be afforded a two-step trial to keep the jury deciding guilt from learning of the prior convictions. Spencer v. Texas, 385 U.S. 554, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967). Nevertheless, a two-step procedure is favored by many legal commentators, and North Carolina in 1967 adopted such a procedure as part of its habitual felon law in Article 2A of Chapter 14 of the General Statutes, Habitual Felons.

The Commission recommended a provision that contains some features of a two-step procedure. It is modeled after a section in the New York Criminal Procedure Law. If the defendant admits his guilt of the punishment-enhancing prior convictions upon a separate arraignment out of the presence of the jury, the fact of the prior convictions is settled and need not be submitted to the jury as an element of the crime. If the defendant does not admit the prior convictions, the State must prove them beyond a reasonable doubt before the jury.

The New York statute, C.P.L. § 200.60, applied only to indictments and informations, and the Commission's draft was also so limited. The General Assembly, however, added subsection (d) to make the procedure also apply to misdemeanors appealed for trial de novo in superior court.

Cross Reference. — As to alleging and proving prior convictions, see also § 15A-924 and the note thereto.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" in the second sentence in subsection (b).

For note on "Constitutional Law — Current Trends in Recidivist Statute Procedures," see 45 N.C.L. Rev. 1039 (1967).

Subsection (c) does not violate the right to jury trial embodied in Art. I, § 24 of the State Constitution. See State v. Smith, 291 N.C. 438, 230 S.E.2d 644 (1976).

The effect of subsection (c) is not to deprive the defendant of a jury trial. It merely allows defendant, by judicially admitting his prior convictions, to preclude the State from adducing evidence of them and to require the judge to submit the case to the jury without reference to them and as if previous convictions were not an element of the offense. State v. Smith, 291 N.C. 438, 230 S.E.2d 644 (1976).

Defendant may stipulate the previous convictions charged against him under subsection (c). State v. Smith, 291 N.C. 438, 230 S.E.2d 644 (1976).

Relevance of Evidence of Previous Conviction. — When evidence of the previous conviction is introduced it is relevant only to the issue whether defendant has previously been convicted of an offense identical to the substantive offense charged, and the judge must charge the jury that they shall not consider such a prior conviction in passing upon his guilt or innocence of the primary charge. State v. Smith, 291 N.C. 438, 230 S.E.2d 644 (1976).

Standard of Proof. — Where the defendant denies the previous conviction the State must prove this element of the offense charged beyond a reasonable doubt. State v. Smith, 291 N.C. 438, 230 S.E.2d 644 (1976).

Introduction of Previous Conviction for Purposes of Impeachment. — See State v. Guinn, 32 N.C. App. 595, 233 S.E.2d 73 (1977).

Stated in State v. Moore, 27 N.C. App. 245, 218 S.E.2d 496 (1975).

Cited in State v. Allen, 292 N.C. 431, 233 S.E.2d 585 (1977).

§§ 15A-929, 15A-930: Reserved for future codification purposes.

ARTICLE 50.

Voluntary Dismissal.

§ 15A-931. Voluntary dismissal of criminal charges by the State. — (a) The prosecutor may dismiss any charges stated in a criminal pleading by entering an oral dismissal in open court before or during the trial, or by filing a written dismissal with the clerk at any time. The clerk must record the dismissal entered by the prosecutor and note in the case file whether a jury has been impaneled or evidence has been introduced.

(b) No statute of limitations is tolled by charges which have been dismissed pursuant to this section. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

The case of Klopfer v. North Carolina, 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967), held that our system of "nol pros" was unconstitutional when it left charges pending against a defendant and he was denied a speedy trial. Thus the Commission here provides for a simple and final dismissal by the solicitor. No approval by the court is required, on the basis that it is the responsibility of the solicitor, as an elected official, to determine how to proceed with regard to pending charges. This section does not itself bar the bringing of new charges. That would be prevented if there were a statute of limitations which had run, or if jeopardy had attached when the first charges were dismissed.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" wherever it appeared in this section.

§ 15A-932. Dismissal with leave when defendant fails to appear and cannot be readily found. — (a) When a defendant fails to appear at any criminal proceeding at which his attendance is required and the prosecutor believes that the defendant cannot be readily found, the prosecutor may enter a dismissal with leave for nonappearance under this section.

(b) Dismissal with leave for nonappearance results in removal of the case from the docket of the court, but all process outstanding retains its validity, and all necessary actions to apprehend the defendant, investigate the case, or otherwise further its prosecution may be taken, including the issuance of nontestimonial identification orders, search warrants, new process, initiation of extradition proceedings, and the like.

(c) The prosecutor may enter the dismissal with leave for nonappearance orally in open court or by filing the dismissal in writing with the clerk. If the dismissal for nonappearance is entered orally, the clerk must note the nature of the dismissal in the case records.

(d) Upon apprehension of the defendant, or in the discretion of the prosecutor when he believes apprehension is imminent, the prosecutor may reinstitute the proceedings by filing written notice with the clerk. (1977, c. 777, s. 1.)

§§ 15A-933 to 15A-940: Reserved for future codification purposes.

ARTICLE 51.

Arraignment.

OFFICIAL COMMENTARY

It is the purpose of this Article not only to define arraignment in any court but also to provide for a separate time of arraignment in superior court. Time for jurors and witnesses will be saved if matters not requiring their presence can be disposed of before they are brought in. The Commission feels that it is important to our system of justice that unnecessary impositions on the time of citizens be avoided. Thus, in the more populous counties here defined as those having as much as 20 weeks of criminal court (and others which the Chief Justice may designate), a separate time for arraignment will be required. In other counties it is authorized on an optional basis.

The Commission is under no illusion that this will cure problems of delay, or that it will end the practice of waiting until a jury is ready before entering a guilty plea, but it does set a pattern within which improvement is possible.

§ 15A-941. Arraignment before judge. — Arraignment consists of bringing a defendant in open court before a judge having jurisdiction to try the offense, advising him of the charges pending against him, and directing him to plead. The prosecutor must read the charges or fairly summarize them to the defendant. If the defendant fails to plead, the court must record that fact, and the defendant must be tried as if he had pleaded not guilty. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor."

Constitutionality. — The fact that under this section the district attorney reads the charges or fairly summarizes them to the defendant before the jury is not a violation of defendant's right to due process and equal protection as required by the Constitutions of the State of North Carolina and the United States. State v. Carter, 30 N.C. App. 59, 226 S.E.2d 179 (1976).

§ 15A-942. Right to counsel. — If the defendant appears at the arraignment without counsel, the court must inform the defendant of his right to counsel, must accord the defendant opportunity to exercise that right, and must take any action necessary to effectuate the right. (1777, c. 115, s. 85, P. R.; R. C., c. 35, s. 13; Code, s. 1182; Rev., s. 3150; C. S., s. 4515; 1973, c. 1286, s. 1.)

§ 15A-943. Arraignment in superior court — required calendaring. — (a) In counties in which there are regularly scheduled 20 or more weeks of trial sessions of superior court at which criminal cases are heard, and in other counties the Chief Justice designates, the prosecutor must calendar arraignments in the superior court on at least the first day of every other week in which criminal cases are heard. No cases in which the presence of a jury is required may be calendared for the day or portion of a day during which arraignments are calendared.

(b) When a defendant pleads not guilty at an arraignment required by subsection (a), he may not be tried without his consent in the week in which he is arraigned.

(c) Notwithstanding the provisions of subsection (a) of this section, in any county where as many as three simultaneous sessions of superior court, whether criminal, civil, or mixed, are regularly scheduled, the prosecutor may calendar arraignments in any of the criminal or mixed sessions, at least every other week, upon any day or days of a session, and jury cases may be calendared for trial in any other court at which criminal cases may be heard, upon such days. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; c. 471.)

Editor's Note. — The first 1975 amendment substituted "prosecutor" for "solicitor" in subsection (a).

The second 1975 amendment added subsection (c).

Quoted in State v. Carter, 30 N.C. App. 59, 226 S.E.2d 179 (1976).

§ 15A-944. Arraignment in superior court — optional calendaring. — In counties other than those described in G.S. 15A-943 the prosecutor may, but is not required to, calendar arraignments in the manner described in that section. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor."

§ 15A-945. Waiver of arraignment. — A defendant who is represented by counsel and who wishes to plead not guilty may waive arraignment prior to the day for which arraignment is calendared by filing a written plea, signed by the defendant and his counsel. (1973, c. 1286, s. 1.)

§§ 15A-946 to 15A-950: Reserved for future codification purposes.

ARTICLE 52.

Motions Practice.

OFFICIAL COMMENTARY

This Article attempts to bring together for the first time a number of provisions relating to motions practice in criminal cases. As the Commission's 1973 proposal only relates to pretrial procedure, it may be subject to later amendment and additions as the Commission works on trial and appeal procedure.

Even as to pretrial motions, of course, this Article does not purport to be exclusive. The next Article, for instance, is devoted to the motion to suppress, and there are a number of particular provisions scattered through this proposal dealing with particular types of motions that must or may be made.

The philosophy of this Article is to restate certain aspects of motions practice using simplified terminology, but not at present to repeal any of the common law even by implication unless it is incompatible with explicit provisions of the Commission's proposal. For example, the terminology "motion to dismiss" is used in several places instead of such common-law terminology "motion to quash," "plea in bar," or "plea in abatement." No doubt many persons will use the old terminology for some time, and they should not be penalized for it. On the other hand, positive provisions requiring that certain motions be made by five o'clock P.M. on the Wednesday preceding a session of court at which the case is scheduled would supersede a common-law rule that the motion was timely if made at arraignment.

At least for the time being the Commission finessed the problem of specifying the impact of the granting of a motion to dismiss. Obviously if dismissal comes after jeopardy has attached, the prosecution may not be renewed. Certain other grounds for dismissal by their nature would also finally dispose of the charge. The effect in other situations, though, has been left to case law.

§ 15A-951. Motions in general; definition, service, and filing. — (a) A motion must:

(1) Unless made during a hearing or trial, be in writing;
(2) State the grounds of the motion; and
(3) Set forth the relief or order sought.

(b) Each written motion must be served upon the attorney of record for the opposing party or upon the defendant if he is not represented by counsel. Service upon the attorney or upon a party may be made by delivering a copy of the motion to him or by mailing it to him at his address of record. Delivery of a copy within the meaning of this Article means handing it to the attorney or to the party or leaving it at the attorney's office with an associate or employee. Service by mail is complete upon deposit of the motion enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the Postal Service of the United States.

(c) All written motions must be filed with the court. Proof of service must be made by filing with the court a certificate:

(1) By the prosecutor, attorney, or defendant making the motion that the paper was served in the manner prescribed; or
(2) Of acceptance of service by the prosecutor, attorney, or defendant to be served.

The certificate must show the date and method of service or the date of acceptance of service. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

This section requires that written motions be served on the other party, be filed with the court, and contain a certificate indicating service on the other party. The motion is to be served on the

attorney of record for the other party, or on the defendant if he has no attorney. Provisions relating to service are set forth.

Motions made at a hearing or trial are exempt from the requirement that they be in writing. The in-writing, service, and filing requirements for motions not made in court apply to motions in the district court as well as in the superior court. This may force more formality upon the district court than in some instances has been true in the past, but the Commission believes that an orderly record of the motions in a cause should be available. Though not specifically required, it is the expectation of the Commission that a notation of motions of consequence made during a trial or hearing, and the judge's rulings upon them, will be made and kept by the court if there is no transcript of the hearing or trial. As the Commission has primarily dealt with pretrial procedure, it has not yet formulated its recommendations concerning the recording of court proceedings.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor."

Applied in State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976); State v. Majette, 30 N.C. App. 120, 226 S.E.2d 223 (1976).

Stated in State v. Carter, 30 N.C. App. 59, 226 S.E.2d 179 (1976); State v. Duncan, 30 N.C. App. 112, 226 S.E.2d 182 (1976).

§ 15A-952. Pretrial motions; time for filing, sanction for failure to file; motion hearing date. — (a) Any defense, objection, or request which is capable of being determined without the trial of the general issue may be raised before trial by motion.

(b) Except as provided in subsection (d), when the following motions are made in superior court they must be made within the time limitations stated in subsection (c) unless the court permits filing at a later time:

(1) Motions to continue.
(2) Motions for a change of venue under G.S. 15A-957.
(3) Motions for a special venire under G.S. 9-12 or G.S. 15A-958.
(4) Motions to dismiss under G.S. 15A-955.
(5) Motions to dismiss for improper venue.
(6) Motions addressed to the pleadings, including:
    a. Motions to dismiss for failure to plead under G.S. 15A-924(e).
    b. Motions to strike under G.S. 15A-924(f).
    c. Motions for bills of particulars under G.S. 15A-924(b) or G.S. 15A-925.
    d. Motions for severance of offenses, to the extent required by G.S. 15A-927.
    e. Motions for joinder of related offenses under G.S. 15A-926(c).

(c) Unless otherwise provided, the motions listed in subsection (b) must be made at or before the time of arraignment if arraignment is held prior to the session of court for which the trial is calendared. If arraignment is to be held at the session for which trial is calendared, the motions must be filed on or before five o'clock P.M. on the Wednesday prior to the session when trial of the case begins.

(d) Motions concerning jurisdiction of the court or the failure of the pleading to charge an offense may be made at any time.

(e) Failure to file the motions in subsection (b) within the time required constitutes a waiver of the motion. The court may grant relief from any waiver except failure to move to dismiss for improper venue.

(f) When a motion is made before trial, the court in its discretion may hear the motion before trial, on the date set for arraignment, on the date set for trial before a jury is impaneled, or during trial. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

Subsection (a) states an important general rule designed to encourage the early filing of motions. The more matters that can be raised and disposed of prior to trial, the fewer interruptions there will be during the course of the trial itself.

Subsections (b) and (c) require the advance filing of certain listed motions. The presence of the motion for a continuance at the head of the list is noteworthy. One of the most common complaints of citizen witnesses is that they are commanded to take time from their own affairs to attend court — and often sit around for several hours, or even days, before being dismissed and told they must come back yet another time because the case is continued. One important amendment made in the course of passage of this legislation was the deletion of motions under § 15A-954(a) from the early-filing requirement. For discussion of this matter, see the commentary under § 15A-954.

Subsections (d) and (e) generally restate the provisions of the common law, except that the time in question is the advance time recommended by the Commission rather than the time of an arraignment immediately preceding the trial. As subsections (b) and (c) by their terms apply only in superior court, the existing common law still applies as to timeliness of motions in district court. The second sentence of subsection (e) providing that no relief could be granted in the case of failure to move to dismiss for improper venue was originally intended to preserve the rule of § 15-134 that venue will be conclusively laid in the county alleged unless timely motion challenging venue is made. In this connection, however, § 15A-135 might be noted, which expressly preserves the right of most defendants to move to dismiss for improper venue on trial de novo in superior court.

Subsection (f) is designed to give the judge flexibility in ruling upon motions made before trial. It should be kept in mind that pretrial venue of cases originating in superior court is, except for the probable cause hearing, in the judicial district rather than the county. This may facilitate hearings upon pretrial motions that can be disposed of on affidavit or representations of counsel. If witnesses must be summoned to a hearing before the judge can rule upon the motion, he may prefer to wait until the date of the trial and hear the motion before or during trial. The judge would certainly exercise his discretion to hear the motion before the commencement of the trial if the attachment of jeopardy prior to the ruling upon the motion would prejudice one of the parties.

Applied in State v. Duncan, 30 N.C. App. 112, 226 S.E.2d 182 (1976); State v. Ellis, 32 N.C. App. 226, 231 S.E.2d 285 (1977).

Stated in State v. Morrow, 31 N.C. App. 654, 230 S.E.2d 568 (1976).

Cited in State v. Harris, 290 N.C. 718, 228 S.E.2d 424 (1976); State v. Hyatt, 32 N.C. App. 623, 233 S.E.2d 649 (1977); State v. Greene, 33 N.C. App. 228, 234 S.E.2d 428 (1977).

§ 15A-953. Motions practice in district court. — In misdemeanor prosecutions in the district court motions should ordinarily be made upon arraignment or during the course of trial, as appropriate. A written motion may be made prior to trial in district court. With the consent of other parties and the district court judge, a motion may be heard before trial. Upon trial de novo in superior court, motions are subject to the provisions of G.S. 15A-952, and except as provided in G.S. 15A-135, no motion in superior court is prejudiced by any ruling upon, or a failure to make timely motion on, the subject in district court. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

In district court there are no jurors in criminal cases to be inconvenienced if motions are heard during the course of the trial. In addition, motions in district court are usually more expeditiously made and disposed of than in superior court. For these reasons, the section indicates that, in general, motions in district court will be made upon arraignment or during the course of trial — in the same manner as at present. If a party wishes to raise a matter by motion before trial, he may do so, but the hearing may not be held prior to trial unless all parties consent.

The section is intended to state existing law in providing that in general a party is not prejudiced upon trial de novo in superior court by any ruling upon or failure to make timely motion on the subject in district court. The rule as to venue is somewhat altered, in accordance with the provisions of § 15A-135.

§ 15A-954. Motion to dismiss — grounds applicable to all criminal pleadings; dismissal of proceedings upon death of defendant. — (a) The court

on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that:

(1) The statute alleged to have been violated is unconstitutional on its face or as applied to the defendant.
(2) The statute of limitations has run.
(3) The defendant has been denied a speedy trial as required by the Constitution of the United States and the Constitution of North Carolina.
(4) The defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution.
(5) The defendant has previously been placed in jeopardy of the same offense.
(6) The defendant has previously been charged with the same offense in another North Carolina court of competent jurisdiction, and the criminal pleading charging the offense is still pending and valid.
(7) An issue of fact or law essential to a successful prosecution has been previously adjudicated in favor of the defendant in a prior action between the parties.
(8) The court has no jurisdiction of the offense charged.
(9) The defendant has been granted immunity by law from prosecution.
(10) The pleading fails to charge an offense as provided in G.S. 15A-924(e).

(b) Upon suggestion to the court that the defendant has died, the court upon determining that the defendant is dead must dismiss the charges.

(c) A motion to dismiss for the reasons set out in subsection (a) may be made at any time. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section refers to motions to dismiss all criminal pleadings including indictments.

Special additional provisions relating to indictments are treated in § 15A-955.

Several of the provisions are new to North Carolina statutory law, but it is believed that a case law foundation exists for all of them. It should be stressed that some of the motions here listed are, and others are not, motions which are normally to be heard prior to trial.

Two of the motions treated in this section have been spawned by relatively recent cases. The speedy-trial motion grows out of the decision in Klopfer v. North Carolina, 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967); although there are specific provisions in Article 35 of Chapter 15A, and these must be followed if applicable, Klopfer unquestionably gives a right that may go beyond the specifics of Article 35. The provisions of subdivision (a)(4) are intended to embody the holding of the Supreme Court of North Carolina in State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971). It is assumed that the drastic relief called for under this motion would be granted most sparingly.

Subsection (b) of this section involves a "suggestion to the court"; if the defendant is dead, he cannot make a motion, and if the solicitor is apprised of the death of a defendant he could enter a voluntary dismissal under Article 50.

The General Assembly added subsection (c) to reinforce its deletion of motions under subsection (a) from the early-filing requirement of § 15A-952(b). In the process, one category of motions has been left in doubt. Section 15A-952(b)(6), subparagraph a, requires early filings of "motions to dismiss for failure to plead under § 15A-924(e)." Section 15A-954(a)(10) includes, as a motion which may be made any time, one on the ground that "the pleading fails to charge an offense as provided in § 15A-924(e)." As § 15A-924(e) simply states that the court must dismiss a pleading that does not state the crime in the manner required in § 15A-924(a) unless an amendment is allowable, it becomes difficult to interpret these provisions. At the least, however, § 15A-954(a)(10) would continue the old rule that a pleading which is so defective a statement of the crime that it cannot be amended is subject to a motion to dismiss at any time — including in an appellate court or after judgment.

Speedy Trial. — The length of the delay is not per se determinative of the question of whether a defendant has been denied a speedy trial. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976).

The right to a speedy trial is necessarily relative, for inherent in every criminal prosecution is the probability of delay. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976).

In a prosecution for felonious sale and delivery of marijuana and felonious possession of marijuana with intent to sell, defendant was not denied his right to a speedy trial by a preindictment delay of four and one-half months, where the delay was necessary to protect an undercover investigation, and defendant failed to show that any evidence was lost as a result of the delay which would have been helpful to his defense. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

The right to a speedy trial is an integral part of the fundamental law of this State. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

Undue delay which is arbitrary and oppressive or the result of deliberate prosecution efforts "to hamper the defense" violates the constitutional right to a speedy trial. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976).

The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976); State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976); State v. Artis, 31 N.C. App. 193, 228 S.E.2d 768 (1976).

Where the record indicates that the delay in the prosecution of a case was due to congested criminal dockets, good-faith efforts to obtain custody of absent codefendants and understandable difficulty in locating out-of-state witnesses, one of whom was a fugitive from justice, an 11-month delay was not unreasonable and the delay itself was not prejudicial to defendant in preparing and presenting his defense. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976).

Interrelated factors to be considered in determining whether a defendant has been denied his constitutional right to a speedy trial are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to defendant resulting from the delay. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976).

The question whether a defendant has been denied a speedy trial must be answered in light of the facts in the particular case. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976).

Whether a speedy trial is afforded must be determined in the light of the circumstances of each particular case. In the absence of a statutory standard, what is a fair and reasonable time is within the discretion of the court. State v. Artis, 31 N.C. App. 193, 228 S.E.2d 768 (1976).

Neither the Constitution nor the legislature has attempted to fix the exact time within which a trial must be had. State v. Artis, 31 N.C. App. 193, 228 S.E.2d 768 (1976).

The congestion of criminal court dockets has consistently been recognized as a valid justification for delay in bringing an accused to trial. State v. Artis, 31 N.C. App. 193, 228 S.E.2d 768 (1976).

Applied in State v. Allen, 292 N.C. 431, 233 S.E.2d 585 (1977).

Cited in State v. Raines, 30 N.C. App. 176, 226 S.E.2d 546 (1976); State v. Terry, 30 N.C. App. 372, 226 S.E.2d 846 (1976); State v. Greene, 33 N.C. App. 228, 234 S.E.2d 428 (1977).

§ 15A-955. Motion to dismiss — grounds applicable to indictments. — The court on motion of the defendant may dismiss an indictment if it determines that:

(1) There is ground for a challenge to the array,

(2) The requisite number of qualified grand jurors did not concur in finding the indictment, or

(3) All of the witnesses before the grand jury on the bill of indictment were incompetent to testify. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

The Commission purposely kept the grounds for challenging an indictment valid on its face to as few grounds as possible. There is North Carolina case law to support all three listed grounds.

Motion Subject to § 15A-952(c). — A motion to dismiss or quash an indictment because of irregularity in the selection of the grand jury subject to the time limitation of § 15A-952(c).

State v. Duncan, 30 N.C. App. 112, 226 S.E.2d 182, cert. denied, 290 N.C. 779, 229 S.E.2d 34 (1976).

Applied in State v. Ellis, 32 N.C. App. 226, 231 S.E.2d 285 (1977).

§ 15A-956. Deferral of ruling on motion to dismiss when charge to be reinstituted. — If a motion to dismiss is made at arraignment or trial, upon motion of the prosecutor the court may recess the proceedings for a period of time requested by the prosecutor, not to exceed 24 hours, prior to ruling upon the motion. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

This section went through several versions within the Commission. Only the caption now reflects the underlying purpose for the section. The Commission believed that if a pleading against a defendant was dismissed on a technical ground and the defendant was properly subject to renewed prosecution on the charge, he should not upon dismissal of the charge be given an interlude of freedom in which to flee.

The first draft considered by the Commission stated that after dismissal the court could retain jurisdiction over the person of the defendant for a limited period. There were objections to allowing the court to do this after a formal finding of a defect in the papers on which the court's jurisdiction over the person is based. Therefore, the Commission adopted the technique of allowing the court to defer its ruling on the motion to dismiss. This same approach was taken by the Commission in § 15A-604(b)(3). In § 15A-629(b), because it involved the grand jury, it was necessary to take the approach rejected by the Commission for this section. That situation is somewhat distinguishable, however, in that the process on which the defendant is bound over to superior court is not specifically declared defective.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor."

§ 15A-957. Motion for change of venue. — If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either:

(1) Transfer the proceeding to another county in the judicial district or to another county in an adjoining judicial district, or

(2) Order a special venire under the terms of G.S. 15A-958.

The procedure for change of venue is in accordance with the provisions of Article 3 of this Chapter, Venue. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

Former § 15-135 provided for a change of venue to an "adjacent" county with the consent of the defendant. The Commission decided to spell out with more precision exactly to what counties venue may be moved upon the defendant's motion. It should be noted, though, that § 15A-133 would permit a change of venue to any county within the State with the consent of both the defendant and the solicitor.

The provision allowing the judge to order the special venire rather than grant the motion for a change of venue is intended to embody existing case law.

Section Not Restricted to Media-Inspired Prejudice. — This section, which requires a change of venue or a special venire panel where prejudice is so great as to prevent a fair trial, is not restricted to media-inspired prejudice. State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976).

Word-of-Mouth Publicity. — Motions under this section on grounds of unfavorable,

prejudicial publicity may be based on word-of-mouth publicity. There is no requirement that the publicity originate in the media. State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976).

Burden of Showing Prejudice on Defendant. — The burden of showing "so great a prejudice against the defendant that he cannot obtain a fair and impartial trial" falls on the defendant. State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976).

Discretion of Trial Judge. — Motions for change of venue on the grounds of unfavorable publicity are addressed to the discretion of the trial judge and will not be disturbed on appeal unless a manifest abuse of such discretion is shown. State v. Boyd, 20 N.C. App. 475, 201 S.E.2d 512, cert. denied, 419 U.S. 860, 95 S. Ct. 111, 42 L. Ed. 2d 95 (1974).

A motion for change of venue is addressed to the sound discretion of the trial judge and his ruling will not be overturned in the absence of an abuse of discretion. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, U.S. , 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Motion for change of venue or for a special venire from another county on grounds of the prominence of the victim and inflammatory publicity is addressed to the sound discretion of the trial judge, and an abuse of discretion must be shown before there is any error. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

A motion for change of venue or for a special venire panel is addressed to the sound discretion of the trial judge, and abuse of discretion must be shown before there is any error. State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976).

A motion for change of venue on the grounds of local prejudice because of pretrial publicity is addressed to the sole discretion of the trial judge and a manifest abuse of discretion must be shown before there is any error. State v. Jackson, 30 N.C. App. 187, 226 S.E.2d 543 (1976).

Abuse of Discretion. — If, under the evidence presented, there is a reasonable likelihood that a fair trial cannot be had, it is an abuse of discretion to fail to grant a change of venue or a special venire panel. State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976).

No Prejudice Shown. — Defendant's motion for change of venue in a prosecution for first-degree murder was properly denied where, with the exception of the coverage of defendants' arrest, the newspaper articles alleged to be prejudicial were of a very general nature and likely to be found in any jurisdiction to which the trial might be moved, the coverage of the arrest indicated only that defendants were charged with a crime and in no way intimated defendants were guilty, and the record did not indicate that any prospective jurors had read or been influenced by the articles. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, U.S. , 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

In a trial for first-degree murder, where the accounts carried by the local news media did not appear to have been beyond the bounds of propriety or to have been inflammatory, the prominence of the victim did not seem to have unfairly affected the trial, and defendant failed to include in the record the voir dire examination of the jury, thereby failing to disclose that the defendant exhausted his peremptory challenges, that he had to accept any juror objectionable to him or even that any juror had prior knowledge or opinion as to this case, there was no abuse of discretion by the trial judge in denying defendant's motion for change of venue or for special venire. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Where the evidence tended to show that the sole newspaper article was confined primarily to a history of prior proceedings involving defendant, and that the "spot" newscast from a television station was critical of law-enforcement officers for their handling of the case, the trial court correctly found that defendant had failed to show that he was prejudiced by this publicity. State v. Jackson, 30 N.C. App. 187, 226 S.E.2d 543 (1976).

Where the record discloses that the presiding judge conducted a full inquiry, examined the press releases and the affidavits in support of the motion, and where the record fails to show that any juror objectionable to the defendant was permitted to sit on the trial panel, or that defendant had exhausted his peremptory challenges before he passed the jury, denial of the motion for change of venue was not error. State v. Harding, 291 N.C. 223, 230 S.E.2d 397 (1976); State v. Tilley, 292 N.C. 132, 233 S.E.2d 433 (1977).

§ 15A-958. Motion for a special venire from another county. — Upon motion of the defendant or the State, or on its own motion, a court may issue an order for a special venire of jurors from another county if in its discretion it determines the action to be necessary to insure a fair trial. The procedure for securing this special venire is governed by G.S. 9-12. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section is essentially a cross reference to § 9-12, which is left unchanged.

Word-of-Mouth Publicity. — Motions under this section on grounds of unfavorable, prejudicial publicity may be based on word-of-mouth publicity. There is no requirement that the publicity originate in the media. State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976).

Discretion of Trial Judge. — Motion for change of venue or for a special venire from another county on grounds of the prominence of the victim and inflammatory publicity is addressed to the sound discretion of the trial judge, and an abuse of discretion must be shown before there is any error. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

A motion for change of venue or for a special venire panel is addressed to the sound discretion of the trial judge, and abuse of discretion must be shown before there is any error. State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976).

Abuse of Discretion. — If, under the evidence presented, there is a reasonable likelihood that a fair trial cannot be had, it is an abuse of discretion to fail to grant a change of venue or a special venire panel. State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976).

§ 15A-959. Notice of defense of insanity; pretrial determination of insanity. — (a) If a defendant intends to raise the defense of insanity, he must within the time provided for the filing of pretrial motions under G.S. 15A-952 file a notice of his intention to rely on the defense of insanity. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make other appropriate orders.

(b) If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he must within the time provided for the filing of pretrial motions under G.S. 15A-952(b) file a notice of that intention. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make other appropriate orders.

(c) Upon motion of the defendant and with the consent of the State the court may conduct a hearing prior to the trial with regard to the defense of insanity at the time of the offense. If the court determines that the defendant has a valid defense of insanity with regard to any criminal charge, it may dismiss that charge, with prejudice, upon making a finding to that effect. The court's denial of relief under this subsection is without prejudice to the defendant's right to rely on the defense at trial. If the motion is denied, no reference to the hearing may be made at the trial, and recorded testimony or evidence taken at the hearing is not admissible as evidence at the trial. (1973, c. 1286, s. 1; 1977, c. 711, s. 25.)

OFFICIAL COMMENTARY

The Commission recommended two new notices to be given by defendants: notice of the defense of insanity and notice of alibi. The General Assembly struck the notice of alibi provision but retained the requirement that a defendant give the State notice of the defense of insanity.

This section covers two overlapping situations. The first relates to an intention to raise the defense of insanity. The second relates to an intention to introduce expert testimony relating to mental disease, defect, or other mental state. A defendant intending to raise the defense of insanity would almost always wish to come forward with his own expert; however, there may be a number of situations where the defense of insanity itself is not technically raised but expert testimony as to mental state will be

introduced to negative the defendant's culpability with respect to some element of the offense. This section would require notice in either situation.

The defendant must give the notices required in this section whether a demand is made by the solicitor or not.

For comparable provisions, see Special Advisory Committee of the Florida Supreme Court, April 17, 1972, Proposed Revision of Florida Criminal Procedure Rules, Rule 3.210 (b); N.Y.C.P.L. § 250.10. See also comment to Pa. Rules Crim. Proc. § 311 (Pretrial Conference).

Editor's Note. — The 1977 amendment, effective July 1, 1978, added subsection (c).

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Applied in State v. Grainger, 29 N.C. App. 694, 225 S.E.2d 595 (1976).

Cited in State v. Harris, 290 N.C. 718, 228 S.E.2d 424 (1976).

§§ 15A-960 to 15A-970: Reserved for future codification purposes.

ARTICLE 53.

Motion to Suppress Evidence.

OFFICIAL COMMENTARY

With the decision in Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), and its progeny, objections to the introduction of various kinds of evidence by the State in criminal trials have become more and more frequent — and the issues have become more and more complicated. Ruling on a constitutional objection to admission of evidence during trial may require interrupting the course of the trial with a lengthy voir dire. Courts all over the country by the late 1960's began utilizing in many instances the pretrial motion to suppress evidence to minimize interruptions during trial. This procedure has been used in North Carolina, despite the lack of any statutory authority for it. This Article prescribes a pretrial procedure for hearing motions to suppress evidence in superior court. As criminal trials in district court are not before a jury and interruptions are not so great a problem, the proposal does not require any change in procedure in district court; it does, however, provide that pretrial motions to suppress may be heard with the consent of all parties.

Another factor affecting the Commission's decision to recommend pretrial motions to suppress is the need to give the State a right to appeal from an adverse ruling. Considerations of jeopardy required that a decision to suppress evidence precede the commencement of the trial if the State is to be afforded a right to appeal. Support for the State's right to appeal the suppression of evidence comes from many quarters. See President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 140 (1967); A.B.A. Project on Standards for Criminal Justice, Standards Relating to Criminal Appeals § 1.4(a)(iii) (1970).

The original draft of this Article was based upon Article 710 of the New York Criminal Procedure Law, but it underwent substantial modifications in the course of the Commission's deliberations.

§ 15A-971. Definitions. — As used in this Article the following definitions apply unless the context clearly requires otherwise:

(1) Evidence. — When referring to matter in the possession of or available to a prosecutor, any tangible property or potential testimony which may be offered in evidence in a criminal action.

(2) Potential Testimony. — Information or factual knowledge of a person who is or may be available as a witness. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

The source of these definitions is N.Y.C.P.L. § 710.10.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor."

§ 15A-972. Motion to suppress evidence before trial in superior court in general. — When an indictment has been returned or an information has been filed in the superior court, or a defendant has been bound over for trial in superior court, a defendant who is aggrieved may move to suppress evidence in accordance with the terms of this Article. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

An early draft authorized within the Commission motions to suppress in superior court at any time after initiation of the charge in district court — even before the probable cause hearing. One result of this approach would have been to relieve district court judges of the responsibility of ruling upon complicated constitutional issues underlying many motions to suppress. (See commentary to § 15A-611 for discussion of the compromise position reached on that point.) A majority of the Commission, however, thought that the case should be technically within the superior court's jurisdiction before a motion to suppress may be made in that court. Therefore, under this Article, once the case is bound over to superior court, the motion to suppress is permitted. This section also specifies that the motion may be made upon return of an indictment or the filing of any information to take care of the rare situations in which a case is initiated in superior court without any preliminaries in district court.

The Commission discussed at length who should have standing to object to the introduction of unlawfully obtained evidence. The alternatives considered were:

(1) Eliminate the standing requirement, as has been done in California. People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955).

(2) Spell out in the statute the various bases for standing. See, e.g., American Law Institute, A Model Code of Pre-Arraignment Procedure — Tentative Draft No. 4, § 8.01(5) (1971).

(3) Utilize the word describing who has standing used in Rule 41(e) of the Federal Rules of Criminal Procedure — that is, a person who is "aggrieved." This would give North Carolina the benefit of case law as to standing developed in the federal courts and in the courts of many other states which also use the same terminology. Although that rule relates to exclusion of evidence gained by an unlawful search and seizure, it is thought that the principles developed could be applied by analogy to other evidence subject to suppression under this Article.

As may be noted, the Commission and the General Assembly concurred in choosing alternative (3).

§ 15A-973. Motion to suppress evidence in district court. — In misdemeanor prosecutions in the district court, motions to suppress evidence should ordinarily be made during the course of the trial. A motion to suppress may be made prior to trial. With the consent of the prosecutor and the district court judge, the motion may be heard prior to trial. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

The basis for this section has been developed in the general commentary for this Article.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor."

§ 15A-974. Exclusion or suppression of unlawfully obtained evidence. — Upon timely motion, evidence must be suppressed if:

(1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or

(2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:

a. The importance of the particular interest violated;

b. The extent of the deviation from lawful conduct;

c. The extent to which the violation was willful;

d. The extent to which exclusion will tend to deter future violations of this Chapter. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

An important point to note is that subdivision (1) only requires suppression of evidence if its exclusion is constitutionally required. It is possible then that evidence may be gathered in violation of constitutional rights, but suppression is not the sanction to be applied unless authoritative case law so declares. There are indications that the Burger Court will moderate some of the exclusionary rules, and this section is designed not to freeze North Carolina's statutory law into patterns set solely by current case law.

In addition to constitutionally required exclusions, the Commission believed that the State should not have the benefit of unlawfully obtained evidence when there was a "substantial" violation. The factors for judges to consider in determining whether a violation is "substantial" are set out, but it is clear that this concept will need to be developed by case law over a period of time. It seems likely that case law from other jurisdictions may also be used, as these factors, or similar ones, may be adopted elsewhere. See American Law Institute, A Model Code of Pre-Arraignment Procedure — Tentative Draft No. 4, § 8.02(2):

"(2) Determination. Unless otherwise required by the Constitution of the United States or of this State, a motion to suppress evidence based upon a violation of any of the provisions of this Code shall be granted only if the court finds that such violation was substantial. In determining whether a violation is substantial the court shall consider all the circumstances, including:

"(a) the importance of the particular interest violated;

"(b) the extent of deviation from lawful conduct;

"(c) the extent to which the violation was willful;

"(d) the extent to which privacy was invaded;

"(e) the extent to which exclusion will tend to prevent violations of this Code;

"(f) whether, but for the violation, the things seized would have been discovered; and

"(g) the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him."

One departure made by the Commission from the New York statute and from Tentative Draft No. 4 of the A.L.I.'s Model Code was the decision to speak merely of suppression of "evidence" constitutionally required to be excluded or obtained as a result of a substantial violation of Chapter 15A. The definition of "evidence" set out in § 15A-971 is very broad, but it may not include "fruits of the poisonous tree" unless there is a constitutional requirement that such derivative evidence be excluded. The New York and A.L.I. provisions are more specific on this matter.

Effect of Section. — This section sets more stringent standards for arrest than those required by the federal Constitution and requires a wider application of the exclusionary rule to meet these statutory standards relating not only to arrest and to search and seizure, but also "substantial violation" of all other provisions of the Criminal Procedure Act. State v. Williams, 31 N.C. App. 237, 229 S.E.2d 63 (1976).

Violation of Section outside Criminal Procedure Act. — The evidence could not be suppressed under subdivision (2) on the ground that the arrest was a "substantial violation" of the Criminal Procedure Act because the arrest by the city policeman was in violation of § 160A-286 and not the Criminal Procedure Act. State v. Williams, 31 N.C. App. 237, 229 S.E.2d 63 (1976).

Former Provision Compared. — See State v. Johnson, 29 N.C. App. 698, 225 S.E.2d 650 (1976).

Applied in State v. Armstrong, 33 N.C. App. 52, 234 S.E.2d 197 (1977).

§ 15A-975. Motion to suppress evidence in superior court prior to trial and during trial. — (a) In superior court, the defendant may move to suppress evidence only prior to trial unless the defendant did not have reasonable opportunity to make the motion before trial or unless a motion to suppress is allowed during trial under subsection (b) or (c).

(b) A motion to suppress may be made for the first time during trial when the State has failed to notify the defendant's counsel or, if he has none, the defendant, sooner than 20 working days before trial, of its intention to use the evidence, and the evidence is:

(1) Evidence of a statement made by a defendant;

(2) Evidence obtained by virtue of a search without a search warrant; or

(3) Evidence obtained as a result of search with a search warrant when the defendant was not present at the time of the execution of the search warrant.

(c) If, after a pretrial determination and denial of the motion, the judge is satisfied, upon a showing by the defendant, that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion, he may permit the defendant to renew the motion before the trial or, if not possible because of the time of discovery of alleged new facts, during trial.

When a misdemeanor is appealed by the defendant for trial de novo in superior court, the State need not give the notice required by this section. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

Subsection (a) states the general rule that motions to suppress must be made before trial. Exceptions are allowed:

(1) When the defendant did not have a reasonable opportunity to make the motion before trial.

(2) In the case of statements of the defendant and evidence from certain types of searches if the State fails to give approximately a month's advance notice (20 working days).

(3) After a motion to suppress has been denied, upon the discovery of additional facts bearing upon the issue which could not have been discovered with reasonable diligence prior to trial.

Under subsection (c), if the new evidence is discovered prior to trial, the defendant must reopen his motion to suppress before the trial begins.

The final sentence of the section was somewhat misplaced in the course of amendment in the General Assembly. It indicates that the advance notice in search and confession cases is not required when misdemeanors are tried de novo in superior court. Presumably the State would have already utilized, or have attempted to utilize, the evidence in the trial in district court, and notice would be unnecessary. Therefore, the general rule would apply: Any motion to suppress would have to be made before trial unless some other exception pertained in that case.

To challenge the admissibility of in-court identification testimony defendant is required to interpose at least a general objection when such evidence is offered in addition to filing a pretrial motion to suppress evidence. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

A pretrial motion to suppress identification evidence which the trial judge has not heard and ordinarily will not hear until it is offered at trial will not suffice to challenge the admissibility of in-court identification testimony. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

Absent an objection to in-court identification testimony when such evidence is offered, or a request for a voir dire to probe the competency of the proffered evidence, the trial judge is not required to conduct a voir dire, make findings of fact and determine whether the proffered testimony meets the test of admissibility. State v. Wilson, 289 N.C 531, 223 S.E.2d 311 (1976).

Cited in State v. Raines, 30 N.C. App. 176, 226 S.E.2d 546 (1976).

§ 15A-976. Timing of pretrial suppression motion and hearing. — (a) A motion to suppress evidence in superior court may be made at any time prior to trial except as provided in subsection (b).

(b) If the State gives notice not later than 20 working days before trial of its intention to use evidence and if the evidence is of a type listed in G.S. 15A-975(b), the defendant may move to suppress the evidence only if its motion is made not later than 10 working days following receipt of the notice from the State.

(c) When the motion is made before trial, the judge in his discretion may hear the motion before trial, on the date set for arraignment, on the date set for trial before a jury is impaneled, or during trial. He may rule on the motion before trial or reserve judgment until trial. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

Subsection (a) indicates that a motion which is required to be made prior to trial may be made at any time beforehand unless the special provisions of subsection (b) apply. The Article does not define when a trial "begins," but it is clear that the motion must be made before the jury is empaneled, as that is when jeopardy attaches.

Subsection (b) keys in with § 15A-975(b). If a prosecutor is alert enough to give the notice under that section at least 20 working days in advance of the trial, he can then compel the defendant to make his motion to suppress well before the trial date. This would allow careful handling of complex constitutional issues that may be present in search and confession cases.

Subsection (c) gives the judge complete discretion as to when he will hear a motion. Presumably in a close case involving crucial evidence he would not wait until after the trial has commenced to hear the motion or rule upon it, as this would have the effect of denying the State's right to appeal an adverse ruling.

§ 15A-977. Motion to suppress evidence in superior court; procedure. — (a) A motion to suppress evidence in superior court made before trial must be in writing and a copy of the motion must be served upon the State. The motion must state the grounds upon which it is made. The motion must be accompanied by an affidavit containing facts supporting the motion. The affidavit may be based upon personal knowledge, or upon information and belief, if the source of the information and the basis for the belief are stated. The State may file an answer denying or admitting any of the allegations. A copy of the answer must be served on the defendant's counsel, or on the defendant if he has no counsel.

(b) The judge must summarily grant the motion to suppress evidence if:

(1) The motion complies with the requirements of subsection (a), it states grounds which require exclusion of the evidence, and the State concedes the truth of allegations of fact which support the motion; or

(2) The State stipulates that the evidence sought to be suppressed will not be offered in evidence in any criminal action or proceeding against the defendant.

(c) The judge may summarily deny the motion to suppress evidence if:

(1) The motion does not allege a legal basis for the motion; or

(2) The affidavit does not as a matter of law support the ground alleged.

(d) If the motion is not determined summarily the judge must make the determination after a hearing and finding of facts. Testimony at the hearing must be under oath.

(e) A motion to suppress made during trial may be made in writing or orally and may be determined in the same manner as when made before trial. The hearing, if held, must be out of the presence of the jury.

(f) The judge must set forth in the record his findings of facts and conclusions of law. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section is structured to produce in as many cases as possible a summary granting or denial of the motion to suppress. The defendant must file an affidavit as to the facts with his motion, and the State may file an answer denying or admitting facts alleged in the affidavit. If the motion cannot be otherwise disposed of, subsection (d) provides for a hearing at which testimony under oath will be given. Section 15A-976(c) would allow the hearing to be set for the day of the trial if this would be the time most convenient for the witnesses.

Constitutionality. — This section does no more than shift to the defendant the burden of going forward with evidence when the State's warrants appear to be regular. The State still has the burden of proving that the evidence was lawfully obtained. Accordingly, this section is constitutional. State v. Gibson, 32 N.C. App. 584, 233 S.E.2d 84 (1977).

Subsection (a) requires an affidavit, but requiring the affidavit does not amount to compelling defendant to be a witness against himself in a criminal case in violation of the Fifth Amendment of the United States Constitution and North Carolina Const., Art. I, § 23. State v. Gibson, 32 N.C. App. 584, 233 S.E.2d 84 (1977).

Subsection (a) does not violate the Code of Professional Responsibility, Canon 4; it does not require an attorney to reveal information told to him in confidence by his client. The decision to file the affidavit and attempt to suppress the evidence remains with the defendant. If he consents to disclosure, Canon 4 is not violated. State v. Gibson, 32 N.C. App. 584, 233 S.E.2d 84 (1977).

And does not conflict with § 8-54 which says that a defendant is a competent witness in a criminal trial only if he takes the stand "at his own request." State v. Gibson, 32 N.C. App. 584, 233 S.E.2d 84 (1977).

Applied in State v. Philyaw, 291 N.C. 312, 230 S.E.2d 370 (1976); State v. Montgomery, 33 N.C. App. 225, 234 S.E.2d 434 (1977).

Cited in State v. Johnson, 29 N.C. App. 698, 225 S.E.2d 650 (1976).

§ 15A-978. Motion to suppress evidence in superior court or district court; challenge of probable cause supporting search on grounds of truthfulness; when identity of informant must be disclosed. — (a) A defendant may contest the validity of a search warrant and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony showing probable cause for its issuance. The defendant may contest the truthfulness of the testimony by cross-examination or by offering evidence. For the purposes of this section, truthful testimony is testimony which reports in good faith the circumstances relied on to establish probable cause.

(b) In any proceeding on a motion to suppress evidence pursuant to this section in which the truthfulness of the testimony presented to establish probable cause is contested and the testimony includes a report of information furnished by an informant whose identity is not disclosed in the testimony, the defendant is entitled to be informed of the informant's identity unless:

(1) The evidence sought to be suppressed was seized by authority of a search warrant or incident to an arrest with warrant; or

(2) There is corroboration of the informant's existence independent of the testimony in question.

The provisions of subdivisions (b)(1) and (b)(2) do not apply to situations in which disclosure of an informant's identity is required by controlling constitutional decisions.

(c) This section does not limit the right of a defendant to contest the truthfulness of testimony offered in support of a search made without a warrant. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section is derived from American Law Institute, Model Code of Pre-Arraignment Procedure — Tentative Draft No. 4 § 8.03 (1971).

The basic question presented is this: Suppose an informer supplies false information to a law-enforcement officer; the officer believes the information and uses it in good faith to obtain a search warrant; the magistrate believes the officer and finds probable cause; the information if true, along with other facts available to the officer, would indeed constitute probable cause and the warrant is valid on its face; a search is made under the authority of the warrant, and by chance evidence of a crime is discovered despite the underlying falsity of the informer's information — should the evidence obtained with the warrant be excluded? The answer provided by subsection (a) is "no." The A.L.I. commentary to § 8.03 states the following:

"The draft embodies the conclusion that the testimony given in support of probable cause should be subject to challenge on the ground that it was untruthful in the sense that it was not given in good faith, but not on the ground that it was objectively inaccurate due to honest mistake. When the witness (usually an officer) has given hearsay evidence by reporting what he had been told by an informant, the Council's conclusion, reached by a vote of 18 to 6, was that the truth of the hearsay evidence so reported should not be open to challenge, as long as the officer's report of the hearsay evidence was an honest report.

"The Reporters are not in agreement with the last conclusion. It has the result of immunizing the hearsay from, while subjecting the direct testimony to, contradiction, and under such a rule the police have everything to lose and nothing to gain from producing the informants directly to the magistrate, whereas the thrust of policy should be the other way. . . ."

One important factor in the Commission's determination to go along with the Council of the American Law Institute is its belief that the use of a warrant is to be encouraged. Subsection (c) is intended to make it clear that attacks upon the validity of probable cause for a search without a warrant are left to case law development. If, for example, an officer made an emergency search without a warrant in good-faith reliance upon a false report from an informer, but inadvertently uncovered evidence of a crime, the rule laid down in subsection (a) should not be treated as giving even analogous guidance to the courts in deciding whether such a search is valid.

Subsection (b) treats the thorny problem of revealing the identity of an informer. Subdivision (1) embodies the Commission's preference for actions taken under a warrant. Subdivision (2) is intended to state the general trend of the case law on this point. It should be noted that as introduced subdivision (2) required substantial corroboration of the informant's existence and reliability. The General Assembly was persuaded to amend primarily upon the argument that the minimum standard will be set by case law construing constitutional requirements and that the Commission's wording possibly sets a higher standard than is absolutely required — or may later be required under rulings of the Burger Court.

Cross References. — As to search warrants, see § 15A-241 et seq. As to probable cause for issuance of search warrant, see note to § 15A-245.

Upon voir dire hearing, the court should receive evidence and make findings of fact. In this respect there is no distinction between the admissibility of a confession and the admissibility of evidence obtained by a search without a warrant. The determining fact in each of these instances is whether the confession or the consent to the search was given voluntarily and without compulsion by the officers. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971).

Inquiry Before Court When Defendant Moves to Suppress Evidence Obtained by Warrant. — When a defendant moves to suppress evidence obtained by a search warrant upon the ground that there was no probable cause for issuance of the search warrant, the inquiry before the court is whether the issuance of the warrant comports with the statute and whether the issuing officer was justified in finding probable cause. State v. Logan, 18 N.C. App. 557, 197 S.E.2d 238 (1973).

Search and Seizure Directed to Someone Other Than Defendant. — Where the search and seizure was directed to a rifle in a friend's residence, defendant came within the class who can only claim prejudice through the use of evidence gathered as a consequence of a search or seizure directed to someone else. This class is not one for whose sake the constitutional protection is given. Thus defendant was not the victim of an invasion of privacy and had no standing to object to the introduction of the

evidence. State v. Nickerson, 13 N.C. App. 125, 185 S.E.2d 326 (1971), cert. denied, 408 U.S. 925, 92 S. Ct. 2503, 33 L. Ed. 2d 336 (1972).

Trespassers Have No Standing to Challenge Lawfulness of Search of Premises. — Defendants had no standing to challenge the lawfulness of a search of a premises occupied by defendants where defendants were trespassers on the property, notwithstanding the State relied on the doctrine of recent possession of stolen property found in the premises in prosecuting defendants for breaking and entering and larceny. State v. Eppley, 14 N.C. App. 314, 188 S.E.2d 758 (1972).

Defendants were not prejudiced by the trial court's denial of their motion for a voir dire examination on the question of the legality of a search of the premises occupied by defendants, where the evidence showed that defendants were trespassers on the premises and had no standing to contest the validity of the search. State v. Eppley, 14 N.C. App. 314, 188 S.E.2d 758 (1972).

§ 15A-979. Motion to suppress evidence in superior and district court; orders of suppression; effects of orders and of failure to make motion. — (a) Upon granting a motion to suppress evidence the judge must order that the evidence in question be excluded in the criminal action pending against the defendant. When the order is based upon the ground of an unlawful search and seizure and excludes tangible property unlawfully taken from the defendant's possession, and when the property is not contraband or otherwise subject to lawful retention by the State or another, the judge must order that the property be restored to the defendant at the conclusion of the trial including all appeals.

(b) An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty.

(c) An order by the superior court granting a motion to suppress prior to trial is appealable to the appellate division of the General Court of Justice prior to trial upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case.

(d) A motion to suppress evidence made pursuant to this Article is the exclusive method of challenging the admissibility of evidence upon the grounds specified in G.S. 15A-974. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

This section contains two important new sections.

The first, in subsection (b), permits a defendant whose motion to suppress was denied to plead guilty and then appeal the ruling of the judge on the motion. If the appellate court sustains the ruling on the motion, the conviction stands; if the ruling on the motion is overturned, then the defendant is entitled to a new trial at which the evidence would be suppressed. This provision is intended to prevent a defendant whose only real defense is the motion to suppress from going through a trial simply to preserve his right of appeal. This section on its face would apply whether the appeal is from district court or superior court, though the right of trial de novo already guarantees the defendant the right to renew motions in superior court — even after a plea of guilty. If the superior court judge reaffirms the ruling denying the motion to suppress, however, the Constitution of North Carolina may force the defendant either to plead guilty in superior court or go to trial; the judge apparently would not be empowered to "affirm" the district court judgment.

The second important provision in the section is subsection (c). It allows the State to take an interlocutory appeal from superior court to the appellate division of the General Court of Justice if the judge grants a motion to suppress prior to trial. The phrase "prior to trial" unquestionably will be interpreted to mean prior to the attachment of jeopardy. The only requirement for staying the proceedings so the State may appeal is for the solicitor to make an appeal motion before the superior court judge accompanied by a certificate that the appeal is not taken for the purpose of delay and that the evidence is essential to the case.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" in subsection (c).

Applied in State v. Johnson, 29 N.C. App. 698, 225 S.E.2d 650 (1976); State v. Watlington, 30 N.C. App. 101, 226 S.E.2d 186 (1976); State v. Hardy, 31 N.C. App. 67, 228 S.E.2d 487 (1976); State v. Downing, 31 N.C. App. 743, 230 S.E.2d 581 (1976); State v. Montgomery, 33 N.C. App. 225, 234 S.E.2d 434 (1977).

Cited in State v. Brown, 29 N.C. App. 180, 223 S.E.2d 572 (1976); State v. Williams, 32 N.C. App. 204, 231 S.E.2d 282 (1977).

ARTICLE 54.

§§ 15A-980 to 15A-990: Reserved for future codification purposes.

ARTICLE 55.

§§ 15A-991 to 15A-1000: Reserved for future codification purposes.

SUBCHAPTER X. GENERAL TRIAL PROCEDURE.

ARTICLE 56.

Incapacity to Proceed.

OFFICIAL COMMENTARY

This Article has two major objectives. The first is to codify the rule of law which provides that a defendant may not be tried (or punished) when he lacks mental capacity to proceed, and to provide adequate procedures for determining when that situation exists. See State v. Propst, 274 N.C. 62, 161 S.E.2d 560 (1968). The second is to provide appropriate procedures for the commitment and care of a defendant who is not capable of being tried, and to provide for his return for trial in the event that he does gain capacity. A number of sources were consulted for ideas for this draft, including North Carolina case and statutory law, the New York Criminal Procedure Law, the Model Penal Code, and proposed rules for the State of Arizona, but the result is not a wholesale copy of any of these.

The definition of incapacity is intended to be inclusive, and would appear to be both self-explanatory and flexible enough to cover appropriate situations. The proceeding prior to trial required by the Propst case is provided. In addition to existing provisions for temporary commitment to a State hospital, the court is given additional sources of information by the provisions permitting the appointment of medical experts.

A provision not found in the former law is that in § 15A-1501(b) which permits the court to go forward in matters which may be handled by counsel without the assistance of the defendant. If, for example, the pleadings charge facts which do not amount to a crime, there is no reason to delay that determination.

The second major objective requires consideration of the case of Jackson v. Indiana, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972). In that case the Supreme Court of the United States said,

"We hold, consequently, that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal."

In order to accomplish these requirements, this Article provides that when the trial court determines that the defendant does not have capacity to proceed, it will direct the initiation of civil commitment proceedings. This will eliminate the possibility that a defendant suffers extended commitment simply because he has been accused of a crime. Thus the defendant who is not dangerous, but who lacks capacity for trial, can be released. That result is required by the Jackson case. What the criminal court can do is to enter appropriate orders to provide for the return of the defendant for trial, as it can do for

any other defendant. Ample authority for such orders is provided here.

In recent years there have been reported some rather striking instances when defendants were committed to a State institution and apparently forgotten. After many years they were "discovered" and a question arose as to how to dispose of the pending case. The Commission has devised a requirement for periodic reporting to the clerk (§ 15A-1004(d)) to prevent this from happening. In addition, authority for dismissal of the pending case is provided in three appropriate instances, as set out in § 15A-1008.

The question of the determination of mental capacity is a much broader question than the provisions proposed here. Revision of the civil commitment provisions is beyond the assignment of the Criminal Code Commission, and there are problems that must be faced. The case of In re Tew, 280 N.C. 612, 187 S.E.2d 13 (1972), held unconstitutional certain portions of § 122-86, dealing with the disposition of persons acquitted by reason of insanity. If the Commission is to work with that section, it necessarily must be done in connection with drafting for the trial stages of criminal procedure, a task remaining to be done when these sections were drafted. Codification or modification of the rules with regard to the capacity to commit crime is another area which is outside the scope of the present procedural codification.

Editor's Note. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-1001. No proceedings when defendant mentally incapacitated; exception. — (a) No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."

(b) This section does not prevent the court from going forward with any motions which can be handled by counsel without the assistance of the defendant. (1973, c. 1286, s. 1.)

Editor's Note. — For article entitled, "Review of the Presentence Diagnostic Study Procedure in North Carolina," see 8 N.C. Cent. L.J. 17 (1976).

Applied in State v. Taylor, 290 N.C. 220, 226 S.E.2d 23 (1976); State v. Grainger, 29 N.C. App. 694, 225 S.E.2d 595 (1976); State v. McRae, 32 N.C. App. 243, 231 S.E.2d 915 (1977).

§ 15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders. — (a) The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court. The motion shall detail the specific conduct that leads the moving party to question the defendant's capacity to proceed.

(b) When the capacity of the defendant to proceed is questioned, the court:

(1) May appoint one or more impartial medical experts to examine the defendant and return a written report describing the present state of the defendant's mental health. Reports so prepared are admissible at the hearing and the court may call any expert so appointed to testify at the hearing. In addition, any expert so appointed may be called to testify at the hearing by the court at the request of either party.

(2) May commit the defendant to a State mental health facility for observation and treatment for the period necessary to determine the defendant's capacity to proceed. In no event may the period exceed 60 days. The superintendent of the facility must direct his report on defendant's condition to the defense attorney and to the clerk of

superior court, who must bring it to the attention of the court. The report is admissible at the hearing.

a. If the report indicates that the defendant lacks capacity to proceed, proceedings for involuntary civil commitment under Chapter 122 of the General Statutes may be instituted on the basis of the report in either the county where the criminal proceedings are pending or in the county in which the defendant is hospitalized.

b. If the report indicates that the defendant has capacity to proceed, the clerk must direct the sheriff to return him to the county.

(3) Must hold a hearing to determine the defendant's capacity to proceed. If examination is ordered pursuant to subdivision (1) or (2), the hearing must be held after the examination. Reasonable notice must be given to the defendant and to the prosecutor and the State and the defendant may introduce evidence.

(c) The court may make appropriate temporary orders for the confinement or security of the defendant pending the hearing or ruling of the court on the question of the capacity of the defendant to proceed.

(d) Any report made to the court pursuant to this section shall be forwarded to the clerk of superior court in a sealed envelope addressed to the attention of a presiding judge, with a covering statement to the clerk of the fact of the examination of the defendant and any conclusion as to whether the defendant has or lacks capacity to proceed. A copy of the full report shall be forwarded to defense counsel, or to the defendant if he is not represented by counsel. A copy of the covering statement shall be forwarded to the district attorney. Until such report becomes a public record, the full report to the court shall be kept under such conditions as are directed by the court, and its contents shall not be revealed except as directed by the court. Any report made to the court pursuant to this section shall not be a public record unless introduced into evidence. (1973, c. 1286, s. 1; 1975, c. 166, ss. 20, 27; 1977, cc. 25, 860.)

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" in subsection (a) and in the third sentence of subdivision (3) of subsection (b). The amendment also substituted "involuntary civil commitment under Chapter 122 of the General Statutes" for "judicial hospitalization" near the beginning of paragraph a of subdivision (2) of subsection (b).

The first 1977 amendment added subsection (d).

The second 1977 amendment in subsection (a), inserted "on motion" in the first sentence, deleted "on its own motion" from the end of the first sentence, and added the second sentence.

For article entitled, "Review of the Presentence Diagnostic Study Procedure in North Carolina," see 8 N.C. Cent. L.J. 17 (1976).

Ability to Plead and Conduct Defense Should Be Determined Prior to Trial. — Whether defendant is able to plead to the indictment and conduct a rational defense should be determined prior to the trial of defendant for the crime charged in the indictment. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971); State v. Thompson, 285 N.C. 181, 203 S.E.2d 781, cert. denied, 419 U.S. 867, 95 S. Ct. 123, 42 L. Ed. 2d 104 (1974).

By Trial Judge. — The preliminary question of a defendant's mental capacity to plead to a bill of indictment and to aid in the preparation and conduct of his defense is properly a question to be decided by the trial judge. State v. Thompson, 285 N.C. 181, 203 S.E.2d 781, cert. denied, 419 U.S. 867, 95 S. Ct. 123, 42 L.Ed.2d 104 (1974).

Proper to Request Court-Conducted Inquiry of Defendant's Mental Capacity. — It is proper for the defendant's counsel to request the court to conduct an inquiry to determine whether the defendant has sufficient mental capacity to plead to the indictment and conduct a rational defense. State v. Lewis, 11 N.C. App. 226, 181 S.E.2d 163 (1971).

The distinction between the test of the competency of a person to stand trial and the test of the mental responsibility in the commission of a crime is set forth in State v. Propst, 274 N.C. 62, 161 S.E.2d 560 (1968). State v. Lewis, 11 N.C. App. 226, 181 S.E.2d 163 (1971).

Order of Commitment Is Discretionary. — A defendant is not entitled to an order of commitment to a State hospital for a period of not exceeding 60 days for observation and treatment as a matter of right; he must show that the failure to grant his belated motion is an abuse of discretion. State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973), cert. denied, 414 U.S. 1132, 94 S. Ct. 873, 38 L. Ed. 2d 757 (1974).

Waiver of Hearing Right. — While this

section requires the court to hold a hearing to determine defendant's capacity to proceed if the question is raised, a defendant may waive the benefit of this section's provisions by express consent, failure to assert it in apt time or by conduct inconsistent with a purpose to insist upon it. State v. Young, 291 N.C. 562, 231 S.E.2d 577 (1977).

Where neither defendant nor defense counsel questioned the correctness of the diagnostic finding that defendant was competent to stand trial, understood the charges and was able to cooperate with his attorney, neither objected to the failure to hold the hearing, and when arraigned, defendant entered a plea of not guilty and did not raise the defense of insanity, defendant's statutory right, under subsection (b)(3) to a hearing subsequent to his commitment, was waived by his failure to assert that right. State v. Young, 291 N.C. 562, 231 S.E.2d 577 (1977).

Where the record showed that the report of the examining psychiatrist was to the effect that the defendant did have the requisite mental capacity to plead to the indictment and to stand trial and nothing in the record indicated that before going to trial the defendant requested a hearing or otherwise indicated any adherence to his initial contention of lack of mental capacity, defendant waived his right to a hearing under subsection (b)(3). State v. Dollar, 292 N.C. 344, 233 S.E.2d 521 (1977).

Rules as to Competency of Evidence Relaxed in Hearing. — In a hearing before the judge on a motion under this section, the ordinary rules as to the competency of evidence applied in a trial before a jury are to some extent relaxed, for the reason that the judge with knowledge of the law is able to eliminate from the testimony he hears that which is immaterial and incompetent, and consider only that which tends properly to prove the facts to be found. State v. Willard, 292 N.C. 567, 234 S.E.2d 587 (1977).

Findings Sufficient to Show Defendant Mentally Ill at Time of Arraignment. — The findings by the judge that the defendant was unable to plead to the bill "for . . . he does not have the capacity at this time to stand trial or to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, or to cooperate understandingly with his counsel with respect to his defense" in the context of the order were sufficient findings that the defendant was mentally ill at the time of arraignment and for that reason could not plead. State v. Lewis, 11 N.C. App. 226, 181 S.E.2d 163 (1971).

§ 15A-1003. Referral of incapable defendant for civil commitment proceedings. — (a) If a defendant is found to be incapable of proceeding, the court must enter an order directing the initiation of proceedings for involuntary civil commitment, and the court's order is authority for a magistrate or clerk to order a law-enforcement officer to take the defendant into custody for examination by a qualified physician under G.S. 122-58.3(b), or for processing as an emergency case under G.S. 122-58.18.

(b) The court may make appropriate orders for the temporary detention of the defendant pending that proceeding.

(c) Evidence used at the hearing with regard to capacity to proceed is admissible in the involuntary civil commitment proceedings. (1973, c. 1286, s. 1; 1975, c. 166, s. 20.)

Editor's Note. — The 1975 amendment substituted "involuntary civil commitment" for "judicial hospitalization" in subsections (a) and (c) and substituted the language beginning "authority for a magistrate" for "a sufficient basis for the initiation of those proceedings" at the end of subsection (a).

Failure to Act under Former Statute Not a Bar to Proceeding under § 122-84 in Proper Cases. — Where the superintendent (now administrator) of the State hospital (now facility) had not reported his findings and recommendations to the clerk of the superior court as required by former § 122-91, covering the same subject matter as this section, and § 15A-1002, the clerk could not institute proceedings for civil commitment under that section. But the failure to act under the provisions of former § 122-91 did not prevent a judge of the superior court from proceeding under the provisions of § 122-84 in proper cases. State v. Lewis, 11 N.C. App. 226, 181 S.E.2d 163 (1971).

Quoted in State v. Taylor, 290 N.C. 220, 226 S.E.2d 23 (1976).

§ 15A-1004. Orders for safeguarding of defendant and return for trial. — (a) When a defendant is found to be incapable of proceeding, the trial court must

make appropriate orders to safeguard the defendant and to ensure his return for trial in the event that he subsequently becomes capable of proceeding.

(b) If the defendant is not placed in the custody of a hospital or other institution in a proceeding for involuntary civil commitment, appropriate orders may include any of the procedures, orders, and conditions provided in Article 26 of this Chapter, Bail, specifically including the power to place the defendant in the custody of a designated person or organization agreeing to supervise him.

(c) If the defendant is placed in the custody of a hospital or other institution in a proceeding for involuntary civil commitment, the orders must provide for reporting to the clerk if the defendant is to be released from the custody of the hospital or institution. The original or supplemental orders may make provisions as in subsection (b) in the event that the defendant is released.

(d) If the defendant is placed in the custody of a hospital or institution pursuant to proceedings for involuntary civil commitment, or if the defendant is placed in the custody of another person pursuant to subsection (b), the orders of the trial court must require that the hospital, institution, or individual report the condition of the defendant to the clerk at the same times that reports on the condition of the defendant-respondent are required under Chapter 122 of the General Statutes, Article 5A (Involuntary Commitment), or more frequently if the court requires, and immediately if the defendant gains capacity to proceed. The order must also require the report to state the likelihood of the defendant's gaining capacity to proceed, to the extent that the hospital, institution, or individual is capable of making such a judgment.

(e) The orders must require and provide for the return of the defendant to stand trial in the event that he gains capacity to proceed, unless the charges have been dismissed, and may also provide for the confinement or pretrial release of the defendant in that event.

(f) The orders of the court may be amended or supplemented from time to time as changed conditions require. (1973, c. 1286, s. 1; 1975, c. 166, s. 20.)

Editor's Note. — The 1975 amendment substituted "involuntary civil commitment" for "judicial hospitalization" near the beginning of subsections (b), (c) and (d) and substituted the language beginning "at the same times" and ending "(Involuntary Commitment)" for "annually" in the first sentence of subsection (d).

§ 15A-1005. Reporting to court with regard to defendants incapable of proceeding. — The clerk of the court in which the criminal proceeding is pending must keep a docket of defendants who have been determined to be incapable of proceeding. The clerk must submit the docket to the senior resident superior court judge in his district at least semiannually. (1973, c. 1286, s. 1.)

§ 15A-1006. Return of defendant for trial upon gaining capacity. — If a defendant who has been determined to be incapable of proceeding, and who is in the custody of an institution or an individual, gains capacity to proceed, the individual or institution must notify the clerk in the county in which the criminal proceeding is pending. The clerk must notify the sheriff to return the defendant to the county for trial, and to hold him for trial, subject to the orders of the court entered pursuant to G.S. 15A-1004. (1973, c. 1286, s. 1.)

§ 15A-1007. Supplemental hearings. — (a) When it has been reported to the court that a defendant has gained capacity to proceed, or when the defendant has been determined by the individual or institution having custody of him to have gained capacity and has been returned for trial, the court may hold a supplemental hearing to determine whether the defendant has capacity to proceed. The court may take any action at the supplemental hearing that it could have taken at an original hearing to determine the capacity of the defendant to proceed.

(b) The court may hold a supplemental hearing any time upon its own

determination that a hearing is appropriate or necessary to inquire into the condition of the defendant.

(c) The court must hold a supplemental hearing if it appears that any of the conditions for dismissal of the charges have been met. (1973, c. 1286, s. 1.)

§ 15A-1008. Dismissal of charges. — When a defendant lacks capacity to proceed, the court may dismiss the charges:

(1) When it appears to the satisfaction of the court that the defendant will not gain capacity to proceed; or

(2) When the defendant has been substantially deprived of his liberty for a period of time equal to or in excess of the maximum permissible period of confinement for the crime or crimes charged; or

(3) Upon the expiration of a period of five years from the date of determination of incapacity to proceed in the case of misdemeanor charges and a period of 10 years in the case of felony charges. (1973, c. 1286, s. 1.)

§§ 15A-1009, 15A-1010: Reserved for future codification purposes.

ARTICLE 57.

Pleas.

OFFICIAL COMMENTARY

This Article states rules concerning pleas in both district and superior court. A primary model utilized in drafting was American Law Institute, A Model Code of Pre-Arraignment Procedure — Tentative Draft No. 5, Article 350 (1972). This Article, in turn, was based substantially upon A.B.A. Project on Standards for Criminal Justice, Standards Relating to Pleas of Guilty (1968).

Editor's Note. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-1011. Pleas in district and superior courts; waiver of appearance. — (a) A defendant may plead not guilty, guilty, or no contest "(nolo contendere)." A plea may be received only from the defendant himself in open court except when:

(1) The defendant is a corporation, in which case the plea may be entered by counsel or a corporate officer; or

(2) There is a waiver of arraignment and a filing of a written plea of not guilty under G.S. 15A-945; or

(3) In misdemeanor cases there is a written waiver of appearance submitted with the approval of the presiding judge; or

(4) Written pleas in traffic cases are authorized under G.S. 7A-146(8); or

(5) The defendant executes a waiver and plea of not guilty as provided in G.S. 15A-1011(d).

(6) The defendant, before a magistrate or clerk of court, enters a written appearance, waiver of trial and plea of guilty and at the same time makes restitution in a case wherein the sole allegation is a violation of G.S. 14-107, the amount of the check is three hundred dollars ($300.00) or less, and the warrant does not charge a fourth or subsequent violation of this statute.

(b) A defendant may plead no contest only with the consent of the prosecutor and the presiding judge.

(c) Upon entry of a plea of guilty or no contest or after conviction on a plea of not guilty, the defendant may request permission to enter a plea of guilty or no contest as to other crimes with which he is charged in the same or another judicial district. A defendant may not enter any plea to crimes charged in another judicial district unless the district attorney of that district consents in writing to the entry of such plea. The prosecutor or his representative may appear in person or by filing an affidavit as to the nature of the evidence gathered as to these other crimes. Entry of a plea under this subsection constitutes a waiver of venue. A superior court is granted jurisdiction to accept the plea, upon an appropriate indictment or information, even though the case may otherwise be within the exclusive original jurisdiction of the district court. A district court may accept pleas under this section only in cases within the original jurisdiction of the district court.

(d) A defendant may execute a written waiver of appearance and plead not guilty and designate legal counsel to appear in his behalf in the following circumstances:

(1) The defendant agrees in writing to waive the right to testify in person and waives the right to face his accusers in person and agrees to be bound by the decision of the court as in any other case of adjudication of guilty and entry of judgment, subject to the right of appeal as in any other case; and

(2) The defendant submits in writing circumstances to justify the request and submits in writing a request to proceed under this section; and

(3) The judge allows the absence of the defendant because of distance, infirmity or other good cause.

(e) In the event the judge shall permit the procedure set forth in the foregoing subsection (d), the State may offer evidence and the defendant may offer evidence, with right of cross-examination of witnesses, and the other procedures, including the right of the prosecutor to dismiss the charges, shall be the same as in any other criminal case, except for the absence of defendant. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; c. 626, s. 1.)

OFFICIAL COMMENTARY

Although a number of commentators have recommended that the plea of nolo contendere should be abolished, the Commission decided to follow the draft of the American Law Institute and retain this plea. The A.B.A. standards merely made retention optional. In line with its policy of eliminating Latin and Law French phraseology from the code, the Commission renamed the plea of nolo contendere as a plea of no contest. The Commission did not intend to change the legal effect of the plea as developed by North Carolina's common law. See Lane-Reticker, Nolo Contendere in North Carolina, 34 N.C.L. Rev. 280 (1956).

Although cases have suggested that only the approval of the presiding judge is necessary to the acceptance of the plea of nolo contendere, and this is the approach adopted by the A.B.A. and A.L.I. proposals, the Commission determined that the customary practice in North Carolina is to require the solicitor's approval also. It therefore added this to subsection (b). With this change, it became unnecessary for the Commission to retain the A.B.A.-A.L.I. admonition that the nolo plea should "be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice." If the solicitor's consent is required, it becomes superfluous for the judge to take his views into account; the Commission thought the precatory language concerning the interest of the public was well understood to be a governing legal principle, and that it was futile to restate the matter in the text of a procedural statute.

Subsection (a) sets out the general requirement that the defendant be present in person before the judge at the time he pleads. The exception in subdivision (1) is suggested in the A.B.A.-A.L.I. provisions. The others were added by the Commission. Subdivision (2) creates an exception to harmonize with the new provisions on arraignment, and specifically authorizes waiver of arraignment and the submission of a written plea of not guilty signed by defendant and his counsel. Subdivision (4) acknowledges the written appearance, waiver of

trial, and plea of guilty in traffic cases authorized in § 7A-146(8).

Subdivision (3) caused the Commission more of a problem. It understood that under common law a defendant represented by counsel at trial may waive his appearance in certain misdemeanors. There was some dispute within the Commission as to what the best policy on this matter should be, but it found the general question beyond the scope of its 1973 proposal. It left the matter open, however, so far as trial is concerned, and limited subdivision (3) to the plea stage. It allows a written waiver of appearance upon entering pleas in misdemeanor cases — with the approval of the presiding judge. The subdivision is silent as to waiver of appearance at trial. The Commission believed the question at both stages could well be handled by court rule or guidelines adopted by conferences of judges in the absence of authoritative case law.

Subdivision (5) and its companion provision, subsection (d), were added in committee while the code was being considered by the General Assembly. These provisions go far beyond what the Commission was willing to recommend at the pretrial stage, and indeed provides clearly for trials in both felony and misdemeanor cases in which the defendant may waive his appearance. As the procedure requires consent of the presiding judge, it can be presumed that the judge will allow this procedure in few felony cases—though it might be possible to imagine tax evasion cases in which defendants are hospitalized in which it might be feasible to allow waiver.

Subsection (c) is a new provision based on A.B.A. and A.L.I. proposals. The economy to the State in wrapping up all charges against a defendant at once is obvious. To cut down on factors of judge- or solicitor-shopping, the consent of the solicitor in any other district in which other charges are pending is necessary before the procedure of subsection (c) may be utilized.

Editor's Note. — The first 1975 amendment substituted "prosecutor" for "solicitor" and "district attorney" for "district solicitor" in subsections (b), (c) and (e).

The second 1975 amendment added subdivision (6) to subsection (a).

Plea by Deaf Mute. — In State v. Early, 211 N.C. 189, 189 S.E. 668 (1937), the court, upon finding that defendant was a deaf mute, subpoenaed an interpreter, who, after being duly sworn and after the reading of the indictment, interpreted and explained the indictment to defendant. After defendant had indicated to the interpreter that he understood the indictment, the interpreter translated the solicitor's (now prosecutor's) question of whether defendant was guilty or not guilty, and upon a negative reply given through the interpreter, a plea of not guilty was entered. It was held that there was no error on the arraignment of defendant or in the acceptance of his negative answer as a plea of not guilty.

Changing Plea. — Whether a prisoner may retract a plea of guilty and enter a plea of not guilty, or vice versa, is a matter for the sound legal discretion of the trial court. State v. Branner, 149 N.C. 559, 63 S.E. 169 (1908).

§ 15A-1012. Aid of counsel; time for deliberation. — (a) A defendant may not be called upon to plead until he has had an opportunity to retain counsel or, if he is eligible for assignment of counsel, until counsel has been assigned or waived in accordance with Article 36 of Chapter 7A of the General Statutes.

(b) In cases in the original jurisdiction of the superior court a defendant who has waived counsel may not plead within less than seven days following the date he was arrested or was otherwise informed of the charge. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

Subsection (a) states the salutary rule that a defendant may not be arraigned, or otherwise called upon to plead, whether in district or superior court, without first being afforded his right to counsel. The wording is taken from the A.L.I. draft.

Subsection (b) is also based in part upon the A.L.I. draft, but has been limited to cases first tried in superior court. The Commission felt the procedure in district court misdemeanors could not accommodate the mandated seven-day delay in cases, even as to defendants without counsel. The purpose of the delay period is to give a "cooling-off" time to the defendant who may during a period of emotional stress decide both to waive counsel and plead guilty. The original draft of subsection (b) within the Commission followed the language of the A.B.A.-A.L.I. proposal and stated that the defendant may not be "called upon" to plead within the seven-day

period. After one member raised a question as to language, subsection (b) was changed to say that a defendant may not be "required" to plead sooner than in seven days; a parallel change was not suggested for subsection (a). This change was for the apparent purpose of allowing an uncounseled defendant who affirmatively wanted to plead to do so immediately. For example, the mandated seven-day delay for a defendant without counsel might in a rural county mean waiting several months in county jail (if conditions of pretrial release could not be met or unless there was a waiver of venue) until the next session of court. The General Assembly, however, amended to the present language stating a one-week flat ban on pleas. The answer apparently is that if the defendant wants to enter an earlier plea, he must retain or accept appointment of counsel.

§§ 15A-1013 to 15A-1020: Reserved for future codification purposes.

ARTICLE 58.

Procedures Relating to Guilty Pleas in Superior Court.

OFFICIAL COMMENTARY

Since the mid-1960's a number of commentators have urged that the criminal justice system be examined realistically. They indicate that the rules postulate an adversary "due-process" mode of proceeding but in fact about 90 percent of the criminal convictions obtained come through the entry or negotiation of a guilty plea. They have called this the "administrative" mode of proceeding within the criminal justice system. Most of the recent proposals have been to legitimate the administrative handling of cases — to bring plea negotiations out of the back room and put them on the record. It is thought that making the procedure public should have a number of benefits.

These benefits include:

(1) Making the basis for negotiations more rational. If the process is legitimate but carries its approved guidelines, it becomes more difficult to make plea bargains on factors such as the particular mood of the prosecutor when approached, the political power exercised by the defendant or his lawyer, peculiar conditions of the local docket, etc.

(2) Allowing defendants to tell the truth in plea proceedings. They should not be expected to go before judges after plea negotiations and lie by saying no promises or agreements were made.

(3) The possibility of clear rules setting out exactly to what extent the judge should or should not get involved at various stages of the plea negotiations.

(4) The likelihood of fewer successful attacks on guilty pleas in post-conviction hearings. If the procedures of plea negotiation are on the record and accurately reflect the things (legitimately) done, the basis for later challenge is effectively minimized.

One of the first major proposals on plea negotiation was in the Report of the President's Commission on Law Enforcement and the Administration of Justice, The Challenge of Crime in a Free Society, pp. 134-137 (1967). This was soon followed by A.B.A. Project on Standards for Criminal Justice, Standards Relating to Guilty Pleas (1968). The model utilized in drafting this article is American Law Institute, A Model Code of Pre-Arraignment Procedure — Tentative Draft No. 5, Article 350 (1972).

Although the Commission proposed no statute as to plea negotiations in district court, it assumes that these negotiations will be utilized in that court. The provisions of a normative nature in this Article should apply in district court also, though it is clearly expected the process should be less formal and not subject to the procedural restrictions placed upon pleas of guilty or no contest in superior court.

Editor's Note. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-1021. Plea conference; improper pressure prohibited; submission of arrangement to judge; restitution and reparation as part of plea arrangement agreement, etc. — (a) In superior court, the prosecution and the defense may

discuss the possibility that, upon the defendant's entry of a plea of guilty or no contest to one or more offenses, the prosecutor will not charge, will dismiss, or will move for the dismissal of other charges, or will recommend or not oppose a particular sentence. If the defendant is represented by counsel in the discussions the defendant need not be present. The trial judge may participate in the discussions.

(b) No person representing the State or any of its political subdivisions may bring improper pressure upon a defendant to induce a plea of guilty or no contest.

(c) If the parties have reached a proposed plea arrangement in which the prosecutor has agreed to recommend a particular sentence, they may, with the permission of the trial judge, advise the judge of the terms of the arrangement and the reasons therefor in advance of the time for tender of the plea. The proposed plea arrangement may include a provision for the defendant to make restitution or reparation to an aggrieved party or parties for the damage or loss caused by the offense or offenses committed by the defendant. The judge may indicate to the parties whether he will concur in the proposed disposition. The judge may withdraw his concurrence if he learns of information not consistent with the representations made to him.

(d) When restitution or reparation by the defendant is a part of the plea arrangement agreement, if the judge concurs in the proposed disposition he may order that restitution or reparation be made pursuant to the provisions of G.S. 15-199(10), or pursuant to the provisions of G.S. 15-197.1. If an active sentence is imposed other than by the provisions of G.S. 15-197.1, the court may order that the defendant make restitution or reparation out of any earnings gained by the defendant if he attains work release privileges under the provisions of G.S. 148-33.1, or that restitution or reparation be imposed as a condition of parole in accordance with the provisions of G.S. 148-57.1. The order providing for restitution or reparation shall be in accordance with the applicable provisions of G.S. 15-199(10). When restitution or reparation is ordered as a part of a plea arrangement or a condition of parole or work release privileges, the sentencing court shall enter as a part of the commitment that restitution or reparation is ordered as a part of a plea arrangement. The Administrative Office of the Courts shall prepare and distribute forms which provide for ample space to make restitution or reparation orders incident to commitments, which forms shall be conveniently structured to enable the sentencing court to make its order. (1973, c. 1286, s. 1; 1975, c. 117; c. 166, s. 27; 1977, c. 614, ss. 3, 4.)

OFFICIAL COMMENTARY

Subsection (a) is basic. It legitimates plea negotiations, prohibits the judge from taking an active role in the actual striking of any bargain, and indicates that counsel may represent a defendant's interests and that the defendant need not be present. The Commission's proposal went one important step farther and only authorized plea negotiations in superior court with defendants represented by counsel. This provision was deleted in the General Assembly.

Subsection (b) prohibits use of "improper pressure" to induce the defendant to enter a plea of guilty or no contest. The original draft followed an adaptation of the wording of A.L.I. Code of Pre-Arraignment Procedure § 350.3(3), but the Commission decided the concept was sufficiently well understood that it need not be spelled out in detail. Indeed, some thought that a specific definition of "improper pressure" might restrict the meaning of the phrase, though the primary impetus for deleting the definition came from those who felt that inserting such a detailed prohibition on use of improper pressure might by implication indicate a Commission belief that the prohibited acts have been widely practiced in the past. The Commission specifically directed, however, that the A.L.I. language be quoted in the commentary. It is:

"(3) Improper Pressure. The prosecutor shall not seek to induce a plea of guilty or nolo contendere by

"(a) charging or threatening to charge the defendant with a crime not supported by the facts believed by the prosecutor to be provable;

"(b) charging or threatening to charge the defendant with a crime not ordinarily charged in the jurisdiction for the conduct allegedly engaged in by him; or

"(c) threatening the defendant that if he pleads not guilty, his sentence may be more severe than that which is ordinarily imposed in the jurisdiction in similar cases on defendants who plead not guilty."

The basis for subsection (c) is in the A.L.I. proposal, but the Commission has made two changes. First, upon objection to the term "plea agreement" used in the A.L.I. proposal, the Commission adopted the term "plea arrangement." The objection to "agreement" was that it may imply a binding contract on the parties.

Second, the Commission decided to handle plea arrangements differently depending on whether it involved a sentence recommendation or a decision relating to the charge. The final word on sentencing must come from the judge; the Commission (unlike the A.L.I. proposal) gave the final decision as to charge reduction or dismissal to the prosecutor. The judge cannot veto that. Therefore, it is significant that subsection (c) refers to "a proposed plea arrangement in which the solicitor has agreed to recommend a particular sentence. . . ."

One other point needs to be made concerning subsection (c). No one may discuss a plea arrangement with a judge except with his permission. Some judges do not wish to commit themselves even tentatively as to sentence. The purpose of the subsection, of course, is to find out the judge's reaction to a proposed sentence; if the judge reacts negatively, the parties may resume negotiations and try again. One important aspect of this section is that it requires negotiation with full knowledge of the facts of the case and the defendant's prior criminal history, as the judge's tentative approval may be withdrawn "if he learns of information not consistent with the representations made to him."

Editor's Note. — The first 1975 amendment deleted "not" between "may" and "participate" in the last sentence of subsection (a).

The second 1975 amendment substituted "prosecutor" for "solicitor" in subsection (a).

The 1977 amendment substituted "prosecutor" for "solicitor" in the first sentence of subsection (c), added the present second sentence of subsection (c), and added subsection (d).

Purpose of Article. — Procedures under this article serve (1) to prevent the occurrence of constitutional errors in the arraignment process, and (2) to discourage the filing of baseless petitions for habeas corpus and facilitate speedy but fair disposition of those that are filed. Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977).

The safeguards associated with "plea bargaining" and contained in this article are designed to insure that defendant is fully aware of the ramifications of the plea of guilty. State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976).

The prosecution is bound by the terms and conditions utilized to obtain the guilty plea. State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976).

Cited in State v. Williams, 291 N.C. 442, 230 S.E.2d 515 (1976).

§ 15A-1022. Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required. — (a) Except in the case of corporations or in misdemeanor cases in which there is a waiver of appearance under G.S. 15A-1011(a)(3), a superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:

(1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;
(2) Determining that he understands the nature of the charge;
(3) Informing him that he has a right to plead not guilty;
(4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;
(5) Determining that the defendant, if represented by counsel, is satisfied with his representation; and
(6) Informing him of the maximum possible sentence on the charge, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge.

(b) By inquiring of the prosecutor and defense counsel and the defendant personally, the judge must determine whether there were any prior plea discussions, whether the parties have entered into any arrangement with respect to the plea and the terms thereof, and whether any improper pressure was exerted in violation of G.S. 15A-1021(b). The judge may not accept a plea of guilty or no contest from a defendant without first determining that the plea is a product of informed choice.

(c) The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:

(1) A statement of the facts by the prosecutor.
(2) A written statement of the defendant.
(3) An examination of the presentence report.
(4) Sworn testimony, which may include reliable hearsay.
(5) A statement of facts by the defense counsel.

(d) The judge may accept the defendant's plea of no contest even though the defendant does not admit that he is in fact guilty if the judge is nevertheless satisfied that there is a factual basis for the plea. The judge must advise the defendant that if he pleads no contest he will be treated as guilty whether or not he admits guilt. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

Subsection (a) is based upon the requirements imposed by Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). The "catechism" here required of the judge is similar to, though varying in particulars from, those in the A.B.A. and A.L.I. proposals. (A.L.I. Code § 350.4(1); A.B.A. Standards § 1.4.)

The terminology "informed choice" in subsection (1) comes from the A.L.I. proposal. The A.B.A. standards used the word "voluntary."

In subsection (c), on the other hand, the Commission adopted the wording of the A.B.A. standards: "factual basis for the plea." The A.L.I. draft would go slightly farther and require the judge to make sure that reasonable cause for the charge made exists.

The Commission thought it would help clarify matters to insert in subsection (c) a description of the type of evidence that the judge may entertain in ruling on a plea. The Commission avoided, however, the thorny problem of the extent to which the defendant must be apprised of adverse information in the presentence report. This issue is subject to consideration when the Commission tackles the entire question of sentencing procedure.

Subsection (d) departs somewhat from the wording of the A.L.I. proposal, but like it, is based upon the decision in North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

§ 15A-1023. Action by judge in plea arrangements relating to sentence; no approval required when arrangement does not relate to sentence. — (a) If the parties have agreed upon a plea arrangement pursuant to G.S. 15A-1021 in which the prosecutor has agreed to recommend a particular sentence, they must disclose the substance of their agreement to the judge at the time the defendant is called upon to plead.

(b) Before accepting a plea pursuant to a plea arrangement in which the prosecutor has agreed to recommend a particular sentence, the judge must advise the parties whether he approves the arrangement and will dispose of the case accordingly. If the judge rejects the arrangement, he must so inform the parties, refuse to accept the defendant's plea of guilty or no contest, and advise the defendant personally that neither the State nor the defendant is bound by the rejected arrangement. The judge must advise the parties of the reasons he rejected the arrangement and afford them an opportunity to modify the arrangement accordingly. Upon rejection of the plea arrangement by the judge the defendant is entitled to a continuance until the next session of court. A decision by the judge disapproving a plea arrangement is not subject to appeal.

(c) If the parties have entered a plea arrangement relating to the disposition

of charges in which the prosecutor has not agreed to make any recommendations concerning sentence, the substance of the arrangement must be disclosed to the judge at the time the defendant is called upon to plead. The judge must accept the plea if he determines that the plea is the product of the informed choice of the defendant and that there is a factual basis for the plea. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1977, c. 186.)

OFFICIAL COMMENTARY

This section merely spells out procedures that follow through on policies discussed in the commentary to prior sections.

Subsection (1) requires the judge in open court, presumably after going through the "catechism" required by § 15A-1022, to tell the defendant whether he will abide by the recommendation as to sentence. If the judge refuses to go along, the parties can either renegotiate or the defendant may withdraw his plea and secure a continuance as a matter of right. See § 15A-1024.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" wherever it appeared in this section.

The 1977 amendment added the fourth sentence of subsection (b).

Applicability of Subsection (b). — The unambiguous language of subsection (b) makes it clear that its provisions are activated when the trial judge rejects a negotiated plea arrangement before actual arraignment of defendant and before the introduction of evidence. State v. Williams, 291 N.C. 442, 230 S.E.2d 515 (1976).

Stated in Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977).

§ 15A-1024. Withdrawal of guilty plea when sentence not in accord with plea arrangement. — If at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section is based in part on A.L.I. Code § 350.6, except the Commission did not adopt the part that would tie down for the record defendant's acquiescence as to the sentence pronounced. The right to automatic continuance was added by the Commission.

The Commission's proposal allowed withdrawal of the plea if the sentence was "more severe" than specified in the arrangement. After some discussion in a legislative committee as to whether a short sentence of imprisonment was more severe than a substantially longer probationary period, the section was amended to apply if there is any change at all concerning the sentence.

Applicability of Section. — The unambiguous language of this section discloses that it applies in cases in which the trial judge does not reject a plea arrangement when it is presented to him but hears the evidence and at the time for sentencing determines that a sentence different from that provided for in the plea arrangement must be imposed. State v. Williams, 291 N.C. 442, 230 S.E.2d 515 (1976).

There is no conflict in the language of this section and § 15A-1023 requiring that they be harmonized or construed. Rather, it clearly appears that the legislature intended that these separate statutes be independent and apply to entirely different, carefully delineated factual situations. State v. Williams, 291 N.C. 442, 230 S.E.2d 515 (1976).

§ 15A-1025. Plea discussion and arrangement inadmissible. — The fact that the defendant or his counsel and the prosecutor engaged in plea discussions or made a plea arrangement may not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

The parallel provision in A.L.I. Code § 350.7 has an initial qualifying clause: "Unless the defendant subsequently enters a plea of guilty or nolo contendere which is not withdrawn. . . ." The Commission thought this clause unnecessary as § 15A-1022(b) requires the judge to examine the defendant as to plea arrangements, and § 15A-1026 requires that a verbatim record be kept.

The Commission rejected a proposal to add a proviso to this section allowing evidence of plea discussions and arrangements to come in when essential to perjury prosecutions or contempt proceedings. It is not clear whether this was a deliberate policy decision or was based upon the assumption that the courts of necessity would engraft those exceptions upon the literal words of the section.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor."

Discussion between Defendant and Arresting Officer. — This section is not applicable where the only evidence of plea negotiation concerns a discussion between defendant and an arresting officer. State v. Lewis, 32 N.C. App. 298, 231 S.E.2d 693 (1977).

Applied in State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976).

Quoted in State v. Jenkins, 292 N.C. 179, 232 S.E.2d 648 (1977).

§ 15A-1026. Record of proceedings. — A verbatim record of the proceedings at which the defendant enters a plea of guilty or no contest and of any preliminary consideration of a plea arrangement by the judge pursuant to G.S. 15A-1021(c) must be made and preserved. This record must include the judge's advice to the defendant, and his inquiries of the defendant, defense counsel, and the prosecutor, and any responses. If the plea arrangement has been reduced to writing, it must be made a part of the record; otherwise the judge must require that the terms of the arrangement be stated for the record and that the assent of the defendant, his counsel, and the prosecutor be recorded. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1975, 2nd Sess., c. 983, s. 144.)

OFFICIAL COMMENTARY

This section is similar to A.L.I. Code § 350.8.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" in the second and third sentences of the section.

The 1975, 2nd Sess., amendment substituted "preserved" for "transcribed" at the end of the first sentence.

Quoted in State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976).

Stated in Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977).

§ 15A-1027. Limitation on collateral attack on conviction. — Noncompliance with the procedures of this Article may not be a basis for review of a conviction after the appeal period for the conviction has expired, unless the review is expressly authorized by G.S. 15-217. (1973, c. 1286, s. 1; 1975, c. 166, s. 21.)

OFFICIAL COMMENTARY

This section was originally similar to A.L.I. Code § 350.9 in banning collateral attack except when review is required by constitutional provisions "or by other law of this State." The section was amended during the course of passage to delete the reference to constitutional provisions (as they apply in any event) and to specify the North Carolina statute presently governing the question.

Editor's Note. — The 1975 amendment deleted "required" preceding "expressly authorized" near the end of the section.

Cited in Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977).

§§ 15A-1028 to 15A-1030: Reserved for future codification purposes.

ARTICLE 59.

Maintenance of Order in the Courtroom.

OFFICIAL COMMENTARY

The fountainhead case dealing with maintenance of order in the courtroom is Illinois v. Allen, 397 U.S. 337 (1970). In addition to this case, the Commission in its drafting also consulted applicable standards of the American Bar Association cited below.

§ 15A-1031. Custody and restraint of defendant and witnesses. — A trial judge may order a defendant or witness subjected to physical restraint in the courtroom when the judge finds the restraint to be reasonably necessary to maintain order, prevent the defendant's escape, or provide for the safety of persons. If the judge orders a defendant or witness restrained, he must:

(1) Enter in the record out of the presence of the jury and in the presence of the person to be restrained and his counsel, if any, the reasons for his action; and
(2) Give the restrained person an opportunity to object; and
(3) Unless the defendant or his attorney objects, instruct the jurors that the restraint is not to be considered in weighing evidence or determining the issue of guilt.

If the restrained person controverts the stated reasons for restraint, the judge must conduct a hearing and make findings of fact. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section is based on A.B.A. Project on Standards for Criminal Justice, Standards Relating to Trial by Jury § 4.1(c) (1968) (hereinafter cited as A.B.A. Standards, Trial by Jury), and the North Carolina case State v. Tolley, 290 N.C. 349 (1976).

Editor's Note. — Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that

the provisions of Article 85, "Parole" shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

The "Official Comments" under this Article are reprinted from the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly.

§ 15A-1032. Removal of disruptive defendant. — (a) A trial judge, after warning a defendant whose conduct is disrupting his trial, may order the defendant removed from the trial if he continues conduct which is so disruptive that the trial cannot proceed in an orderly manner. When practicable, the judge's warning and order for removal must be issued out of the presence of the jury.

(b) If the judge orders a defendant removed from the courtroom, he must:

(1) Enter in the record the reasons for his action; and

(2) Instruct the jurors that the removal is not to be considered in weighing evidence or determining the issue of guilt.

A defendant removed from the courtroom must be given the opportunity of learning of the trial proceedings through his counsel at reasonable intervals as directed by the court and must be given opportunity to return to the courtroom during the trial upon assurance of his good behavior. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The primary basis for this section comes from A.B.A. Project on Standards for Criminal Justice, Standards Relating to the Function of the Trial Judge § 6.8 (1972) (provisions on courtroom disruption approved in 1971) (hereinafter cited as A.B.A. Standards, Function of the Trial Judge). The warning requirement in subsection (a) is suggested in the commentary to the A.B.A. Standards, and the Commission originated the provision that the warning and order for removal occur out of the jury's presence if practicable.

The provisions of subsection (b) as to recordation and jury instruction were added by the Commission to parallel those in G.S. 15A-1031. The remainder of subsection (b) is based on A.B.A. Standards, Function of the Trial Judge § 6.8, though the Commission has omitted the explicit statement that "removal is preferable to gagging or shackling the disruptive defendant." The Commission agreed in general with this policy, but was reluctant to put merely precatory instructions into statutory text. The Commission was of the opinion that judges would consider the applicable A.B.A. Standards in exercising their discretion.

A more substantive change has been made by the Commission as to the defendant's opportunity to return to the courtroom following his removal. The Commission deleted the specification that the opportunity should be "continuing" and further omitted this sentence found in the A.B.A. Standards: "The removed defendant should be summoned to the courtroom at appropriate intervals, with the offer to permit him to remain repeated in open court each time."

§ 15A-1033. Removal of disruptive witnesses and spectators. — The judge in his discretion may order any person other than a defendant removed from a courtroom when his conduct disrupts the conduct of the trial. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The genesis of this section is A.B.A. Standards, Function of the Trial Judge § 6.10, although the judge's discretion to exclude is somewhat broader than that recommended by the American Bar Association.

§ 15A-1034. Controlling access to the courtroom. — (a) The presiding judge may impose reasonable limitations on access to the courtroom when necessary to ensure the orderliness of courtroom proceedings or the safety of persons present.

(b) The judge may order that all persons entering or any person present and choosing to remain in the courtroom be searched for weapons or devices that could be used to disrupt or impede the proceedings and may require that belongings carried by persons entering the courtroom be inspected. An order under this subsection must be entered on the record. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section originated with the Commission based upon several acts of violence occurring in courtrooms in the early 1970s.

§ 15A-1035. Other powers. — In addition to the use of the powers provided in this Article, a presiding judge may maintain courtroom order through the use of his contempt powers as provided in Chapter 5A, Contempt, and through the use of other inherent powers of the court. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Compare A.B.A. Standards, Function of the Trial Judge § 6.10: "Any person who engages in conduct which disturbs the orderly process of the trial may be admonished or excluded, and, if his conduct is intentional, may be punished for contempt." See also A.B.A. Standards, Function of the Trial Judge §§ 7.1 to 7.5.

§§ 15A-1036 to 15A-1039: Reserved for future codification purposes.

ARTICLE 60.

§§ 15A-1040 to 15A-1050: Reserved for future codification purposes.

ARTICLE 61.

Granting of Immunity to Witnesses.

OFFICIAL COMMENTARY

In its second interim report to the President and the Congress dated March 17, 1969, the National Commission on Reform of Federal Criminal Laws recommended a legislative enactment to be considered separately from its later comprehensive recommendations for revision of the federal substantive criminal law. The separate proposal dealt with immunity to witnesses, and out of the proposal grew the Federal Immunity of Witnesses Act, 18 U.S.C. §§ 6001 to 6005. This act replaced over 50 scattered federal immunity provisions with one general law.

The Commission in drafting relied upon the wording of the National Commission's proposal rather than the slightly different act that passed. See 2 National Commission on Reform of Federal Criminal Laws, Working Papers 1405-48 (1970). The federal model contained provisions concerning the granting of immunity before:

(1) Courts;

(2) Grand juries;

(3) Administrative agencies conducting hearings; and

(4) Legislative bodies conducting hearings.

The Commission's proposal only extends to grants of immunity before courts and grand juries.

Another major departure from the federal model was the retention of "transactional" immunity rather than using the narrower "use" immunity approved by the Supreme Court of the United States. This will be discussed in more detail below.

In utilizing the immunity provisions of this Article, it is instructive to note the concurrent amendments to § 5-1, § 5-4, and § 5-8 to strengthen the contempt laws in the event a person granted immunity then refuses to testify.

§ 15A-1051. Immunity; general provisions. — (a) A witness who asserts his privilege against self-incrimination in a hearing or proceeding in court or before a grand jury of North Carolina may be ordered to testify or produce other information as provided in this Article. He may not thereafter be excused from testifying or producing other information on the ground that his testimony or other information required of him may tend to incriminate him. No such witness may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled under these provisions to testify or to produce information, nor may testimony or other information so compelled, nor any information or evidence derived therefrom, be used against the witness in any criminal case, except a prosecution for perjury or any other offense arising from a failure to comply with such order.

(b) An order to testify or produce other information authorized by this Article may be issued prior to the witness's assertion of his privilege against self-incrimination, but the order is not effective until the witness asserts his privilege against self-incrimination and the person presiding over the inquiry communicates the order to him.

(c) As used in this Article, "other information" includes any book, paper, document, record, recordation, tangible object, or other material. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

A formal grant of immunity is not conferred under this Article unless the witness is first asked the incriminating question, claims his privilege against self-incrimination, and is then ordered by a judge to answer the question notwithstanding his privilege. If he does answer the question, then immunity from prosecution is conferred.

When it is anticipated that a witness in a trial in the district or superior court will claim the privilege against self-incrimination, the solicitor may request the superior court judge in advance for an order directing the witness to testify (after notifying the Attorney General in advance also, in accordance with § 15A-1052(b)), but subsection (b) makes it clear that the order of the judge is not effective until the witness formally claims the privilege. In the original draft subsection (b) applied to the various types of immunity grants in the federal statute, but the Commission reduced the coverage to court and grand jury proceedings. Later by a change of wording in the grand jury immunity provision, the Commission effectively allowed for advance order of immunity only in court proceedings.

Until recently it was believed that a witness had to be given a complete grant of immunity with respect to any matter on which he testified to protect fully a witness's privilege against self-incrimination. This conferring of full immunity is known as "transactional" immunity. The National Commission on Reform of Federal Criminal Laws, however, proposed granting a somewhat narrower immunity. The argument ran that a person in being forced to testify should only be protected against having his disclosures, and the evidentiary leads flowing from his disclosures, used against him. If, for example, a totally independent investigation had been in progress for some time in Agency A, conferring of immunity in connection with another overlapping matter should not fortuitously frustrate the efforts of Agency A to prosecute — using only its independently gathered evidence. This narrower form of immunity for use of evidence and its leads is known as "use" immunity.

The Supreme Court of the United States has held that "use" immunity is all that is constitutionally required by the Fifth Amendment, but indicated that the prosecutor in a prosecution covering the same ground as that on which the defendant was formally compelled to testify as a witness would bear an extremely heavy burden of proving that the evidence being used was in fact totally

independent. Kastigar v. United States, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972); Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472, 92 S. Ct. 1670, 32 L. Ed. 2d 234 (1972).

Despite the ruling upholding "use" immunity as constitutional, the Commission decided to retain within North Carolina the full transactional immunity for anyone compelled under this Article to testify to incriminating information. The model used for conferring transactional immunity was former 18 U.S.C. § 3486, which is now repealed by the Federal Immunity of Witnesses Act.

§ 15A-1052. Grant of immunity in court proceedings. — (a) When the testimony or other information is to be presented to a court of the trial division of the General Court of Justice, the order to the witness to testify or produce other information must be issued by a superior court judge, upon application of the district attorney:

(1) Be in writing and filed with the permanent records of the case; or

(2) If orally made in open court, recorded and transcribed and made a part of the permanent records of the case.

(b) The application may be made whenever, in the judgment of the district attorney, the witness has asserted or is likely to assert his privilege against self-incrimination and his testimony or other information is or will be necessary to the public interest. Before making application to the judge, the district attorney must inform the Attorney General, or a deputy or assistant attorney general designated by him, of the circumstances and his intent to make an application.

(c) In a jury trial the judge must inform the jury of the grant of immunity and the order to testify prior to the testimony of the witness under the grant of immunity. During the charge to the jury, the judge must instruct the jury as in the case of interested witnesses. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

Under the federal model, applications for immunity orders in court or grand jury proceedings may be done only with the approval of the Attorney General of the United States, the Deputy Attorney General, or a specifically designated Assistant Attorney General. The reason for centralized clearance is that under the Constitution of the United States the privilege against self-incrimination applies nationwide; to be effective, then, a grant of immunity must be nationwide. The Supreme Court has suggested that a grant of valid immunity conferred by one jurisdiction under our federal system will automatically be extended to apply in all jurisdictions under our federal system. Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); Murphy v. Waterfront Comm'n, 378 U.S. 52, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964).

The Commission determined that there was also a need for central clearance in North Carolina to guard against a solicitor's unwittingly granting immunity to a key figure under investigation elsewhere in the State or in the United States. The Commission decided, though, that it would be sufficient for the district solicitor to inform the Attorney General of North Carolina, or a deputy or assistant attorney general designated by him, of the proposed application for an immunity order. The person in the Department of Justice receiving the information should then be able to tell the district solicitor whether our Department of Justice knows of any reason why the particular individual should not be given immunity. A telephone call should be sufficient to satisfy the terms of the statute. Only the elected district solicitor may apply for the immunity order from the judge.

One interesting point might be noted. Even though the North Carolina statute grants full transactional immunity, this grant would be effective only with respect to prosecutions under the laws of North Carolina. In other jurisdictions the immunity would be the automatic one conferred by the holding in Malloy v. Hogan, but under Kastigar v. United States, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972) and Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472, 92 S. Ct. 1670, 32 L. Ed. 2d 234 (1972) this immunity would be "use" immunity only.

A question was raised in the Commission as to whether the judge has any option to refuse to issue the order to the witness to testify if he determines that:

(1) The applicant is a district solicitor;

(2) The district solicitor notified the proper person in the North Carolina Department of Justice before making application; and

(3) A witness has refused, or apparently will refuse, to testify on Fifth Amendment grounds in a proceeding covered by the statute.

The answer seems to be that the judge, except in the most extraordinary situations, must issue the order. He is the one to issue it so that the contempt powers of the court may attach upon any refusal to testify notwithstanding the grant of immunity. Also, the judge in his order would spell out the exact questions or subject-matter area as to which the witness is compelled to testify. Having this carefully delineated in the record may be of importance later. Compare the comment in the National Commission's Working Papers at 1435-36:

"The President's Commission mentioned only two grounds for a court order requirement. It spoke of avoiding abuse of authority by prosecutors, and it spoke of the danger of hidden immunization for corrupt purposes. However, with the approval power centralized in the Attorney General, these two points really are a single point: is the Attorney General to be trusted, or is a court somehow to review his good faith? Professor Blakey, in his supporting memorandum for the President's Commission, speaks of making 'visible' the Attorney General's decision in order to minimize the 'danger of hidden immunization of friends.' If such were attempted, he suggested, the Federal district court would 'have inherent power to refuse to be a party to it.'

"A court order requirement will be harmless, however, if the Federal district courts continue to view their role here as being solely ministerial — i.e., service as a recording agency. This approach was outlined in the leading case of Ullmann v. United States, 350 U.S. 422, 76 S. Ct. 497, 100 L. Ed. 511 (1956), sustaining the constitutionality of the initial court order requirement statute, 18 U.S.C. § 3486(c), concerning grand jury investigation and national security. At the same time the proposed language, while clearly negating a full policy review, would not prevent a Federal district court from finding sufficient reserve authority to deny a request for an immunity order in the context of cronyism."

Many of the practicing lawyers in the General Assembly expressed fears that prosecutors might abuse the power of granting immunity. One of several added provisions was subsection (c). It not only requires the judge during his charge to instruct the jury to scrutinize the immunized testimony with care but goes the further step of requiring that the judge inform the jury of the grant of immunity prior to the witness's testimony. See also the commentary under § 15A-1055.

Editor's Note. — The 1975 amendment substituted "district attorney" for "district solicitor" wherever it appeared in this section.

§ 15A-1053. Grant of immunity before grand jury. — (a) When the testimony or other information is to be presented to a grand jury, the order to the witness to testify or produce other information must be issued by the presiding or convening superior court judge, upon application of the district attorney. The order of a superior court judge under this section must be in writing and filed as a part of the permanent records of the court.

(b) The application may be made when the district attorney has been informed by the foreman of the grand jury that the witness has asserted his privilege against self-incrimination and the district attorney determines that the testimony or other information is necessary to the public interest. Before making application to the judge, the district attorney must inform the Attorney General, or a deputy or assistant attorney general designated by him, of the circumstances and his intent to make an application. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

This section was originally to be construed in conjunction with § 15A-625. That section provided that the foreman of the grand jury must report to the district solicitor if a witness

before the grand jury refuses to answer on the ground of self-incrimination, and indicated that the district solicitor had the discretion to seek the order of immunity or to refuse to do so. In committee, § 15A-625 was deleted from the Article on the grand jury, but this section — considered at a different time — was left intact. It is apparently sufficiently complete within itself to be given effect notwithstanding the omission of § 15A-625.

The language of subsection (b) states that the application to the judge "may be made when the solicitor *has* been informed by the foreman of the grand jury that the witness has asserted his privilege against self-incrimination . . . ." (Emphasis added.) Contrasting this language with that in § 15A-1052(b) makes plain that the statute authorizes the order of immunity in grand jury proceedings only after the witness's refusal to testify. The delay in grand jury proceedings to obtain the judge's order, however, may not be so disruptive as it would be in a trial situation.

Editor's Note. — The 1975 amendment substituted "district attorney" for "district solicitor" wherever it appeared in this section.

§ 15A-1054. Charge reductions or sentence concessions in consideration of truthful testimony. — (a) Whether or not a grant of immunity is conferred under this Article, a prosecutor, when the interest of justice requires, may exercise his discretion not to try any suspect for offenses believed to have been committed within the judicial district, to agree to charge reductions, or to agree to recommend sentence concessions, upon the understanding or agreement that the suspect will provide truthful testimony in one or more criminal proceedings.

(b) Recommendations as to sentence concessions must be made to the trial judge by the prosecutor in accordance with the provisions of Article 58 of this Chapter, Procedure Relating to Guilty Pleas in Superior Court.

(c) When a prosecutor enters into any arrangement authorized by this section, written notice fully disclosing the terms of the arrangement must be provided to defense counsel, or to the defendant if not represented by counsel, against whom such testimony is to be offered, a reasonable time prior to any proceeding in which the person with whom the arrangement is made is expected to testify. Upon motion of the defendant or his counsel on grounds of surprise or for other good cause or when the interests of justice require, the court must grant a recess. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

After studying the federal models, the Commission thought that formal grants of immunity in North Carolina would probably be few and far between. Several persons described a more informal assurance of lenience or nonprosecution often offered by solicitors as being more effective and much more prevalent in the run of cases coming before the courts of North Carolina. The Commission, therefore, described this quasi-immunity practice which merges into plea negotiation, and added a notice requirement as a safeguard. The result is this section.

Because sentence concessions may only come from the judge, subsection (b) is a "piggyback" provision which stipulates that the working out of agreements concerning sentence must be in accordance with the provisions of Article 58, Procedures Relating to Guilty Pleas in Superior Court.

Editor's Note. — The 1975 amendment substituted "prosecutor" for "solicitor" wherever it appeared in this section.

Testimony Properly Allowed. — The district attorney's failure to disclose to defense counsel an agreement with a State witness under this section did not warrant suppression of the witness's testimony where the trial judge granted a recess as required by this section, and the record showed that defense counsel had

known of the agreement for over three weeks. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

Stated in State v. Hopper, 292 N.C. 580, 234 S.E.2d 580 (1977).

§ 15A-1055. Evidence of grant of immunity or testimonial arrangement may be fully developed; impact may be argued to the jury. — (a) Notwithstanding any other rule of evidence to the contrary, any party may examine a witness testifying under a grant of immunity or pursuant to an arrangement under G.S. 15A-1054 with respect to that grant of immunity or arrangement. A party may also introduce evidence or examine other witnesses in corroboration or contradiction of testimony or evidence previously elicited by himself or another party concerning the grant of immunity or arrangement.

(b) A party may argue to the jury with respect to the impact of a grant of immunity or an arrangement under G.S. 15A-1054 upon the credibility of a witness. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section was added in the General Assembly and is another manifestation of fears by some attorneys of prosecutorial misuse of this new, for North Carolina, set of provisions. It is important to note that the section applies both to grants of immunity and to arrangements for truthful testimony under § 15A-1054. It seems probable that the law of evidence would allow defense attorneys to attack testimony given under immunity or under an arrangement pursuant to § 15A-1054 in the ways contemplated by this section, but the proponents wanted to nail the matter down. The same goes for the right of argument in subsection (b).

No Prejudicial Error Shown. — Trial judge's refusal to inform the jury of an agreement between the district attorney and a State witness under § 15A-1054 was not prejudicial error where the jury was fully informed of the agreement prior to the time it began deliberations by trial judge's instructions following the testimony, and by defense counsel's cross-examination of the witness concerning promises made to him. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

Stated in State v. Hopper, 292 N.C. 580, 234 S.E.2d 580 (1977).

§§ 15A-1056 to 15A-1060: Reserved for future codification purposes.

ARTICLE 62.

Mistrial.

OFFICIAL COMMENTARY

The Commission's original impulse was to draft a comprehensive article detailing all of the various situations in which a mistrial may be granted or must be granted. After struggling unsuccessfully with several drafts utilizing this approach, the Commission abandoned the attempt. The major problem was that there are stringent constitutional limitations on when a mistrial may be granted without the consent, or on motion, of the defendant. See, e.g., Illinois v. Sommerville, 410 U.S. 458 (1973).

In seeking a more general codification of the rules that must govern the granting of mistrials, the Commission used as a model an earlier draft of the material now published in National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure, Rule 541 (1974) (hereinafter cited as Uniform Rules). This Article does not purport to be exclusive in its coverage, and there are other sections in this chapter which specifically deal with the granting of mistrials in particular circumstances. See, e.g., G.S. 15A-1224 (death or disability of trial judge) and G.S. 15A-1235(d) (deadlocked jury).

Editor's Note. — The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly, as revised by the Commission prior to the reprinting of this volume.

§ 15A-1061. Mistrial for prejudice to defendant. — Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case. If there are two or more defendants, the mistrial may not be declared as to a defendant who does not make or join in the motion. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

With only minor changes of wording this section reflects the substance of Uniform Rules, Rule 541(a).

Editor's Note. — Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

§ 15A-1062. Mistrial for prejudice to the State. — Upon motion of the State, the judge may declare a mistrial if there occurs during the trial, either inside or outside the courtroom, misconduct resulting in substantial and irreparable prejudice to the State's case and the misconduct was by a juror or the defendant, his lawyer, or someone acting at the behest of the defendant or his lawyer. If there are two or more defendants, the mistrial may not be declared as to a defendant who does not join in the motion of the State if:

(1) Neither he, his lawyer, nor a person acting at his or his lawyer's behest participated in the misconduct; or

(2) The State's case is not substantially and irreparably prejudiced as to him. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section is based upon Uniform Rules, Rule 541(b). The major substantive change is to add the misconduct of a juror to the grounds for which the State may secure a mistrial on its own motion — provided the prejudice was substantial and irreparable.

§ 15A-1063. Mistrial for impossibility of proceeding. — Upon motion of a party or upon his own motion, a judge may declare a mistrial if:

(1) It is impossible for the trial to proceed in conformity with law; or
(2) It appears there is no reasonable probability of the jury's agreement upon a verdict. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section is based upon Uniform Rules, Rule 541(c). The Commission deleted, upon a divided vote, a discretionary ground for mistrial if the poll of the jury indicated there was not unanimous concurrence with the verdict returned. G.S. 15A-1238 states that the judge should direct the jury to retire for further deliberations in this instance, and the Commission saw no necessity to write in a special discretionary right to a mistrial. The defendant would always have the privilege under G.S. 15A-1061 to move for a discretionary mistrial if he thought the circumstances revealed by the poll of the jury were substantially prejudicial to him. The State would have a right to request a mistrial if the prejudice to it were tied to misconduct of a juror — under the Commission's version of G.S. 15A-1062. If the prejudice were so total as to make it "impossible" for the trial to proceed "in conformity with law," then either party or the judge on his own motion could trigger the mistrial under subdivision (1) of this section — provided this would be constitutional.

In its deliberations the Commission was furnished the following draftsman's comment with this section: "The language in subparagraph (1) is intended to cover the limited number of situations in which a judge may grant a mistrial without consent of the defendant because of the impossibility of proceeding with the trial. It covers the case in which a juror dies or becomes disabled to continue, and there is no alternate or else deliberations have already begun. It also covers the situation in which it becomes physically impossible for the trial to proceed — such as may be caused by fire, flood, or other catastrophe.... (This subparagraph gives) the judge as broad and flexible a power as possible in impossibility cases consistent with the constitutional rulings concerning former jeopardy."

§ 15A-1064. Mistrial; finding of facts required. — Before granting a mistrial, the judge must make finding of facts with respect to the grounds for the mistrial and insert the findings in the record of the case. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This provision will be important when the rule against prior jeopardy prohibits retrial unless the mistrial is upon certain recognized grounds or unless the defendant requests or acquiesces in the mistrial. If the defendant requests or acquiesces in the mistrial, that finding alone should suffice.

§ 15A-1065. Procedure following mistrial. — When a mistrial is ordered, the judge must direct that the case be retained for trial or such other proceedings as may be proper. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The statute on which this section is based, Kan. Stat. Ann. § 22-3423, added a provision requiring "that the defendant be held in custody pending such further proceedings, unless he is released pursuant to the terms of an appearance bond." The Commission thought the matter was already covered by Article 26, Bail, and deleted this portion.

§§ 15A-1066 to 15A-1070: Reserved for future codification purposes.

ARTICLE 63.

§§ 15A-1071 to 15A-1080: Reserved for future codification purposes.

ARTICLE 64.

§§ 15A-1081 to 15A-1100: Reserved for future codification purposes.

SUBCHAPTER XI. TRIAL PROCEDURE IN DISTRICT COURT.

ARTICLE 65.

In General.

§ 15A-1101. Applicability of superior court procedure. — Trial procedure in the district court is in accordance with the provisions of Subchapter XII, Trial in Superior Court, except for provisions:

(1) Relating to jury trial.

(2) Requiring recordation of proceedings unless they specify their applicability to the district court.

(3) That specify their applicability to superior court. (1977, c. 711, s. 1.)

Editor's Note. — Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

§§ 15A-1102 to 15A-1110: Reserved for future codification purposes.

ARTICLES 66 THROUGH 70.

§§ 15A-1111 to 15A-1200: Reserved for future codification purposes.

SUBCHAPTER XII. TRIAL PROCEDURE IN SUPERIOR COURT.

ARTICLE 71.

Right to Trial by Jury.

§ 15A-1201. Right to trial by jury. — In all criminal cases the defendant has the right to be tried by a jury of 12 whose verdict must be unanimous. In the district court the judge is the finder of fact in criminal cases, but the defendant has the right to appeal for trial de novo in superior court as provided in G.S. 15A-1431. In superior court all criminal trials in which the defendant enters a plea of not guilty must be tried before a jury. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section preserves the existing law. The Commission briefly considered possible changes that would apparently require amendment of the Constitution of North Carolina, such as providing for trial to the court upon waiver of jury trial, less than unanimous verdicts, and fewer than 12 jurors in certain classes of cases, but decided against recommending such changes.

Editor's Note. — Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly, as revised by the Commission prior to the reprinting of this volume.

§§ 15A-1202 to 15A-1210: Reserved for future codification purposes.

ARTICLE 72.

Selecting and Impaneling the Jury.

OFFICIAL COMMENTARY

One of the models used in the initial drafts of this Article was American Law Institute, Code of Criminal Procedure, Chapter 13 (Proposed Final Draft 1930), but the material went through so many revisions that it can be said essentially to originate with the Commission.

Unless the context otherwise requires, the word "juror" in this Article refers to members of the jury panel generally, and not merely those selected as trial jurors or alternates.

Editor's Note. — The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly, as revised by the Commission prior to the reprinting of this volume.

§ 15A-1211. Selection procedure generally; role of judge; challenge to the panel; authority of judge to excuse jurors. — (a) The provisions of Chapter 9 of the General Statutes, Jurors, pertinent to criminal cases apply except when this Chapter specifically provides a different procedure.

(b) The trial judge must decide all challenges to the panel and all questions concerning the competency of jurors.

(c) The State or the defendant may challenge the jury panel. A challenge to the panel:

(1) May be made only on the ground that the jurors were not selected or drawn according to law.
(2) Must be in writing.
(3) Must specify the facts constituting the ground of challenge.
(4) Must be made and decided before any juror is examined.

If a challenge to the panel is sustained, the judge must discharge the panel.

(d) The judge may excuse a juror without challenge by any party if he determines that grounds for challenge for cause are present. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The challenge procedure set out in this section also applies when the challenge is to the panel from which grand jurors were drawn. See the 1977 amendment to G.S. 15A-622(a), effective July 1, 1978.

Editor's Note. — Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

§ 15A-1212. Grounds for challenge for cause. — A challenge for cause to an individual juror may be made by any party on the ground that the juror:

(1) Does not have the qualifications required by G.S. 9-3.
(2) Is incapable by reason of mental or physical infirmity of rendering jury service.
(3) Has been or is a party, a witness, a grand juror, a trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge against the defendant.
(4) Has been or is a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.
(5) Is related by blood or marriage within the sixth degree to the defendant or the victim of the crime.
(6) Has formed or expressed an opinion as to the guilt or innocence of the defendant. It is improper for a party to elicit whether the opinion formed is favorable or adverse to the defendant.
(7) Is presently charged with a felony.
(8) As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.
(9) For any other cause is unable to render a fair and impartial verdict. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

To the extent possible the Commission has attempted to restate in this Article the rules governing selecting and impaneling the jury in a criminal case. This section incorporates the disqualifications set out in G.S. 9-3 and adds a number of additional grounds for challenge for cause. A companion provision recommended by the Commission was the amendment of G.S. 9-3 to add as a qualification for jury service that the person be able to hear and understand the English language.

Subdivisions (3) and (4) supersede G.S. 9-15(c), which is concurrently amended to apply to civil cases only.

Subdivision (5) modifies North Carolina case law, which makes kinship within the ninth degree — by blood — a basis for challenge. The addition of kinship to the victim of the crime as a ground for challenge is new.

Subdivision (8) is primarily intended to codify the rule of Witherspoon v. Illinois, 391 U.S. 510 (1968), but the Commission broadened the

provision to apply generally rather than only to capital cases. It determined that in other situations certain jurors might, regardless of the circumstances, refuse to vote for conviction.

§ 15A-1213. Informing prospective jurors of case. — Prior to selection of jurors, the judge must identify the parties and their counsel and briefly inform the prospective jurors, as to each defendant, of the charge, the date of the alleged offense, the name of any victim alleged in the pleading, the defendant's plea to the charge, and any affirmative defense of which the defendant has given pretrial notice as required by Article 52, Motions Practice. The judge may not read the pleadings to the jury. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This procedure is designed to orient the prospective jurors as to the case, and is discussed in the commentary to G.S. 15A-1221.

To facilitate enforcement of the prohibition against reading the pleadings to jurors, chosen or prospective, and minimize difficulties where courtroom facilities are limited, the Commission contemplates that in most instances arraignment will occur on a different day than the day jurors are called, or else arraignment will be waived pursuant to G.S. 15A-945.

§ 15A-1214. Selection of jurors; procedure. — (a) The clerk, under the supervision of the presiding judge, must call jurors from the panel by a system of random selection which precludes advance knowledge of the identity of the next juror to be called. When a juror is called and he is assigned to the jury box, he retains the seat assigned until excused.

(b) The judge must inform the prospective jurors of the case in accordance with G.S. 15A-1213. He may briefly question prospective jurors individually or as a group concerning general fitness and competency to determine whether there is cause why they should not serve as jurors in the case.

(c) The prosecutor and the defense counsel, or the defendant if not represented by counsel, may personally question prospective jurors individually concerning their fitness and competency to serve as jurors in the case to determine whether there is a basis for a challenge for cause or whether to exercise a peremptory challenge. The prosecution or defense is not foreclosed from asking a question merely because the court has previously asked the same or similar question.

(d) The prosecutor must conduct his examination of the first 12 jurors seated and make his challenges for cause and exercise his peremptory challenges. If the judge allows a challenge for cause, or if a peremptory challenge is exercised, the clerk must immediately call a replacement into the box. When the prosecutor is satisfied with the 12 in the box, they must then be tendered to the defendant. Until the prosecutor indicates his satisfaction, he may make a challenge for cause or exercise a peremptory challenge to strike any juror, whether an original or replacement juror.

(e) Each defendant must then conduct his examination of the jurors tendered him, making his challenges for cause and his peremptory challenges. If a juror is excused, no replacement may be called until all defendants have indicated satisfaction with those remaining, at which time the clerk must call replacements for the jurors excused. The judge in his discretion must determine order of examination among multiple defendants.

(f) Upon the calling of replacement jurors, the prosecutor must examine the replacement jurors and indicate satisfaction with a completed panel of 12 before the replacement jurors are tendered to a defendant. Only replacement jurors may be examined and challenged. This procedure is repeated until all parties have accepted 12 jurors.

(g) If at any time after a juror has been accepted by a party, and before the jury is impaneled, it is discovered that the juror has made an incorrect statement during voir dire or that some other good reason exists:

(1) The judge may examine, or permit counsel to examine, the juror to determine whether there is a basis for challenge for cause.

(2) If the judge determines there is a basis for challenge for cause, he must excuse the juror or sustain any challenge for cause that has been made.

(3) If the judge determines there is no basis for challenge for cause, any party who has not exhausted his peremptory challenges may challenge the juror.

Any replacement juror called is subject to examination, challenge for cause, and peremptory challenge as any other unaccepted juror.

(h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:

(1) Exhausted the peremptory challenges available to him;

(2) Renewed his challenge as provided in subsection (i) of this section; and

(3) Had his renewal motion denied as to the juror in question.

(i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:

(1) Had peremptorily challenged the juror; or

(2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

The judge may reconsider his denial of the challenge for cause, reconsidering facts and arguments previously adduced or taking cognizance of additional facts and arguments presented. If upon reconsideration the judge determines that the juror should have been excused for cause, he must allow the party an additional peremptory challenge.

(j) In capital cases the trial judge for good cause shown may direct that jurors be selected one at a time, in which case each juror must first be passed by the State. These jurors may be sequestered before and after selection. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

In comparing notes, members of the Commission discovered that procedures for selecting jurors varied from district to district, and decided there would be a virtue in spelling out a uniform system. The Commission recognized that absolute uniformity would not be possible because of differences in size of caseloads, physical facilities, and the like. Some counties use a jury pool; others do not. For this reason the Commission deliberately refrained from attempting to draft any definition of the jury "panel."

The Commission considered an alternative draft to subsections (e) and (f) in which the defense would be required to examine replacement jurors and tender a full panel of 12 back to the State, but chose the procedure in this section by a divided vote. Experienced defense attorneys on the Commission differed as to which of the two procedures they preferred.

Prior case law required that a party must not only exhaust his peremptory challenges but must also attempt to challenge one more juror in order to preserve his right to appeal. The Commission thought this to be an extremely undesirable requirement since, in most cases, the juror attempted to be challenged would remain on the jury. Therefore, the Commission devised the new procedure set out in subsection (i) to allow renewal of a challenge in writing so the juror would not be aware of it, and further provided for restoration of a previously used challenge if there are grounds for reconsideration. In this latter event the challenge would be to some other juror — an attempt to exercise the peremptory challenge which the party asserts should be restored to him. In most cases it is assumed the judge will deny restoration of the challenge, and the party will then be able to appeal the judge's action in refusing to allow the prior challenge for cause. If, of course, the judge does grant the additional challenge, then the party will have no basis for appeal as to that particular challenge. See subsection (h).

The Commission visualized that the written renewal of challenge may be made by a simple form showing the name of the juror as to whom

the challenge for cause was denied, and containing space for the party to set out briefly the basis for the challenge.

Subsection (g) only speaks to the procedure applicable before the jury is empanelled. There is a problem as to the procedure to be followed if a question as to a juror's fitness arises during trial while there is an alternate juror available to replace him. See State v. Kirkmen, 293 N.C 447 (1977) which was decided after the Commission's draft was submitted Cf. G.S. 15A-1215.

While the Commission did not intend in subsection (j) to authorize individual selection of jurors in every capital case, an obvious illustration of "good cause" for such selection would exist when pretrial publicity required individual examination of jurors in order not to expose the remainder of the panel to the prior knowledge of the juror being questioned. The reference to sequestration was included to make sure that the judge's powers are spelled out for highly sensitive cases, but it should be noted that G.S. 15A-1236(b) gives the judge plenary authority as to sequestration.

§ 15A-1215. Alternate jurors. — The judge may permit the seating of one or more alternate jurors. Alternate jurors must be sworn and seated near the jury with equal opportunity to see and hear the proceedings. They must attend the trial at all times with the jury, and obey all orders and admonitions of the judge. When the jurors are ordered kept together, the alternate jurors must be kept with them. If before final submission of the case to the jury, any juror dies, becomes incapacitated or disqualified, or is discharged for any other reason, an alternate juror becomes a juror, in the order in which selected, and serves in all respects as those selected on the regular trial panel. Alternate jurors receive the same compensation as other jurors and, unless they become jurors, must be discharged upon the final submission of the case to the jury. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The Commission determined that it would be preferable to restate the procedure concerning alternate jurors in this Article rather than to continue allowing G.S. 9-18 to apply to all cases. As has been noted previously, an amendment restricts G.S. 9-18 to civil cases. The only changes of importance are those effected in other sections: limiting peremptory challenges to one per alternate juror (G.S. 15A-1217(c)) and selection of alternate jurors before the act of impaneling the jury (G.S. 15A-1216).

§ 15A-1216. Impaneling jury. — After all jurors, including alternate jurors, have been selected, the clerk impanels the jury by instructing them as follows: "Members of the jury, you have been sworn and are now impaneled to try the issue in the case of State of North Carolina versus ..... You will sit together, hear the evidence, and render your verdict accordingly." (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Impaneling the jury is an especially critical stage in criminal cases as jeopardy attaches at this point. The Commission believed that there should be no doubt concerning the procedure, and therefore drafted this section.

Given variance of customs in different districts, members of the Commission were not certain of all points of the customary procedure to mark the impaneling of the jury — for example, whether accomplished by the judge or the clerk — but Commission members did seem positive that the panel as such takes no additional oath.

The Commission believes it would be desirable for a parallel statute to be enacted applying to the process of impaneling the jury in civil cases, perhaps to be codified in Chapter 9 of the General Statutes, but the Commission did not submit such a draft as this exceeds the scope of its mandate.

§ 15A-1217. Number of peremptory challenges. — (a) Capital cases.

(1) Each defendant is allowed 14 challenges.

(2) The State is allowed 14 challenges for each defendant.

(b) Noncapital cases.

(1) Each defendant is allowed six challenges.

(2) The State is allowed six challenges for each defendant.

(c) Each party is entitled to one peremptory challenge for each alternate juror in addition to any unused challenges. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Upon the recommendation of the Commission, G.S. 9-21 is repealed and the substance of that section is treated here. A companion amendment to G.S. 9-18 on alternate jurors makes that section apply only to civil cases.

In equalizing the number of peremptory challenges granted each side, the Commission followed the lead of the National Conference of Commissioners on Uniform State Laws. Uniform Rules, Rule 512(d). Accord, National Advisory Commission on Criminal Justice Standards and Goals, Report on the Courts, Standard 4.13 (1973). Giving an equal number of challenges to each side is the practice in most states. A.B.A. Standards, Trial by Jury, Commentary to § 2.6, at 75. See also Fed. Rules Crim. Proc. 24(b) (as amended effective August 1, 1976).

Subsection (c) makes a substantive change in that it provides for one peremptory challenge for each alternate juror rather than the two challenges allowed by G.S. 9-18 in civil cases.

§§ 15A-1218 to 15A-1220: Reserved for future codification purposes.

ARTICLE 73.

Criminal Jury Trial in Superior Court.

OFFICIAL COMMENTARY

The Commission decided to codify to a fairly large extent the procedures applicable to criminal jury trial, though it is obvious that many matters not specifically covered will continue to be governed by common law or tradition. In searching for drafting models, the Commission did not find any single satisfactory source, and has employed a wide variety of sources — and, additionally, has drafted several sections from scratch. In all events, this Article went through a large number of drafts, and all sections were changed in the course of successive meetings. Because of the numerous changes and many drafts it may not always be possible to pinpoint the source of a particular provision in the ensuing commentary. Citation of source, however, will be made when available and still pertinent to the statute in its final form.

Editor's Note. — The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly, as revised by the Commission prior to the reprinting of this volume.

§ 15A-1221. Order of proceedings in jury trial. — The order of a jury trial, in general, is as follows:

(1) The defendant must be arraigned and must have his plea recorded, out of the presence of the prospective jurors, unless he has waived arraignment under G.S. 15A-945.

(2) The judge must inform the prospective jurors of the case in accordance with G.S. 15A-1213.

(3) The jury must be sworn, selected and impaneled in accordance with Article 72, Selecting and Impaneling the Jury.
(4) Each party must be given the opportunity to make a brief opening statement, but the defendant may reserve his opening statement.
(5) The State must offer evidence.
(6) The defendant may offer evidence and, if he has reserved his opening statement, may precede his evidence with that statement.
(7) The State and the defendant may then offer successive rebuttals as provided in G.S. 15A-1226.
(8) At the conclusion of the evidence, the parties may make arguments to the jury in accordance with the provisions of G.S. 15A-1230.
(9) The judge must deliver a charge to the jury in accordance with the provisions of G.S. 15A-1231 and 15A-1232.
(10) The jury must retire to deliberate, and alternate jurors who have not been seated must be excused as provided in G.S. 15A-1215. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section is primarily based upon N.Y. Crim. Proc. Law § 260.30. See also Uniform Rules, Rule 521.

New features in this section include the requirement that the arraignment be out of the presence of prospective jurors and the authorization of opening statements by the parties — as the pleadings will not be read to the jury. See G.S. 15A-1213.

The Commission was aware that requiring arraignments to be held out of the presence of the prospective jurors may cause difficulties in some courthouses, but determined that the objective was desirable enough to be worth the trouble. The Commission thought that jurors hearing the stilted language of indictments and other pleadings and witnessing various motions upon arraignment are likely to get a distorted view of the case. It determined that the initial speech by the judge telling the jurors about the case, under G.S. 15A-1213, plus opening statements of the parties would be a far superior method of telling the jurors about the case and what to look and listen for.

The wording of subdivision (6) is designed to insure that a defendant is allowed to use a reserved opening statement only if he presents evidence. Otherwise, he would in effect be given an additional closing argument.

It should be noted that the order of trial set out in this section is that generally to be followed. It does not preclude a differing order if authorized by the common law or other applicable statutes or rules of court. An example is the defense of confession and avoidance entered by a defendant, which alters the order of proof in the case.

Editor's Note. — Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

§ 15A-1222. Expression of opinion prohibited. — The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section codifies the traditional North Carolina position requiring strict neutrality on the part of the trial judge. Compare A.B.A. Standards, Function of the Trial Judge § 5.6. A related section dealing with judicial comment on the verdict is G.S. 15A-1239.

§ 15A-1223. Disqualification of judge. — (a) A judge on his own motion may disqualify himself from presiding over a criminal trial or other criminal proceeding.

(b) A judge, on motion of the State or the defendant, must disqualify himself from presiding over a criminal trial or other criminal proceeding if he is:

(1) Prejudiced against the moving party or in favor of the adverse party; or
(2) A witness for or against one of the parties in the case; or
(3) Closely related to the defendant by blood or marriage; or
(4) For any other reason unable to perform the duties required of him in an impartial manner.

(c) A motion to disqualify must be in writing and must be accompanied by one or more affidavits setting forth facts relied upon to show the grounds for disqualification.

(d) A motion to disqualify a judge must be filed no less than five days before the time the case is called for trial unless good cause is shown for failure to file within that time. Good cause includes the discovery of facts constituting grounds for disqualification less than five days before the case is called for trial. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The source of this section is Special Advisory Committee of the Florida Supreme Court, Proposed Revision of Florida Criminal Procedure Rules, Rule 3.230 (1972). Compare Uniform Rules, Rule 741.

The Commission directed that the commentary indicate that the rules of evidence applicable to jury trials should not apply in the hearing on disqualification of a judge, so that affidavits otherwise reliable should not be excluded from consideration by virtue of the hearsay rule.

As to the judge's duty to excuse himself when he has any doubt as to his ability to preside impartially or whenever his impartiality can be reasonably questioned, see A.B.A. Standards, Function of the Trial Judge § 1.7.

§ 15A-1224. Death or disability of trial judge. — (a) If by reason of sickness or other disability a judge before whom the defendant is being tried is unable to continue presiding over the trial without the necessity of a continuance, he may in his discretion order a mistrial.

(b) If by reason of absence, death, sickness, or other disability, the judge before whom the defendant is being or has been tried is unable to perform the duties required of him before entry of judgment, and has not ordered a mistrial, any other judge assigned to the court may perform those duties, but if the other judge is satisfied that he cannot perform those duties because he did not preside at an earlier stage of the proceedings or for any other reason, he must order a mistrial. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section is a fairly elaborate expansion of A.B.A. Standards, Trial by Jury § 4.3. Compare Uniform Rules, Rule 741(e) and (f).

§ 15A-1225. Exclusion of witnesses. — Upon motion of a party the judge may order all or some of the witnesses other than the defendant to remain outside of the courtroom until called to testify, except when a minor child is called as a witness the parent or guardian may be present while the child is testifying even though his parent or guardian is to be called subsequently. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The Commission considered several different approaches to this section. One draft simply made the matter of exclusion discretionary with the trial judge. There was a great deal of sentiment within the Commission, however, for specifically allowing the key investigating officer in a complex case to remain beside the prosecutor to aid in the handling of the State's case. Some thought that such an officer should be required to testify first, and not be exempt from exclusion, but more Commission members believed this might distort the orderly presentation of the facts of the case. The Commission considered, and finally rejected as too complex, a draft that defined the "key investigating officer" who could not be excluded. (This draft attempted to distinguish the complex case with a key investigator from a simple "two-officer" case which many members of the Commission thought particularly called for exclusion.)

The Commission's final proposal was flatly to allow the prosecutor to select one witness to remain and assist in the courtroom — in addition to providing that the parent or guardian of a child may remain in the courtroom even though later to be called as a witness.

The General Assembly modified this section, though, to delete the clause relating to a witness to assist the prosecutor. The apparent basis lay in the belief that exclusion should not be prevented in the "two-officer" case, and in addition it was thought inappropriate for the statute to single out the State for a special privilege. It is assumed the judge would exercise his discretion to allow a key investigator, for the State or the defense, to remain in the courtroom to assist in the case — even though later to be called to the stand.

§ 15A-1226. Rebuttal evidence; additional evidence. — (a) Each party has the right to introduce rebuttal evidence concerning matters elicited in the evidence in chief of another party. The judge may permit a party to offer new evidence during rebuttal which could have been offered in the party's case in chief or during a previous rebuttal, but if new evidence is allowed, the other party must be permitted further rebuttal.

(b) The judge in his discretion may permit any party to introduce additional evidence at any time prior to verdict. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The source of this section is N.Y. Crim. Proc. Law § 260.30, paragraph 7.

§ 15A-1227. Motion for dismissal. — (a) A motion for dismissal for insufficiency of the evidence to sustain a conviction may be made at the following times:

(1) Upon close of the State's evidence.

(2) Upon close of all the evidence.

(3) After return of a verdict of guilty and before entry of judgment.
(4) After discharge of the jury without a verdict and before the end of the session.

(b) Failure to make the motion at the close of the State's evidence or after all the evidence is not a bar to making the motion at a later time as provided in subsection (a).

(c) The judge must rule on a motion to dismiss for insufficiency of the evidence before the trial may proceed.

(d) The sufficiency of all evidence introduced in a criminal case is reviewable on appeal without regard to whether a motion has been made during trial, as provided in G.S. 15A-1446(d)(5). (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Subsection (b) is new and changes a rule which the Commission believed had little utility.

The Commission believed the practice of reserving decision on a motion is little followed at present in North Carolina — and ought not to be encouraged. It therefore amended a draft provision based on the procedure of another jurisdiction, authorizing reservation of decision on the motion to dismiss, to bar such a procedure. This decision is reflected in subsection (c). Compare A.B.A. Standards, Trial by Jury, § 4.5.

Subsection (d) will allow appeal whether or not a motion has been made or renewed, and thus constitutes a change in the law. The phrase "all evidence" in that subsection, however, indicates that the reviewing court must consider the evidence of the defendant as well as that of the State in determining the question of sufficiency. In this respect the subsection represents a continuation of the rule presently followed by the Supreme Court of North Carolina.

§ 15A-1228. Notes by the jury. — Jurors may make notes and take them into the jury room during their deliberations. Upon objection of any party, the judge must instruct the jurors that notes may not be taken. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section was hotly debated. Some trial attorneys believed that jurors who carefully watched the demeanor of witnesses, not taking notes, are often better judges of the truth of testimony than their fellow jurors assiduously taking notes — who would only have a record of what the witness *said*. Others in the Commission championed the "modern" position that everyone in our society takes notes, and that it would be foolish to prohibit jurors from doing so. In favor of the taking of notes, see A.B.A. Standards, Trial by Jury § 4.2. See also State v. Ward, 286 N.C. 304 (1974).

The Commission finally offered a compromise draft which allowed notes to be taken unless a party objected. To keep one side from objecting in the middle of a trial as a stratagem to alter the courtroom dynamics, the Commission's draft required the objection to taking notes to be made before any evidence was offered. The General Assembly, however, removed the restriction on the right to object.

§ 15A-1229. View by jury. — (a) The trial judge in his discretion may permit a jury view. If a view is ordered, the judge must order the jury to be conducted to the place in question in the custody of an officer. The officer must be instructed to permit no person to communicate with the jury on any subject connected with the trial, except as provided in subsection (b), nor to do so himself, and to return the jurors to the courtroom without unnecessary delay or at a specified time. The judge, prosecutor, and counsel for the defendant must be present at the view by the jury. The defendant is entitled to be present at the view by the jury.

(b) A judge in his discretion may permit a witness under oath to testify at the site of the jury view and point out objects and physical characteristics material to his testimony. The testimony must be recorded. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The provision authorizing the taking of testimony at the scene of the view by the jury is an innovation. Although the defendant has a constitutional right to be present, it is believed that he can waive this right even if testimony is taken at the place of the view — so long as the defendant's counsel is there to cross-examine as appropriate and otherwise represent the defendant's interests.

§ 15A-1230. Limitations on argument to the jury. — (a) During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

(b) Length, number, and order of arguments allotted to the parties are governed by G.S. 84-14. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Although this section does no more than codify provisions that have long been in the case law and codes of ethics, it nevertheless engendered lengthy debate within the Commission. An original draft more closely modeled on A.B.A. Standards, Function of the Trial Judge § 5.10, was modified to reflect certain language in North Carolina State Bar, Code of Professional Responsibility, DR7-106(C).

As for subsection (b), it should be noted that in another action the 1977 General Assembly created a specific rule on order of argument in the sentencing phase of a capital case. In this separate penalty proceeding, the defendant is always given the right to the last argument. G.S. 15A-2000(a)(4).

§ 15A-1231. Jury instructions. — (a) At the close of the evidence or at an earlier time directed by the judge, any party may tender written instructions. A party tendering instructions must furnish copies to the other parties at the time he tenders them to the judge.

(b) On request of either party, the judge must, before the arguments to the jury, hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury. The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.

(c) After the arguments are completed, the judge must instruct the jury in accordance with G.S. 15A-1232.

(d) All instructions given and tendered instructions which have been refused become a part of the record. Failure to object to an erroneous instruction or to the erroneous failure to give an instruction does not constitute a waiver of the right to appeal on that error in accordance with G.S. 15A-1446(d)(13). (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section is believed by the Commission essentially to codify present practice, but the provision for a recorded conference under subsection (b) is new. Compare A.B.A. Standards, Trial by Jury § 4.6(c). It is noteworthy, however, that the Commission deleted that subsection's bar of right of appeal on failure to give an instruction unless one is tendered and a bar of right of appeal as to erroneous instructions unless objection is entered.

§ 15A-1232. Jury instructions; explanation of law; opinion prohibited. — In instructing the jury, the judge must declare and explain the law arising on the evidence. He is not required to state the evidence except to the extent necessary to explain the application of the law to the evidence. He must not express an opinion whether a fact has been proved. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section restates the substance of G.S. 1-180, which is repealed concurrently with the amendment of this section. The Commission found to be unnecessary the proviso in G.S. 1-180 requiring the judge to "give equal stress to the State and defendant in a criminal action" because this is a duty imposed on the judge by general requirements of fairness to the parties; it is not necessary that it be explicitly stated.

I. In General.
II. Opinion of Judge.
A. General Consideration.
B. What Constitutes an Opinion.
C. Illustrative Cases.
1. Remarks Held Not Erroneous.
a. Remarks Concerning a Party to the Trial.
b. Remarks Concerning Witnesses.
c. Remarks Concerning Weight and Credibility of Testimony.
d. Miscellanous Remarks.
2. Remarks Held Erroneous.
a. Remarks Concerning a Party to the Trial.
b. Remarks Concerning Witnesses.
c. Remarks Concerning Weight and Credibility of Testimony.
d. Miscellaneous Remarks.
III. Explanation of Law and Evidence.
A. General Consideration of the Charge.
B. Explanation Required.
1. In General.
2. Statement of Evidence.
3. Explanation of Law.
C. Illustrative Cases.

I. IN GENERAL.

Cross Reference. — For similar provisions relating to civil actions, see Rule 51 of the Rules of Civil Procedure (§ 1A-1).

Editor's Note. — The annotations under this section are from cases decided under former § 1-180. References to "this section" are to be construed as references to § 1-180.

For case law survey as to expression of opinion by trial judge, see 44 N.C.L. Rev. 1065 (1966); 45 N.C.L. Rev. 981 (1967).

For comment on North Carolina jury charge, present practice and future proposals, see 6 Wake Forest Intra. L. Rev. 459 (1970).

For note on judges' remarks in the absence of a jury as a violation of this section, see 13 Wake Forest L. Rev. 259 (1977).

This section establishes these fundamental propositions: (1) That it is the duty of the judge alone to decide legal questions presented at the trial, and to instruct the jury as to the law arising on the evidence given in the case; (2) that it is the task of the jury alone to determine the facts of the case from the evidence adduced; and (3) that "no judge, in giving a charge to the petit jury, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury."

This section is designed to make effectual the right of every litigant to have his cause considered with the "cold neutrality of the impartial judge" and the equally unbiased mind of a properly instructed jury. State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954); State v. McEachern, 283 N.C. 57, 194 S.E.2d 787 (1973).

This section imposes a duty of absolute impartiality on the trial judge. State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971); State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972); State v. Holden, 280 N.C. 426, 185 S.E.2d 889 (1972); State v. Allen, 283 N.C. 354, 196 S.E.2d 256 (1973).

The judge should be the embodiment of even and exact justice. He should at all times be on the alert lest in an unguarded moment something be incautiously said or done to shake the wavering balance which, as a minister of justice, he is supposed, figuratively speaking, to hold in his hands. Every suitor is entitled by the law to have his cause considered with the cold neutrality of the impartial judge, and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged. State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966); State v. Greene, 285 N.C. 482, 206 S.E.2d 229 (1974); State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

Every suitor is entitled by the law to have his cause considered with the cold neutrality of the impartial judge and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged. State v. Douglas, 268 N.C. 267, 150 S.E.2d 412 (1966).

Every person charged with crime has an absolute right to a fair trial. By this it is meant that he is entitled to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

It is the duty of the trial judge at all times to be absolutely impartial. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 2292, 29 L. Ed. 2d 861 (1971).

Every person charged with crime has an absolute right to a fair trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. To accord this right the trial judge must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. State v. Cox, 6 N.C. App. 18, 169 S.E.2d 134 (1969); State v. Lemmond, 12 N.C. App. 128, 182 S.E.2d 636 (1971).

Every person charged with a crime has a right to trial before an impartial judge and an unprejudiced jury, and any intimation or expressed opinion by the judge at any time during the trial which prejudices the jury against the accused is ground for a new trial. State v. Arnold, 284 N.C. 41, 199 S.E.2d 423 (1973).

And Judge Not to Invade Province of Jury. — The respective functions of the judge and jury in criminal trials are clearly demarcated by this section; by that demarcation the trial judge is denied the right, in any manner or in any form, to invade the province of the jury. State v. Holden, 280 N.C. 426, 185 S.E.2d 889 (1972).

Judge to Abstain from Prejudicial Conduct or Language. — The judge must abstain from conduct or language which tends to prejudice the accused or his cause with the jury. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 2292, 29 L. Ed. 2d 861 (1971).

The trial judge occupies an exalted station. Jurors entertain great respect for his opinion, and are easily influenced by any suggestion coming from him. As a consequence, he must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966); State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971); State v. Lowery, 12 N.C. App. 538, 183 S.E.2d 797 (1971); State v. Allen, 283 N.C. 354, 196 S.E.2d 256 (1973).

The judge occupies an exalted station, and jurors entertain a profound respect for his opinion. As a consequence, the judge prejudices a party or his cause in the minds of the trial jurors whenever he violates this section by expressing an adverse opinion on the facts. When this occurs, it is virtually impossible for the judge to remove the prejudicial impression from the minds of the trial jurors by anything which he may afterwards say to them by way of atonement or explanation. State v. Carter, 268 N.C. 648, 151 S.E.2d 602 (1966).

Strict Observance of Section's Provisions Required. — The Supreme Court of North Carolina has consistently endeavored to maintain the integrity of this section by requiring strict observance of its provisions. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970).

Cannot Be Extended. — The North Carolina statute being a restriction upon the almost universal rule, cannot be extended beyond its terms. State v. Baldwin, 178 N.C. 687, 100 S.E. 348 (1919); State v. Pugh, 183 N.C. 800, 111 S.E. 849 (1922).

The provisions of this section are mandatory, and a failure to comply is prejudicial error. State v. Bryant, 189 N.C. 112, 126 S.E. 107 (1925); State v. Evans, 211 N.C. 458, 190 S.E. 724 (1937); State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970); State v. Wingo, 30 N.C. App. 123, 226 S.E.2d 221 (1976).

And Failure to Observe Call for New Trial. — This section requires that the judge shall declare and explain the law arising on the evidence given in the case. This is a substantial right of litigants. Failure to observe it is error for which the injured party is entitled to a new trial. State v. Jones, 254 N.C. 450, 119 S.E.2d 213 (1961).

Any opinion or intimation of the judge at any time during the trial which prejudices a litigant in the eyes of the jury is reversible error. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 2292, 29 L. Ed. 2d 861 (1971).

Section Not Applicable to Hearing Where No Jury Is Present. — The provisions of this section prohibiting a court from giving an opinion on the evidence in the presence of the jury are obviously not applicable in a hearing where no jury is present. State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

The provisions of this section prohibiting a court from giving an opinion on the evidence do not apply in a juvenile delinquency proceeding where no jury is present. State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

II. OPINION OF JUDGE.

A. General Consideration.

This section forbids the judge to intimate his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury. State v. Owenby, 226 N.C. 521, 39 S.E.2d 378 (1946); State v. Wallace, 251 N.C. 378, 111 S.E.2d 714 (1959); State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971); State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 2292, 29 L. Ed. 2d 861 (1971); State v. Allen, 283 N.C. 354, 196 S.E.2d 256 (1973); State v. Hewitt, 19 N.C. App. 663, 199 S.E.2d 729 (1973); State v. Covington, 290 N.C. 313, 226 S.E.2d 629 (1976).

The slightest intimation from a judge as to the strength of the evidence, or as to credibility of the witness, will always have great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial. State v. Woolard, 227 N.C. 645, 44 S.E.2d 29 (1947), citing State v. Ownby, 146 N.C. 677, 61 S.E. 630 (1908); State v. Shinn, 234 N.C. 397, 67 S.E.2d 270 (1951), aff'd, 238 N.C. 535, 78 S.E.2d 388 (1953); State v. McLean, 17 N.C. App. 629, 195 S.E.2d 336 (1973); State v. Head, 24 N.C. App. 564, 211 S.E.2d 534 (1975).

This section forbids a judge to express to the jury his opinion on the facts of the case he is trying. State v. Douglas, 268 N.C. 267, 150 S.E.2d 412 (1966).

The trial judge is forbidden by this section to express an opinion upon the evidence in any manner during the course of the trial or in his instructions to the jury. State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

The expression by the court in the presence of the jury of an opinion concerning a fact to be found by the jury is forbidden by this section. State v. Carter, 268 N.C. 648, 151 S.E.2d 602 (1966).

Proof must be made without intimation or suggestion from the court that the controverted facts have or have not been established. State v. Patton, 2 N.C. App. 605, 163 S.E.2d 542 (1968); State v. Hall, 11 N.C. App. 410, 181 S.E.2d 240 (1971); State v. Whitted, 14 N.C. App. 62, 187 S.E.2d 391 (1972).

The slightest intimation from the judge as to the weight, importance, or effect of the evidence has great weight with the jury, and, therefore, the Supreme Court must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial. State v. Patton, 2 N.C. App. 605, 163 S.E.2d 542 (1968).

The trial judge is expressly forbidden to convey to the jury, in any manner, at any stage of the trial, his opinion as to whether a fact is fully or sufficiently proven. State v. Cox, 6 N.C. App. 18, 169 S.E.2d 134 (1969); State v. Lemmond, 12 N.C. App. 128, 182 S.E.2d 636 (1971).

The judge may not make a statement or ask a defendant or a witness questions tending to impeach him or to cast doubt on his credibility or which intimate that a fact has or has not been established. State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 738 (1970).

This section has been construed to include any opinion or even an intimation of the judge, at any time during the trial, calculated to prejudice either of the parties with the jury. State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971).

This section forbids any intimation of the trial judge's opinion in any form whatsoever. State v. Cousin, 292 N.C. 461, 233 S.E.2d 554 (1977).

Evidence Must Be Stated Impartially. — It has been accepted as the proper construction and meaning of the act of this section, though it goes beyond the words: that a judge in charging a jury shall state the evidence fairly and impartially, and that he shall express no opinion on the weight of evidence. State v. Jones, 67 N.C. 280 (1872).

Section Not Confined to Charge. — In terms, this statute refers to the charge, but it has always been construed as including the expression of any opinion, or even an intimation by the judge, at any time during the trial which is calculated to prejudice either of the parties. State v. Bryant, 189 N.C. 112, 126 S.E. 107 (1925); State v. Oakley, 210 N.C. 206, 186 S.E. 244 (1936); State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

Although this section refers in terms to the charge, it has always been construed to forbid the judge to convey to the trial jury in any way at any stage of the trial his opinion on the facts involved in the case. State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954).

This section does not apply to the charge alone, but prohibits a trial judge from asking questions or making comments at any time during the trial which amount to an expression of opinion as to what has or has not been shown

by the testimony of a witness. State v. Patton, 2 N.C. App. 605, 163 S.E.2d 542 (1968); State v. Cox, 6 N.C. App. 18, 169 S.E.2d 134 (1969); State v. Lemmond, 12 N.C. App. 128, 182 S.E.2d 636 (1971).

This section applies not only to the charge of the court, but also prohibits the court at a jury trial from expressing an opinion on the evidence or the veracity of the witnesses at any time during the trial in any manner, or in any form, by word of mouth or by action, and prohibits the trial judge from asking questions or making comments at any time during the trial which amount to an expression of opinion as to what has or has not been shown by the testimony of a witness. State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 738 (1970).

It is error for the trial judge to express or imply, in the presence of the jury, any opinion as to the guilt or innocence of the defendant, or as to any other fact to be determined by the jury, or as to the credibility of any witness. It is immaterial how such opinion is expressed or implied, whether in the charge of the court, in the examination of a witness, in the rulings upon objections to evidence or in any other manner. State v. Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972).

Section Applies Throughout Trial. — This section applies to any expression of opinion by the judge in the hearing of the jury at any time during the trial. State v. Cook, 162 N.C. 586, 77 S.E. 759 (1913); State v. Williamson, 250 N.C. 204, 108 S.E.2d 443 (1959); State v. Walker, 266 N.C. 269, 145 S.E.2d 833 (1966); State v. McEachern, 283 N.C. 57, 194 S.E.2d 787 (1973).

It was considered so essential to protect the right of trial by jury that this section was broadly worded and was among the earliest of our remedial enactments, and, while it refers in terms to the charge, it has always been construed as including the expression of any opinion, or even an intimation of the judge, at any time during the trial, calculated to prejudice either of the parties. State v. Smith, 240 N.C. 99, 81 S.E.2d 263 (1954); State v. Lewis, 32 N.C. App. 471, 232 S.E.2d 472 (1977).

This section proscribes the court from expressing an opinion upon the weight or credibility of the evidence in any manner either in the course and conduct of the trial or in its instructions to the jury. Bailey v. Hayman, 220 N.C. 402, 17 S.E.2d 520 (1941); Hyder v. Asheville Storage Battery Co., 242 N.C. 553, 89 S.E.2d 124 (1955).

This section has been interpreted to forbid the judge's expression of an opinion before the jury at every stage of the trial process. State v. Teasley, 31 N.C. App. 729, 230 S.E.2d 692 (1976).

This section has been construed to prohibit any opinion or intimation of the judge at any time during the trial which is calculated to prejudice the parties in the eyes of the jury. State v. Holden, 280 N.C. 426, 185 S.E.2d 889 (1972); State v. Allen, 283 N.C. 354, 196 S.E.2d 256 (1973).

But this section relates only to expressions of opinion during trial of case. State v. Dark, 22 N.C. App. 566, 207 S.E.2d 290, cert. denied, 285 N.C. 760, 209 S.E.2d 284 (1974).

A statement of the court, made prior to the time the case was called for trial, indicating that he would not try the case until defendants were apprehended, does not violate this section, since this section relates only to the expression of opinion during the trial of the case. State v. Lippard, 223 N.C. 167, 25 S.E.2d 594, cert. denied, 320 U.S. 749, 64 S. Ct. 52, 88 L. Ed. 2d 445 (1943).

The trial of a case begins within the purview of this section when the prospective jurors are called to be examined touching their fitness to serve on the trial jury. This being so, it is a violation of the section for the judge to communicate his opinion on the facts in the case to the trial jury by his remarks or questions to prospective jurors during the selection of the trial jury. State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954); State v. Dark, 22 N.C. App. 566, 207 S.E.2d 290 (1974).

Motive of Judge Immaterial. — The probable effect or influence upon the jury, and not the motive of the judge, determines whether the party whose right to a fair trial has been impaired is entitled to a new trial. State v. Bryant, 189 N.C. 112, 126 S.E. 107 (1925); State v. Oakley, 210 N.C. 206, 186 S.E. 244 (1936); State v. Shinn, 234 N.C. 397, 67 S.E.2d 270 (1951), aff'd, 238 N.C. 535, 78 S.E.2d 388 (1953); State v. Smith, 240 N.C. 99, 81 S.E.2d 263 (1954); State v. McEachern, 283 N.C. 57, 194 S.E.2d 787 (1973).

Whether the conduct or the language of the judge amounts to an expression of his opinion on the facts is to be determined by its probable meaning to the jury, and not by the motive of the judge. State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954); State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 738 (1970).

The effect on the jury of the remark and not the judge's motive in making it is determinative. State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

When Equal Protection Clause Violated. — The equal protection clause of the Fourteenth Amendment of the United States Constitution is not violated by prejudicial remarks of the judge unless there is shown to be an element of intentional or purposeful discrimination and the burden of showing this is on the accused. Davis v. North Carolina, 196 F. Supp. 488 (E.D.N.C.), cert. denied, 365 U.S. 855, 81 S. Ct. 816, 5 L. Ed. 2d 819 (1961), rev'd on other grounds, 310 F.2d 904 (1963).

What Remarks Presumed Correct. — The remarks of the trial judge in discharging a jury after verdict, or in impressing upon jurors and the public the duty of jurors in their conduct, are prima facie presumed on appeal to be correct. State v. Pugh, 183 N.C. 800, 111 S.E. 849 (1922).

Inadvertent Expression of Opinion. — The fact that the expression of opinion was unintentional or inadvertent does not make it less prejudicial. State v. Hall, 11 N.C. App. 410, 181 S.E.2d 240 (1971).

Prejudicial Impression Not Removed by Subsequent Explanation. — The judge prejudices a party or his cause in the minds of the trial jurors whenever he violates this section by expressing an adverse opinion on the facts. When this occurs, it is virtually impossible for the judge to remove the prejudicial impression from the minds of the trial jurors by anything which he may afterwards say to them by way of atonement or explanation. State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954).

Once the trial judge has given, in the presence of the jury, the slightest intimation, directly or indirectly, or his opinion concerning a fact to be found by the jury or concerning the credibility of testimony given by a witness, such error cannot be corrected by instructing the jury not to consider the expression by the court. State v. Carter, 268 N.C. 648, 151 S.E.2d 602 (1966).

Once the trial judge expresses an opinion as to the facts before the jury, the resulting prejudice to the defendant is virtually impossible to cure. The prejudice is not removed by the judge's instructing the jury not to consider the remarks. State v. Teasley, 31 N.C. App. 729, 230 S.E.2d 692 (1976).

Error committed by the court in expressing an opinion on the facts is virtually impossible to cure. State v. Clanton, 20 N.C. App. 275, 201 S.E.2d 365 (1973).

Ordinarily, an expression of opinion cannot be cured by instructing the jury to disregard it. State v. McEachern, 283 N.C. 57, 194 S.E.2d 787 (1973).

Harmless Error. — The comment made or the question propounded should be considered in the light of all the facts and attendant circumstances disclosed by the record, and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless. State v. Hoyle, 3 N.C. App. 109, 164 S.E.2d 83 (1968); State v. Huffman, 7 N.C. App. 92, 171 S.E.2d 339 (1970); State v. Gibson, 14 N.C. App. 409, 188 S.E.2d 683 (1972); State v. Wooten, 15 N.C. App. 193, 189 S.E.2d 579 (1972).

Not every ill-advised expression by the trial judge is of such harmful effect as to require a reversal. The objectionable language must be viewed in light of all the facts and circumstances, and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless. State v. Holden, 280 N.C. 426, 185 S.E.2d 889 (1972); State v. Blue, 17 N.C. App. 526, 195 S.E.2d 104 (1973).

Although the language used in an instruction was a poor choice for the purpose intended and was expressly disapproved and would ordinarily require a new trial, it did not constitute reversible error because it had no prejudicial effect on the result of the trial and was therefore harmless. State v. Bailey, 280 N.C. 264, 185 S.E.2d 683, cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

A defendant who contends that the trial court's remarks amount to an expression of opinion in the presence of the jury must show more than the possibility of unfair influence; it must appear with ordinary certainty that the court's language, when fairly interpreted, was likely to convey an opinion to the jury and could reasonably have had an appreciable effect on the result of the trial. State v. Hollingsworth, 11 N.C. App. 674, 182 S.E.2d 26 (1971); State v. Wallace, 21 N.C. App. 523, 204 S.E.2d 855 (1974).

Weight and Sufficiency of Evidence Question for Jury. — Whether there be any evidence is a question for the judge. Whether it is sufficient evidence is a question for the jury. State v. Moses, 13 N.C. 452 (1830); State v. Hardee, 83 N.C. 619 (1880).

A judge is prohibited by this section from expressing an opinion upon the weight of the evidence, and could not instruct the jury that this was or was not clear, strong, and convincing. Earnhardt v. Clement, 137 N.C. 91, 49 S.E. 49 (1904).

It is the province of the jury to ascertain the facts from the evidence, the weight and credibility thereof being exclusively for its determination. In re Will of Bergeron, 196 N.C. 649, 146 S.E. 571 (1929).

Discrepancies and contradictions in the evidence are for the jury and not for the court. Jones v. Johnson, 267 N.C. 656, 148 S.E.2d 583 (1966).

If diverse inferences may be drawn from the evidence, some favorable to the plaintiff and others to the defendant, the case should be submitted to the jury for final determination. Jones v. Johnson, 267 N.C. 656, 148 S.E.2d 583 (1966).

The question of the admissibility of evidence is for the judge; whether there is evidence and its weight and credibility are for the jury. State v. Perry, 3 N.C. App. 356, 164 S.E.2d 629 (1968).

The weight and credibility of the evidence must be left strictly to the jury. State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

And Final Decision of Facts Rests with Jury. — The jury must not only unanimously concur in the verdict, but must be left free to act according to the dictates of their own judgment. The final decision upon the facts rests with them, and any inference by the court tending to influence them into a verdict against their convictions is irregular and without the warrant of law. The judge is not justified in expressing to the jury his opinion that the defendant is guilty upon the evidence adduced. State v. Maxwell, 215 N.C. 32, 1 S.E.2d 125 (1939).

Objections Must Be Made in Apt Time.—The general rule is that objections to the charge in stating the contentions of the parties or in recapitulating the evidence must be called to the court's attention in apt time to afford opportunity for correction, in order that an exception thereto will be considered on appeal. State v. Weaver, 3 N.C. App. 439, 165 S.E.2d 15 (1969).

Objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal. State v. Gaines, 283 N.C. 33, 194 S.E.2d 839 (1973).

A slight inaccuracy in stating the evidence will not be held reversible error when the matter is not called to the court's attention in apt time to afford opportunity for correction. State v. Brandon, 24 N.C. App. 558, 211 S.E.2d 496 (1975); State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975).

An inadvertence in stating the contentions of the parties or in recapitulating the evidence must be called to the trial court's attention in time for correction. State v. Brandon, 24 N.C. App. 558, 211 S.E.2d 496 (1975).

An inadvertence in recapitulating the evidence must be called to the trial court's attention in time for correction and will not be held reversible error when this is not done. State v. Watson, 287 N.C. 147, 214 S.E.2d 85 (1975).

But instruction containing statement of material fact not shown in evidence must be held prejudicial, even though not called to the court's attention at the time. State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975).

Unsupported Assumption of Evidence Is Prejudicial Despite Untimely Objection. — While ordinarily error in stating contentions of the parties must be brought to the trial court's attention in time to afford opportunity for correction, where the misstatement of a contention upon a material point includes an assumption of evidence entirely unsupported by the record, the misstatement must be held prejudicial, notwithstanding the absence of timely objection. State v. Stroud, 10 N.C. App. 30, 177 S.E.2d 912 (1970).

Credibility of Witnesses Is for Jury. — No judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a witness or to impeach his credibility. The cold neutrality of an impartial judge should constantly be observed, as the slightest intimation from the bench will always have great weight with the jury. State v. Auston, 223 N.C. 203, 25 S.E.2d 613 (1943). See State v. Owenby, 226 N.C. 521, 39 S.E.2d 378 (1946); State v. McNeill, 231 N.C. 666, 58 S.E.2d 366 (1950).

The trial court may not by remarks or questions impeach the credibility of a witness or in any manner convey to the jury the impression that the testimony of a witness, in the opinion of the court, is probably unworthy of belief. State v. Perry, 231 N.C. 467, 57 S.E.2d 774 (1950).

No judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a witness or to impeach his credibility. State v. Simpson, 233 N.C. 438, 64 S.E.2d 568 (1951); State v. Kimbrey, 236 N.C. 313, 72 S.E.2d 677 (1952); State v. Hopson, 265 N.C. 341, 144 S.E.2d 32 (1965). See State v. Smith, 240 N.C. 99, 81 S.E.2d 263 (1954).

The credibility of the witnesses and conflicts in the evidence are for the jury, not the court. Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970).

The credibility of witnesses, the weight and sufficiency of testimony, are matters peculiarly within the province of the jury to consider and pass upon. Williford v. Jackson, 29 N.C. App. 128, 223 S.E.2d 528 (1976).

It is for the jury and not for the judge to say how the testimony of a witness is affected by other testimony. Williford v. Jackson, 29 N.C. App. 128, 223 S.E.2d 528 (1976).

The sound rule that no judge at any time is permitted to cast doubt upon the testimony of a witness is firmly fixed in this jurisdiction. The judge must exercise great care to see that nothing he does or says during the trial can be understood by the jury as an expression of an opinion on the facts or conveys an impression of judicial meaning. State v. Battle, 18 N.C. App. 256, 196 S.E.2d 536 (1973).

The criterion for determining whether the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect upon the jury. In applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made. State v. Cox, 6 N.C. App. 18, 169 S.E.2d 134 (1969); State v. Lemmond, 12 N.C. App. 128, 182 S.E.2d 636 (1971); State v. Spinks, 24 N.C. App. 548, 211 S.E.2d 476 (1975).

Manner of Stating Contentions of Parties. — The prohibition against the court expressing an opinion on the evidence applies to the manner of stating the contentions of the parties as well as in any other portion of the charge. State v. Watson, 1 N.C. App. 250, 161 S.E.2d 159 (1968).

Although a statement of contentions is permissible, the trial judge must exercise extreme care to retain, and convey the appearance of retaining, a cold neutrality. State v. Watson, 1 N.C. App. 250, 161 S.E.2d 159 (1968).

Examination of Witnesses Discretionary. — The manner of conducting the examination of witnesses is left largely to the discretion of the judge and can but seldom be the subject of review, even when not entirely approved by this court. State v. Brown, 100 N.C. 519, 6 S.E. 568 (1888).

Exceptions after Verdict. — Where a remark or question by the court amounts to an expression of opinion, an exception thereto need not be taken at the time but may be taken after verdict. State v. Bryant, 189 N.C. 112, 126 S.E. 107 (1925); State v. Perry, 231 N.C. 467, 57 S.E.2d 774 (1950). But see State v. Brown, 100 N.C. 519, 6 S.E. 568 (1888).

A broadside exception to the charge will not be considered, but appellant must point out wherein the charge failed to comply with the provisions of this section. State v. Sutton, 230 N.C. 244, 52 S.E.2d 921 (1949).

Where the error assigned is that "the court erred in failing to declare and explain the law arising on the evidence given in the case," and that in so failing the court violated this section, such an assignment of error is a broadside exception and will not be considered on appeal. State v. Rigsbee, 15 N.C. App. 218, 189 S.E.2d 583 (1972).

Where the court expresses an opinion upon the weight of the evidence while stating contentions, it is not required that it must be brought to the trial judge's attention before verdict; this question can be considered for the first time on appeal upon exceptions duly noted. State v. Watson, 1 N.C. App. 250, 161 S.E.2d 159 (1968).

Record on Appeal Must Show Error. — If an appeal is taken on the ground that the judge, by his manner or emphasis intimated an opinion upon the facts, the record must allege the tone, emphasis or manner. State v. Wilson, 76 N.C. 120 (1877).

An assignment of error to a charge should state wherein the charge fails to comply with this section. State v. Jones, 227 N.C. 402, 42 S.E.2d 465 (1947).

Where there is no assignment of error in the record for failure of the court to state the evidence and declare and explain the law arising thereon, exceptions on this ground will not be considered on appeal. State v. Spivey, 230 N.C. 375, 53 S.E.2d 259 (1949); State v. Thomas, 244 N.C. 212, 93 S.E.2d 63 (1956).

Correctness of Instructions Will Be Presumed. — Upon review by certiorari of the denial of defendant's motion for a new trial on the ground that he was denied due process of law in the trial resulting in his conviction, it will be presumed that the trial court correctly instructed the jury as to the facts of the case, in the absence of suggestion to the contrary. State v. Chesson, 228 N.C. 259, 45 S.E.2d 563 (1947).

Where the charge of the court to the jury does not appear in the record, it will be presumed that the court correctly charged the jury as to the law arising upon the evidence as required by this section. State v. Strickland, 254 N.C. 658, 119 S.E.2d 781 (1961).

When the charge is not included in a case on appeal, it is presumed to be free from error and also it is presumed that the jury was properly instructed as to the law arising upon the evidence. State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971).

B. What Constitutes an Opinion.

In General. — This section has been interpreted to mean that no judge, in giving a charge to the jury or at any time during the trial, shall intimate whether a fact is fully or sufficiently proved. State v. Mitchell, 193 N.C. 796, 138 S.E. 166 (1927), citing State v. Hart, 186 N.C. 582, 120 S.E. 345 (1923); State v. Kline, 190 N.C. 177, 129 S.E. 417 (1925). See Speed v. Perry, 167 N.C. 122, 83 S.E. 176 (1914).

The judge must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. State v. Holden, 280 N.C. 426, 185 S.E.2d 889 (1972); State v. Blue, 17 N.C. App. 526, 195 S.E.2d 104 (1973).

Test of Violation. — It is a violation of this section for a judge at any time in the progress of a trial (as well as during his charge to the jury) to express an opinion as to the weight of evidence or to use language which, fairly interpreted, would make it reasonably certain that it would influence the minds of the jury in determining a fact. State v. Browning, 78 N.C. 555 (1878).

The provisions of this section may be violated at any stage of the trial by comments on the testimony of a witness, by remarks which tend to discredit a witness, by imbalancing the evidence in the charge to the jury or by any other means which intimates an opinion of the trial judge in a manner which would deprive an accused of a fair and impartial trial before the jury. State v. Greene, 285 N.C. 482, 206 S.E.2d 229 (1974).

An expression of opinion prohibited by this section occurs when the judge's remarks imbalance the evidence in a manner which deprives the accused of a fair and impartial trial. State v. Buff, 32 N.C. App. 395, 232 S.E.2d 303 (1977).

The criterion for determining whether or not the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect of the language upon the jury. In applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made. State v. Cousin, 292 N.C. 461, 233 S.E.2d 554 (1977).

Direct Language Not Necessary to Constitute Error. — The judge may indicate to the jury what impression the evidence has made on his mind, or what deductions he thinks should be drawn therefrom, without expressly stating his opinion in so many words. This may be done by his manner or peculiar emphasis or by his so arraying and presenting the evidence as to give one of the parties an undue advantage over the other; or, again the same result may follow the

use of language or from an expression calculated to impair the credit which might not otherwise and under normal conditions be given by the jury to the testimony of one of the parties. State v. Woolard, 227 N.C. 645, 44 S.E.2d 29 (1947), citing State v. Benton, 226 N.C. 745, 40 S.E.2d 617 (1946); State v. Simpson, 233 N.C. 438, 64 S.E.2d 568 (1951); State v. Shinn, 234 N.C. 397, 67 S.E.2d 270 (1951), aff'd, 238 N.C. 535, 78 S.E.2d 388 (1953); State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

Where an intimation as to whether any fact is sufficiently proved is reasonably inferred from the manner of the judge or his peculiar emphasis of the evidence, or in his presentation thereof or his form of expression, or by the tone or general tenor of the trial, giving advantage to the appellee thereby, such as to impair the credit which might otherwise, under normal conditions be given by the jury to the testimony, it comes within the prohibition of this section. State v. Hart, 186 N.C. 582, 120 S.E. 345 (1923); State v. Rhinehart, 209 N.C. 150, 183 S.E. 388 (1936).

It can make no difference in what way or manner or when the opinion of the judge is conveyed to the jury, whether directly or indirectly, by comment on the testimony of a witness, by arraying the evidence unequally in the charge, by imbalancing the contentions of the parties, by the choice of language in stating the contentions, or by the general tone and tenor of the trial. This section forbids any intimation of his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury. State v. Simpson, 233 N.C. 438, 64 S.E.2d 568 (1951); State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

If the judge intimates an opinion by his manner of stating the evidence, by imbalancing the contentions of the parties, by the choice of language in stating the contentions, or by the general tone and tenor of the trial, he violates this section. State v. Douglas, 268 N.C. 267, 150 S.E.2d 412 (1966).

It can make no difference in what way or when the opinion of the judge is conveyed to the jury, whether directly or indirectly, or by the general tone and tenor of the trial, this section forbids an intimation of his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury. State v. McBryde, 270 N.C. 776, 155 S.E.2d 266 (1967); State v. Davis, 272 N.C. 102, 157 S.E.2d 671 (1967); State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

Even if it cannot be said that a remark or comment is prejudicial in itself, an examination of the record may indicate a general tone or trend of hostility or ridicule which has a cumulative effect of prejudice. If so, a new trial must be allowed. State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

No assumption of fact or opinion expressed or fairly inferable from the charge respecting the credibility of the testimony can be made by the trial court without violating this section. State v. Love, 229 N.C. 99, 47 S.E.2d 712 (1948).

Taking Witness into Custody in Presence of Jury. — In the prosecution of defendant for willful failure to support his illegitimate child, the action of the court, in the presence of the jury, in ordering the sheriff to take defendant's witness into custody immediately after the witness had testified for defendant that he had had intercourse with prosecutrix, was held to be prejudicial error as disparaging or impeaching the credibility of the witness in the eyes of the jury. State v. McNeill, 231 N.C. 666, 58 S.E.2d 366 (1950).

Where the court audibly told the defendant's chief witness in the presence of the jury not to leave the courtroom, and shortly thereafter the witness was placed in custody in the prisoner's box in plain view of the jury, the incident must have resulted in weakening the testimony of the witness in the eyes of the jury and constituted a violation of this section. State v. McBryde, 270 N.C. 776, 155 S.E.2d 266 (1967).

If a witness is taken into custody during the course of the trial under such circumstances as to lead the jury to the conclusion that the judge was of the opinion that the witness was guilty of perjury, such action constitutes prejudicial error as being an expression of opinion by the court as to the credibility of the witness. State v. Garrett, 5 N.C. App. 367, 168 S.E.2d 479 (1969).

Taking Witness into Custody Out of Presence of Jury. — The fact that the trial court ordered a State's witness to be taken into custody and charged with perjury does not constitute an expression of opinion to the prejudice of defendants in violation of this section when the trial court's action took place out of the presence of the jury. State v. Garrett, 5 N.C. App. 367, 168 S.E.2d 479 (1969).

Taking Defendant into Custody during Course of Trial. — There is no prejudicial error so long as the discretion of the trial judge to insure the presence of a defendant by ordering him into custody during the course of trial is not exercised in a manner which would convey to the jury, either expressly or implicitly, the slightest intimation that the court had any opinion regarding defendant's credibility as a witness or the strength of his case. State v. Collins, 19 N.C. App. 553, 199 S.E.2d 491 (1973).

Possibility of Unfair Inference Insufficient. — It is not sufficient to show, that what the judge did or said might have had an unfair influence, or that his words, critically examined and detached from the context and the incidents of the trial, were capable of a construction from which his opinion on the weight of testimony might be inferred; but it must appear, with

ordinary certainty, that his manner of arraying and presenting the evidence was unfair, and likely to be prejudicial, or that his language, when fairly interpreted, was likely to convey to the jury his opinion on the weight of the testimony. State v. Jones, 67 N.C. 285 (1872).

It is not sufficient to show by a critical examination that the judge's words, detached from the context and the incidents of the trial, are capable of an interpretation from which an expression of opinion may be inferred. State v. Allen, 283 N.C. 354, 196 S.E.2d 256 (1973); State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976).

The bare possibility that an accused may have suffered prejudice from the conduct or language of the judge is not sufficient to overthrow an adverse verdict. State v. Cousin, 292 N.C. 461, 233 S.E.2d 554 (1977).

Section Applies to Issues. — The facts on which this section restrains the judge from expressing an opinion to the jury are those respecting which the parties take issue or dispute and on which, as having occurred or not occurred, the imputed liability of the defendant depends. Long v. Byrd, 169 N.C. 658, 86 S.E. 574 (1915), citing State v. Angel, 29 N.C. 27 (1846).

Language Subject to Misapprehension. — When there is a conflict of testimony which leaves a case in doubt before the jury, and the judge uses language which may be subject to misapprehension and is calculated to mislead, the Supreme Court will order a venire de novo. State v. Rogers, 93 N.C. 523 (1885).

Remarks Belittling Counsel. — Remarks from the bench which tend to belittle and humiliate counsel, or which suggest that counsel is not acting in good faith, reflect not only on counsel but on the defendant as well and may cause the jury to disbelieve all evidence adduced in defendant's behalf. State v. Holden, 280 N.C. 426, 185 S.E.2d 889 (1972).

When remarks from the bench tend to belittle and humiliate counsel, defendant's case can be seriously prejudiced in the eyes of the jury. State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971).

It is error for the judge to make any remarks which tend to belittle or humiliate defendant's cause or his counsel before the jury. State v. Hewitt, 19 N.C. App. 666, 199 S.E.2d 695 (1973).

While the trial judge should be permitted considerable latitude in dealing with counsel, ruling on objections and keeping the trial moving, he must not forget that the jury hangs on his every word and is most attentive to any indication of his view of the proceedings. Thus repeated indications of impatience and displeasure of such nature to indicate that the judge thinks little of counsel's intelligence and what he is doing are most damaging to a fair presentation of the defense. State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

Admonitions of the court to counsel upon improper questioning of witnesses have repeatedly been held not prejudicial. State v. Cox, 6 N.C. App. 18, 169 S.E.2d 134 (1969).

A remark by the court in admitting or excluding evidence is not prejudicial when it amounts to no more than a ruling on the question or where it is made to expedite the trial. State v. Cox, 6 N.C. App. 18, 169 S.E.2d 134 (1969).

Control of Examination and Cross-Examination. — It is both the right and the duty of the presiding judge to control the examination and cross-examination of witnesses, both for the purpose of conserving the time of the court, and for the purpose of protecting the witness from prolonged and needless examination, but in doing so the court must not intimate any opinion either of the witness or his credibility. State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971).

Intimation That Controverted Facts Have or Have Not Been Established. — Proof must be made without intimation or suggestion from the court that the controverted facts have or have not been established. State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963); State v. Brinkley, 10 N.C. App. 160, 177 S.E.2d 727 (1970).

A court's expressions of opinion are particularly harmful if they include assumptions of evidence entirely unsupported by the record. State v. Stroud, 10 N.C. App. 30, 177 S.E.2d 912 (1970).

Declaration That Evidence Tends to Show Fact Beyond Reasonable Doubt. — The credibility of the evidence is always for the jury and the judge may never declare that all the evidence tends to show any fact beyond a reasonable doubt. State v. Kimball, 261 N.C. 582, 135 S.E.2d 568 (1964).

Remarks Made in Mere Pleasantry. — Remarks made in mere pleasantry by the trial judge in the presence of the jury, in relation to irrelevant testimony of a witness he had theretofore been patiently endeavoring to properly confine, will not be held for reversible error as an expression of his opinion forbidden by statute, when it could not reasonably have had any appreciable effect upon the jury, and could only have been regarded by them in the manner in which it was uttered. State v. Jones, 181 N.C. 546, 106 S.E. 817 (1921).

Assumption That Fact Controverted by Plea of Not Guilty Has Been Established. — The assumption by the court that any fact controverted by a plea of not guilty has been established is prejudicial error. State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963); State v. Patton, 2 N.C. App. 605, 163 S.E.2d 542 (1968); State v. Hall, 11 N.C. App. 410, 181 S.E.2d 240 (1971); State v. Brinkley, 10 N.C. App. 160, 177 S.E.2d 727 (1970); State v. Cates, 24 N.C. App. 65, 210 S.E.2d 100 (1974).

An expression of opinion or assumption by the trial court that all the essential elements of the

offenses charged, which were controverted and put in issue by defendant's plea of not guilty, were not challenged and not denied by the defendant was prejudicial error. State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963).

Instruction That There Is No Evidence. — If any testimony, however slight or insufficient, is given, which tends to establish the issue, it is error to instruct the jury that there is none. State v. Allen, 48 N.C. 257 (1855).

Hypothetical Statements by Judge. — Merely hypothetical instructions are erroneous, and should not be indulged in, as they proceed on an assumption of facts. State v. Benton, 19 N.C. 196 (1836); State v. Collins, 30 N.C. 407 (1848); State v. Murph, 60 N.C. 129 (1863); Johnson v. Bell, 74 N.C. 355 (1876).

Remarks Must Be Prejudicial. — Unless it appears with ordinary certainty that the rights of either party have been in some way prejudiced by the remark or conduct of the court, it cannot be treated as error. State v. Browning, 78 N.C. 555 (1878).

A remark or question by the court during the progress of the trial, even though it amounts to a prohibited expression of opinion by the court, will not entitle defendant to a new trial when the matter, considered in the light of all the facts and attendant circumstances, is not of such prejudicial nature as could reasonably have had an appreciable effect on the result of the trial. State v. Perry, 231 N.C. 467, 57 S.E.2d 774 (1950).

To constitute reversible error, an expression of opinion on the part of the court must be prejudicial to the interest of the appellant. State v. Puett, 210 N.C. 633, 188 S.E. 75 (1936); State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960).

Remarks of the court during a trial will not entitle a defendant to a new trial unless they tend to prejudice the defendant. State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 738 (1970); State v. Raynor, 17 N.C. App. 707, 195 S.E.2d 309 (1973).

An accused is not entitled to a new trial because of remarks of the trial judge unless they tend to prejudice defendant in light of the circumstances in which they were made, and the burden of showing that he has been deprived of a fair trial by such remarks is upon the defendant. State v. Greene, 285 N.C. 482, 206 S.E.2d 229 (1974).

All expressions of opinion do not warrant a new trial. A remark made by the judge in the presence of the jury does not entitle defendant to a new trial if the statement, considered in the light of all the facts and attendant circumstances, is not of such prejudicial nature as could reasonably have had an appreciable effect on the result of the trial. State v. Teasley, 31 N.C. App. 729, 230 S.E.2d 692 (1976).

Burden of Showing Prejudice. — Petitioner has the burden of showing that the judge's remarks constituted prejudicial error. Davis v. North Carolina, 196 F. Supp. 488 (E.D.N.C.), cert. denied, 365 U.S. 855, 81 S. Ct. 816, 5 L. Ed. 2d 819 (1961).

The use of the convenient formula "the evidence tends to show" is not considered expression of an opinion upon the evidence in violation of the prohibition of this section. State v. Jackson, 228 N.C. 656, 46 S.E.2d 858 (1948).

It is not error, as commenting on the weight of evidence, to use in instructions the phrases "the evidence tends to show" and "evidence tending to show." State v. Jackson, 199 N.C. 321, 154 S.E. 402 (1930); State v. Harris, 213 N.C. 648, 197 S.E. 142 (1938).

The use of the phrase "the State has presented evidence in this case which tends to show" in arraying the State's evidence, the same phrase being used when arraying defendant's evidence, did not constitute error as an expression of opinion by the court on the evidence. State v. Huggins, 269 N.C. 752, 153 S.E.2d 475 (1967).

Reprimand of Spectators. — A reprimand of spectators is not a violation of this section. State v. Robertson, 121 N.C. 551, 28 S.E. 59 (1897).

Credibility of Witnesses. — This section prohibits any ridicule that casts aspersions on the testimony of a witness and thus damages his credibility. State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971).

It is error for the trial judge to indicate to the jury in any manner his opinion as to the credibility of a witness, or as to the weight to be given his testimony. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652 (1972), death sentence vacated, 283 N.C. 99, 195 S.E.2d 33 (1973).

Time Spent in Outlining Evidence of One Party. — Where the State has a number of witnesses and only defendant testifies for the defense, the fact that the court necessarily consumes more time in outlining the evidence for the State than that of defendant does not support defendant's contention that the court expressed an opinion upon the facts by laying undue emphasis on the contentions of the State. State v. Cureton, 218 N.C. 491, 11 S.E.2d 469 (1940); Bryant v. Watford, 240 N.C. 333, 81 S.E.2d 926 (1954).

The fact that the court necessarily consumes more time in stating the evidence for the State than in stating that of the defendant does not constitute an expression of opinion on the evidence. State v. Norman, 29 N.C. App. 606, 225 S.E.2d 141 (1976).

The fact that the trial court necessarily consumed more time in outlining the evidence for the State than that of the defendant did not support defendant's contention that the court expressed an opinion upon the facts by laying undue emphasis on the contentions of the State. State v. Crutchfield, 5 N.C. App. 586, 169 S.E.2d 43 (1969).

The court summarized the evidence fairly and accurately showing no bias in favor of either the

State or the defendants; the fact that more time was devoted to the State's evidence than to that of the defendants was to be expected where the State presented far more evidence. State v. Grant, 19 N.C. App. 401, 199 S.E.2d 14 (1973).

The charge of the court in summarizing the evidence for the jury was not weighed in favor of the State to such a degree that it constituted an expression of opinion. The State presented a great deal more evidence than the defendant and it is to be expected that more time would be required for summary. State v. Hamilton, 19 N.C. App. 436, 199 S.E.2d 159 (1973).

The fact that the court spent more time in summarizing the State's evidence than that of the defendant is attributable to the fact that the witnesses for the State testified more extensively than those of the defendant. State v. Payne, 19 N.C. App. 511, 199 S.E.2d 132 (1973).

The trial court may have emphasized discrepancies in defendant's evidence more than those in State's evidence, but the court is not required to give equal time to each side; nothing more is required than a clear instruction applying the law to the evidence and giving the positions taken by the parties as to the essential features of the case. State v. Reisch, 20 N.C. App. 481, 201 S.E.2d 577 (1974).

A mere disparity in the length of time devoted by a judge in stating contentions of parties does not constitute prejudicial error. State v. Brandon, 24 N.C. App. 558, 211 S.E.2d 496 (1975).

The rule that a mere disparity in the length of time devoted by a judge in stating the contentions of the parties does not constitute prejudicial error particularly applies in cases where the number of witnesses presented by one side greatly exceeds the number presented by the other side. State v. Brandon, 24 N.C. App. 558, 211 S.E.2d 496 (1975).

A charge which reviews the State's evidence cannot be held erroneous as an expression of opinion that certain facts were fully proven when it appears that the court categorically indicated to the jury it was reviewing the State's evidence. State v. Rennick, 8 N.C. App. 270, 174 S.E.2d 122 (1970).

Sustained and systematic failure to rule upon objections may indicate an opinion by the trial judge in violation of this section. State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977).

A statement of a valid contention based on competent evidence is not error as being an expression of opinion. State v. Buff, 32 N.C. App. 395, 232 S.E.2d 303 (1977).

Questioning of Witnesses. — The presiding judge, in order to make for better understanding or clarification of what a witness has said or intended to say, or to develop some relevant fact overlooked, is entirely justified in propounding competent questions to a witness, but in doing so care should be exercised to prevent by manner or word what may be understood by the jury as the indirect expression of an opinion on the facts. State v. Kimbrey, 236 N.C. 313, 72 S.E.2d 677 (1952).

It is improper for a trial judge to ask questions which are reasonably calculated to impeach or discredit a witness. Cross-examination for the purpose of impeachment is the prerogative of counsel including the district solicitor (now district attorney), but it is never the privilege of the trial judge. State v. Kimbrey, 236 N.C. 313, 72 S.E.2d 677 (1952).

It is improper for a trial judge to ask questions for the purpose of impeaching a witness. State v. Hoyle, 3 N.C. App. 109, 164 S.E.2d 83 (1968); State v. Blalock, 9 N.C. App. 94, 175 S.E.2d 716 (1970), cert. denied, 401 U.S. 912, 91 S. Ct. 881, 27 L. Ed. 2d 812 (1971).

Questions which serve only to clarify and promote a proper understanding of the testimony of the witnesses do not amount to an expression of opinion by the judge. State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968), cert. denied, 393 U.S. 1087, 89 S. Ct. 876, 21 L. Ed. 2d 780 (1969).

It has been the immemorial custom for the trial judge to examine witnesses who are tendered by either side whenever he sees fit to do so. Such examinations should be conducted with care and in a manner which avoids prejudice to either party. If by their tenor, their frequency, or by the persistence of the trial judge they tend to convey to the jury in any manner at any stage of the trial the "impression of judicial leaning," they violate the purpose and intent of this section and constitute prejudicial error. State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968); State v. Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972); State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

There are times in the course of a trial, when it becomes the duty of the judge to propound competent questions in order to obtain a proper understanding and clarification of the testimony of the witness or to bring out some fact that has been overlooked. But the trial judge should not by word or mannerism convey the impression to the jury that he is giving it the benefit of his opinion on the facts. State v. Hoyle, 3 N.C. App. 109, 164 S.E.2d 83 (1968).

It has been the immemorial custom for the trial judge to examine witnesses who are tendered by either side whenever he sees fit to do so, but the law requires such examinations to be conducted with care and in a manner which avoids prejudice to either party. State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971).

It is proper for the court to ask a witness questions for the purpose of clarifying the witness' testimony, but in so doing the court should be careful not to express an opinion on the facts or impeach or discredit the witness.

State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 738 (1970).

A trial judge may ask questions of a witness in order to obtain a proper understanding and clarification of the witness' testimony. State v. Blalock, 9 N.C. App. 94, 175 S.E.2d 716 (1970), cert. denied, 401 U.S. 912, 91 S. Ct. 881, 27 L. Ed. 2d 812 (1971); State v. Lowery, 12 N.C. App. 538, 183 S.E.2d 797 (1971); State v. Hood, 13 N.C. App. 170, 184 S.E.2d 916 (1971); State v. Best, 13 N.C. App. 204, 184 S.E.2d 905 (1971); State v. Wooten, 15 N.C. App. 193, 189 S.E.2d 579 (1972); State v. Wright, 16 N.C. App. 562, 192 S.E.2d 655 (1972); State v. Lewis, 27 N.C. App. 426, 219 S.E.2d 554 (1975).

It is proper, and often necessary, that judges ask questions of witnesses which are designed to obtain a proper understanding and clarification of the witnesses' testimony. State v. Rennick, 8 N.C. App. 270, 174 S.E.2d 122 (1970).

A trial judge is justified in propounding competent questions in order to develop some relevant fact. State v. Huffman, 7 N.C. App. 92, 171 S.E.2d 339 (1969).

It is not improper for the court to ask questions for the purpose of obtaining a proper understanding and clarification of a witness' testimony as long as the trial judge does not engage in frequent interruptions and prolonged questioning. State v. Huffman, 7 N.C. App. 92, 171 S.E.2d 339 (1969).

If by their tenor, their frequency, or by the persistence of the trial judge they tend to convey to the jury in any manner at any stage of the trial the impression of judicial leaning, examinations of witnesses by the judge violate the purpose and intent of this section and constitute prejudicial error. State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971); State v. Lowery, 12 N.C. App. 538, 183 S.E.2d 797 (1971); State v. Wright, 16 N.C. App. 562, 192 S.E.2d 655 (1972).

The statutory proscription against the trial judge expressing an opinion prohibits the court from asking questions at any time during the trial which amount to an expression of opinion as to what has or has not been shown by the testimony of a witness. State v. Huffman, 7 N.C. App. 92, 171 S.E.2d 339 (1969).

The court can ask questions of the witness for the purpose of clarifying his testimony. State v. McLamb, 13 N.C. App. 705, 187 S.E.2d 458 (1972).

It is sometimes necessary for the purpose of clarification for a trial judge to question a witness, and such questions are proper so long as they are asked with care and in a manner which avoids prejudice to either party. State v. Allen, 14 N.C. App. 485, 188 S.E.2d 568 (1972).

It is improper for a trial judge to question a witness for the purpose of impeaching his testimony. State v. Lowery, 12 N.C. App. 538, 183 S.E.2d 797 (1971).

The trial judge is permitted to ask questions of a witness in the presence of a jury for the purpose of clarifying matters that are unclear or not understood. State v. Laws, 16 N.C. App. 129, 191 S.E.2d 416 (1972).

While this section prohibits the court from expressing an opinion as to what has or has not been shown by the testimony of a witness, it is not improper for the court to ask questions for the purpose of obtaining a proper clarification and understanding of the testimony. State v. Williams, 17 N.C. App. 31, 193 S.E.2d 478 (1972); State v. McMillan, 19 N.C. App. 721, 200 S.E.2d 339 (1973).

In the trial of criminal actions the court may ask a witness questions designed to obtain a proper understanding and clarification of the witness' testimony or to bring out some fact overlooked, but the court may not ask a defendant or a witness questions tending to impeach him or to cast doubt upon his credibility. State v. Pinkham, 18 N.C. App. 130, 196 S.E.2d 290 (1973); State v. Bond, 20 N.C. App. 128, 201 S.E.2d 71 (1973).

While this section prohibits the judge from expressing an opinion as to what has or has not been proven by the testimony of a witness, it is not improper, and is sometimes necessary, for the judge to ask questions of a witness in order to get the truth before the jury. State v. Coble, 20 N.C. App. 575, 202 S.E.2d 303, appeal dismissed, 285 N.C. 236, 204 S.E.2d 21 (1974).

In the exercise of his duty to supervise and control the course of a trial so as to insure justice for all parties, the court may interrogate a witness for the purpose of clarifying his testimony, and it is the duty of the trial judge to control the examination and cross-examination of witnesses. State v. Greene, 285 N.C. 482, 206 S.E.2d 229 (1974).

While it is proper and may on occasion become necessary for the trial judge to interrogate a witness for the purpose of clarifying and promoting a better understanding of the witness's testimony, such examinations should be conducted with care and in a manner which avoids prejudice to either party. If by their tenor, their frequency, or by the persistence of the trial judge, they tend to convey to the jury in any manner at any stage of the trial the "impression of judicial leaning," they violate the purpose and intent of this section and constitute prejudicial error. State v. Bridges, 19 N.C. App. 567, 199 S.E.2d 477 (1973).

The trial judge may not express an opinion to the jury in violation of this section by extensively questioning defendant and his witnesses. State v. Bond, 20 N.C. App. 128, 201 S.E.2d 71 (1973).

A trial judge may propound competent questions in order to clarify a witness' testimony. State v. Spinks, 24 N.C. App. 548, 211 S.E.2d 476 (1975).

It is entirely proper, and often necessary, that

the trial judge ask questions to clarify and promote a proper understanding of the testimony of the witnesses. In so doing, the trial judge expressed no opinion in violation of this section. State v. Riddick, 291 N.C. 399, 230 S.E.2d 506 (1976).

Remark Complimentary to Witness. — A remark of the trial judge complimentary to the character of one who was a witness in the cause, made before the jury is impaneled, is not forbidden by this section. State v. Howard, 129 N.C. 584, 40 S.E. 71 (1901).

Remarks Made in Directing Nonsuit of One of Several Defendants. — It is error for the judge in the presence of the jury, to nonsuit one of several defendants upon the evidence he did not participate in the offense charged against them all in the indictment, when the judge's remarks intimated that the appealing defendants had committed the offense. State v. Sullivan, 193 N.C. 754, 138 S.E. 136 (1927).

Assumption of Existence or Nonexistence of Material Fact. — The trial court in charging a jury may not give an instruction which assumes as true the existence or nonexistence of any material fact in issue. State v. Cuthrell, 235 N.C. 173, 69 S.E.2d 233 (1952).

An instruction that there was evidence that defendant admitted some of the facts related to the crime was an assumption by the judge of a material fact which was not in evidence. It constituted an expression of opinion that a fact had been proven. State v. Clanton, 20 N.C. App. 275, 201 S.E.2d 365 (1973).

Test for Determining Prejudice. — The trial judge must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. The bare possibility, however, that an accused may have suffered prejudice from the conduct or language of the judge is not sufficient to overthrow an adverse verdict. The criterion for determining whether or not the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect of the language upon the jury. In applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made. State v. Carter, 233 N.C. 581, 65 S.E.2d 9 (1951); Davis v. North Carolina, 196 F. Supp. 488 (E.D.N.C.), cert. denied, 365 U.S. 855, 81 S. Ct. 816, 5 L. Ed. 2d 819 (1961).

The question of whether prejudice resulted is to be considered in the light of the circumstances under which the remarks were made. State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 738 (1970); State v. Raynor, 17 N.C. App. 707, 195 S.E.2d 309 (1973).

When an objectionable opinion statement purportedly has been made and possibly violates this section, that remark, standing by itself, may not necessarily constitute reversible error. To establish reversible error, courts must consider the remark in the light of the circumstances under which it was made. State v. Rhodes, 28 N.C. App. 432, 221 S.E.2d 730, rev'd on other grounds, 290 N.C. 16, 224 S.E.2d 631 (1976).

Showing that a critical examination of the judge's words, detached from the context and the incidents of the trial, are capable of an interpretation from which an expression of opinion may be inferred is insufficient to show prejudicial error. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

Statements of the judge must be considered in the context of the entire record, since the test of prejudice resulting from a judge's remarks is whether a juror might reasonably infer that the judge expressed partiality or intimated an opinion as to a witness' credibility or as to any fact to be determined by the jury. State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

C. Illustrative Cases.

1. Remarks Held Not Erroneous.

a. Remarks Concerning a Party to the Trial.

Remarks During Former Trial. — The remarks of the judge in sentencing a prisoner during the previous week cannot be held as improper for the trial of another defendant for participating in the same offense tried during the next week. State v. Baldwin, 178 N.C. 687, 100 S.E. 348 (1919).

Remark That Prisoner Would Escape. — A remark of the judge before trial began, that the jailer had informed him the prisoner "would escape if he had the opportunity" is not an expression of opinion upon the facts. State v. Jacobs, 106 N.C. 695, 10 S.E. 1031 (1890).

Status of Deceased as Boarder or Guest in Home. — The judge did not express an opinion in violation of this section when he instructed the jury: "There was — I would characterize it as limited evidence — about the status of these two principals, that is the deceased and the defendant, with respect to their association with this home. The evidence did indicate that the defendant was living with her parents. There was some evidence that indicated — but it's for you to say — what the status of the deceased was in that home, or his presence in that home was. It was not clear to the court whether he was a boarder, or whether he was a guest, or whether he was living there under some circumstances not clear to the court not fully revealed by the evidence." State v. Hefner, 3 N.C. App. 359, 164 S.E.2d 623 (1968).

Colloquy Whether Defendant Ought to Be Incarcerated Overnight. — Colloquy between the trial court and the defense counsel in which the court stated, as the jury was leaving the courtroom, that the defendant ought to be kept in jail overnight, and in which the court also

stated, in the absence of the jury, that the defendant "has got more reason to run now than he ever had," is not prejudicial. State v. Wood, 9 N.C. App. 706, 177 S.E.2d 449 (1970).

Charge on Contention in Defendant's Confession. — In a prosecution for breaking and entering and larceny, the trial court did not express an opinion on the evidence in charging on defendant's contention as contained in his confession that he acted only as a watchman during perpetration of the crimes where the court immediately thereafter instructed the jury that defendant denied being at the scene of the crime and claimed that his confession was made under duress. State v. McIlwain, 18 N.C. App. 230, 196 S.E.2d 614 (1973).

Ruling A Witness Expert. — The ruling finding a witness to be an expert in his field could not have been understood by the jury as anything other than a ruling upon the qualification of the witness to testify as to his opinions. The general practice in the courts of this State has never been for the trial judge to excuse the jury from the courtroom when ruling upon the qualification of a witness to testify as an expert, and therefore the judge did not express an opinion as to the credibility of this witness contrary to this section. State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

Trial judge's admonition to defense counsel to refer to his client as defendant, or by his full name rather than by his first name, was made in order to preserve the trial judge's conception of dignity and decorum in the courtroom, and did not constitute an opinion or partiality toward either defendant or the State. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976), aff'd, 292 N.C. 461, 233 S.E.2d 554.

b. Remarks Concerning Witnesses.

Defendant Not Prejudiced by Remarks During Cross-Examination of State's Witness. — Remarks of the court in the presence of the jury which tend to discredit a witness will be held for reversible error upon appeal of the injured party, but when such remarks are made during defendant's cross-examination of a State's witness, defendant cannot be prejudiced thereby and his exception thereto cannot be sustained. State v. Puett, 210 N.C. 633, 188 S.E. 75 (1936).

Remark Concerning Emotion of Witness. — On a trial for rape a remark by the judge concerning the mother of the prosecutrix, that "some allowance must be made for the woman, as she is overcome with emotion," was held not to be error. State v. Laxton, 78 N.C. 564 (1878).

Statement as to Corroboration of Witness. — A recitation that the testimony of a witness corroborated the testimony of another witness is not an expression of opinion. State v. Mitchell, 193 N.C. 796, 138 S.E. 166 (1927).

A charge that ". . . and the State contends that the evidence in the case" is sufficient to establish guilt beyond a reasonable doubt and that upon the testimony of the main witness for the State "and other evidence which corroborates this testimony" the jury should return a verdict of guilty, is not an expression of opinion that "the other evidence" did corroborate the witness since it is clear that both phrases related to the statement of contentions of the State. State v. McKnight, 226 N.C. 766, 40 S.E.2d 419 (1946).

The trial court did not express an opinion as to the credibility of witnesses for the State by ruling, in the presence of the jury, that each was an expert in the field of his testimony. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652 (1972), death sentence vacated, 283 N.C. 99, 195 S.E.2d 33 (1973).

Where the court's ruling could not be interpreted by the jury as anything other than a holding that the witness was qualified to testify concerning his expert opinion in his field, it was not necessary for the trial judge to excuse the jury from the courtroom when ruling upon the qualification of a witness to testify as an expert. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652 (1972), death sentence vacated, 283 N.C. 99, 195 S.E.2d 33 (1973).

Remark That Witness' Motion for Directed Verdict Had Been Granted. — A trial court's statement to the jury that motions for directed verdicts of not guilty had been entered by all four defendants and had been granted only as to two defendants, one of whom was about to testify for the other defendants, was not an expression of opinion. State v. Fry, 13 N.C. App. 39, 185 S.E.2d 256 (1971).

Remark That Witness Has Fully Answered Question. — Where the same witness has several times fully answered a question it is within the discretion of the trial judge to relieve the witness from answering substantially the same question; and his statement before the jury that the witness had already fully answered, is not an expression of his opinion upon the credibility of the witness. State v. Mansell, 192 N.C. 20, 133 S.E. 190 (1926).

Where court was of the opinion that State's witness on cross-examination by defendant's counsel had answered interrogations sufficiently, and that witness said she had tried to tell the truth and did not recall all the particulars of the evidence given by her in the former trial, the remark was not an expression of opinion by the court as to the truthfulness of the witness, but was solely to suggest to counsel that her answers to his questions were complete, in the discharge of the court's right and duty to control the cross-examination. State v. Stone, 226 N.C. 97, 36 S.E.2d 704 (1946).

Trial judge's statement that a question put to the witness had been previously answered did not amount to an expression of opinion on the evidence. State v. Hollingsworth, 11 N.C. App. 674, 182 S.E.2d 26 (1971).

The trial judge did not express an opinion in favor of the State by sustaining objections to defendants' questions and saying to defense counsel, "He has answered your question." This was not in any way a disparaging or critical remark but merely a statement of fact. State v. Grant, 19 N.C. App. 401, 199 S.E.2d 14, appeal dismissed, 284 N.C. 256, 200 S.E.2d 656 (1973).

Referring to Eyewitnesses. — Upon the trial under an indictment for assault and larceny, where some of the State's witnesses were eyewitnesses and some were not, and the defendant had admitted he was present at the time, an instruction as to the first class "now that is the testimony of eyewitnesses," followed by correct instructions as to the second class, is not objectionable as an expression of opinion by the trial judge forbidden by this section. State v. Boswell, 195 N.C. 496, 142 S.E. 583 (1928).

Statement that court would strike evidence unless it corroborated witness, and failure to strike it out, was not expression of opinion on weight of evidence. State v. Starnes, 218 N.C. 539, 11 S.E.2d 553 (1940).

Judge's cautionary remark to a witness to prevent his implicating defendant in other crimes was appropriate and in no way amounted to an expression of opinion on the evidence. State v. Roberts, 28 N.C. App. 194, 220 S.E.2d 627 (1975).

Intimation that Witness Committed Perjury. — Any intimation by the judge in the presence of the jury that a witness had committed perjury is a violation of this section and constitutes reversible error. State v. Rhodes, 290 N.C. 16, 224 S.E.2d 631 (1976).

Test with Regard to Perjury References. — The principal determinative questions are whether acts or reference regarding perjury, by whomsoever made, have the effect either of stifling the free presentation of all the legitimate testimony available, or of prevailing the unprejudiced consideration of all the testimony given, either of which may be sufficient to constitute reversible error. State v. Rhodes, 290 N.C. 16, 224 S.E.2d 631 (1976).

c. Remarks Concerning Weight and Credibility of Testimony.

In prosecution for homicide committed in the attempted perpetration of a robbery, the charge of the court to the effect that if the jury were satisfied beyond a reasonable doubt that the defendants conspired and agreed to rob deceased, that one defendant committed acts in furtherance of the common design and agreed to share in the proceeds of the robbery and that in furtherance of such plan and agreement, and while attempting to rob deceased, another defendant shot and killed deceased, the jury should return a verdict of guilty of murder in the first degree, was without error and did not contain an expression of opinion on the evidence in violation of this section. State v. Maynard, 247 N.C. 462, 101 S.E.2d 340 (1958).

Statement concerning Admission. — Where in the course of his charge to the jury a trial judge said: "I believe the State's evidence further tends to show that the defendant after being warned of his rights made an admission or confession to the police and told them that he had a gun; that is to wit: a .22 caliber pistol with a blue steel barrel and white handles," that was not an expression of opinion that defendant had confessed his guilt. State v. Bailey, 280 N.C. 264, 185 S.E.2d 683, cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

Charge Based on Uncontradicted Testimony. — A charge by the court for the jury to return a verdict of guilty if they believed or found as true the testimony of an uncontradicted witness (capable of only one meaning), is not an expression of the court's opinion upon the weight and credibility of the evidence. State v. Moore, 192 N.C. 209, 134 S.E. 456 (1926).

Remark on Evidence of Character of Defendant. — An instruction that "there was evidence tending to show that he (the defendant) is a man of bad character," said while stating the contentions of the State, cannot be held for error as an expression of opinion by the court on the weight or credibility of the testimony in violation of this section. State v. Sims, 213 N.C. 590, 197 S.E. 176 (1938).

Statement That Evidence Satisfies "Beyond Reasonable Doubt". — Where the trial court instructed the jury "all the evidence tends to show a homicide committed in the perpetration of a robbery," and that the State has offered evidence, "which, it contends, tends to show, and which should satisfy you, gentlemen, beyond a reasonable doubt," etc., it was held that the charge will not be held for error on defendant's exception on the ground that it contained an expression of opinion by the court in violation of this section. State v. Johnson, 207 N.C. 273, 176 S.E. 581 (1934).

Testimony of Witnesses Having Interest in Case. — There is no hard and fast form of expression or consecrated formula required, but the jury should be instructed that, as to the testimony of relatives or parties interested in the case and defendants, the jury should scrutinize their testimony in the light of that fact; but if, after such scrutiny, the jury should believe that the witness has told the truth, they should give him as full credit as if he were disinterested. State v. Griffin, 280 N.C. 142, 185 S.E.2d 149 (1971).

A charge did not constitute an expression of opinion upon the credibility of defendant or his mother where the admonition to scrutinize their testimony in light of their interest in the case included not only the defendant and his mother but also the testimony of any witness who had

an immediate personal interest in the outcome of the verdict. State v. Griffin, 280 N.C. 142, 185 S.E.2d 149 (1971).

It is proper for the trial court to instruct the jury to scrutinize the defendant's testimony in the light of his interest in the outcome of the case, and that if they believe he is telling the truth they will give to his testimony the same weight they would give to the testimony of any other believable witness. State v. Best, 13 N.C. App. 204, 184 S.E.2d 905 (1971).

Definition of Reasonable Doubt. — In a first-degree murder prosecution, the trial judge's definition of reasonable doubt as a "possibility of innocence" was more favorable to defendant than was required and therefore did not constitute prejudicial error. State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

Instruction That Jury May Consider "Absence of Provocation" for Murder. — Judge's instruction to the jury in a first-degree murder case that the jury, in determining premeditation and deliberation, may consider the "absence of provocation" did not express a court opinion that there was no evidence of provocation in the case. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1212 (1976).

Use of Word "His" to Refer to All Witnesses. — In a prosecution for kidnapping, where the trial judge charged the jury to scrutinize the testimony of interested witnesses, and the trial judge used the personal pronoun "his" to refer to the testimony of such witnesses, the charge does not constitute an expression of opinion upon the credibility of defendant in violation of this section since the admonition to scrutinize included not only the defendant but also the testimony "of any witness" whether male or female. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

d. Miscellaneous Remarks.

The use of the word "killing," in referring to the degrees of homicide cognizable under the bill of indictment in a prosecution for manslaughter, is not harmful error where its use could not be interpreted as an expression of opinion by the court, considering the charge as a whole and the connection in which the word was used. State v. Scoggins, 225 N.C. 71, 33 S.E.2d 473 (1945).

Where Court Is Merely Identifying Exhibits. — A remark of the court that it would allow the introduction of fingerprints as found at the scene of the alleged offense and the fingerprints of defendant for the purpose of identification will not be held for error as an expression of opinion that the fingerprints were actually taken from the scene, it being obvious that the court was merely identifying the exhibits offered by the State. State v. Hooks, 228 N.C. 689, 47 S.E.2d 234 (1948).

Gambling Nature of Device. — A charge that a punchboard and a tip book are the same under the statute and "that if you find this defendant guilty" will not be held for error as an expression of opinion on the evidence when the phrase is immediately followed by an instruction that in order to convict, the jury must find beyond a reasonable doubt that the tip boards were gambling devices and were in defendant's possession. State v. Webster, 218 N.C. 692, 12 S.E.2d 272 (1940).

A reference in the charge to "these gambling devices" will not be held prejudicial as an expression of opinion on the evidence when it is apparent that the charge referred to the devices mentioned in the warrant and not to those about which evidence had been taken. State v. Webster, 218 N.C. 692, 12 S.E.2d 272 (1940).

Comment upon Admission of Confession in Evidence. — The comment of the trial court upon the admission of defendant's confession in evidence that the court had held the confession competent because it appeared that it was taken without hope of reward or without extortion or fear, after defendant had been duly warned of his rights, amounts to no more than stating that the confession had been admitted in evidence and the reasons for admitting it, and will not be held for error as an expression of opinion by the court prohibited by this section. State v. Fain, 216 N.C. 157, 4 S.E.2d 319 (1939).

Questioning Witnesses. — In a homicide prosecution, the trial court did not express an opinion in asking one State's witness 13 questions or in asking a second State's witness five questions, where each question was designed to clarify the testimony of the witness as to location of the defendant and the deceased at the time the homicide occurred. State v. Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972).

In a homicide prosecution, the trial court did not express an opinion in any of nine questions propounded to defendant where their purpose was to enable the court to rule upon objections by the solicitor (now prosecutor), to clarify a simple, affirmative answer to a question asked in the alternative, to clarify defendant's ambiguous answers to questions by the solicitor (now prosecutor) concerning a prior conviction, or to enable the court to make an accurate note concerning defendant's testimony as to his reason for following deceased out of the poolroom where the homicide occurred. State v. Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972).

Generally, where the jury have retired but are unable to reach a verdict, the court may call the jury back and instruct them as to their duty to make a diligent effort to arrive at a verdict, so long as the court's language in no way tends to coerce or in any way intimate any opinion of the court as to what the verdict should be. State v. Brown, 280 N.C. 588, 187 S.E.2d 85, cert. denied,

409 U.S. 870, 93 S. Ct. 198, 34 L. Ed. 2d 121 (1972).

Comment on Jury's Duty. — Where the jury has failed up to that time to agree upon a verdict in a criminal action, an instruction by the judge that in effect it was a matter of indifference to him, but it was their duty to agree if they could do so without violence to their consciences; that they must find for conviction beyond a reasonable doubt, uninfluenced by prejudices, etc., was held, not to be an expression of opinion by the judge upon the evidence. State v. Pugh, 183 N.C. 800, 111 S.E. 849 (1922).

An instruction to the effect that the jury had a duty to reach a verdict "if you can do so without violence to your conscience" contains nothing that tends to coerce, nor any expression of opinion as to what the verdict should be. State v. Bailey, 280 N.C. 264, 185 S.E.2d 683, cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

It is the duty of the judge to counsel a perplexed jury towards an agreement, keeping always within the statutory restriction that he shall give no intimation on the merits or whether any fact has been fully and sufficiently proved. State v. Bailey, 280 N.C. 264, 185 S.E.2d 683, cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

A statement made by the trial court that insofar as he knew all available evidence had been introduced was simply a statement that the court knew of no other evidence which would come up in a new trial, and that based upon the evidence it was the duty of the jury, if possible, to reach a verdict. State v. Brown, 280 N.C. 588, 187 S.E.2d 85, cert. denied, 409 U.S. 870, 93 S. Ct. 198, 34 L. Ed. 2d 121 (1972).

The court may properly instruct the jury that the trial of the cause involves heavy expense to the county and that it is the duty of the jury to continue its deliberations and attempt to reach an agreement, but that the court is not attempting to force an agreement. State v. Brown, 280 N.C. 588, 187 S.E.2d 85, cert. denied, 409 U.S. 870, 93 S. Ct. 198, 34 L. Ed. 2d 121 (1972).

The trial judge correctly instructed the jury: "It is your duty to remember and consider all of the evidence whether called to your attention by counsel or the court or not, for all of the evidence is important." State v. McClain, 282 N.C. 396, 193 S.E.2d 113 (1972).

Where the jury, after some deliberation, returned to the courtroom without reaching a verdict and the trial judge at that time, inter alia, stated to the jury that the case was one of importance to the State and to the defendant, and some jury must pass upon it and that it was their duty to consider the evidence and not to decline to agree on account of stubbornness, such statements were allowed. State v. Bryant, 282 N.C. 92, 191 S.E.2d 745 (1972), cert. denied, 410 U.S. 958, 93 S. Ct. 1432, 35 L. Ed. 2d 691 (1973).

When jurors, after deliberating only a short time, reported to the court that they were unable to agree, and the court twice simply asked them to continue their deliberations, the court being careful to point out that it did not want any juror to do anything against his conscience, the instruction that the jury try to reach a unanimous verdict neither intimated an opinion in violation of this section nor tended to coerce the jury to reach a verdict notwithstanding the conscientious convictions of any member. State v. Strickland, 21 N.C. App. 545, 204 S.E.2d 888 (1974).

Comment upon Attitude and Conduct of Jurors. — The trial judge's charge was allowed which said that the attitude and conduct of jurors at the outset of their deliberations are matters of considerable importance, and that it is rarely productive of good for a juror upon entering the jury room to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. State v. Bryant, 282 N.C. 92, 191 S.E.2d 745 (1972), cert. denied, 410 U.S. 958, 93 S. Ct. 1432, 35 L. Ed. 2d 691 (1973).

Apology for Having to Excuse Jury to Conduct Voir Dire Hearing. — Where the jury was excused so that the court could conduct a voir dire hearing, and, shortly after the jury returned, it became necessary to excuse the jury again for the same reason, the trial court's statement, "Ladies and gentlemen, step into your room. I hate to bother you," was simply an apology for having to excuse the jury so soon after their return to the courtroom and did not tend to reflect an opinion that defendant's position was unsound and not worthy of the inconvenience being imposed upon the jury. State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

Informing Jury That Manslaughter Does Not Arise from Evidence. — It is not an expression of opinion, but rather the duty of the trial judge, where the evidence so warrants, to inform the jury that manslaughter does not arise on the evidence in the case. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

In a prosecution for kidnapping, use of the word "rape" by the judge in a charge to the jury did not indicate an expression on the judge's part that such fact had been established where, in addition to the full and adequate curative instruction regarding the use of the word "rape," the jury was instructed elsewhere in the charge that "what the evidence does actually show is a question of fact for the jury's determination." Therefore, the charge when considered as a whole is free from prejudicial error. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

Unqualified Use of "Assault" and "Rape". — The charge, when read as a whole, did not show

that the judge in any manner expressed any opinion in violation of this section by the unqualified use of the words "assault" and "rape" or "raping" in referring to the charges against the defendants and the use of these words, did not lead the jury to assume that the facts in controversy had been established. State v. Blalock, 9 N.C. App. 94, 175 S.E.2d 716 (1970), cert. denied, 401 U.S. 912, 91 S. Ct. 881, 27 L. Ed. 2d 812 (1971).

Reading Warrant. — In a drunken driving prosecution, the trial court did not express an opinion by the statement in the instructions that "the offense charged here was committed against the peace and dignity of the State" where the court was reading the warrant upon which the defendant was being tried. State v. Rennick, 8 N.C. App. 270, 174 S.E.2d 122 (1970).

Instruction as to Voluntary Flight of Defendant. — The trial court's instruction that the voluntary flight of a defendant immediately after he is accused of a crime is not a circumstance sufficient in itself to establish his guilt, is not an expression of opinion, on the theory that the court implied to the jury that defendant had been formally charged with crime at the time of his flight from a deputy sheriff's car, when in fact the deputy had told defendant that he wanted to talk to him concerning a robbery. State v. Kirby, 7 N.C. App. 366, 172 S.E.2d 93 (1970).

Reference to Deceased as Common-Law Husband. — In a prosecution for first-degree murder, the trial judge's characterization of deceased as the common-law husband of the defendant in his charge to the jury was harmless error. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Customary Rulings Sustaining Prosecutor's Objections. — A trial court did not express an opinion on the credibility or guilt of defendant in sustaining the prosecutor's objections on 10 occasions to questions propounded to the defendant on direct examination, the ruling in each instance being the customary ruling, "Objection sustained," and the rulings being interspersed with six others overruling objections by the prosecutor. State v. Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972).

Instruction That Whether Statement Was Oral or Written Made No Difference. — In replying to the jury's question as to whether defendant's statement to the sheriff was oral or written, the trial court's instruction that, if the jury believed that such a statement was made, it would make no difference whether or not the statement was in writing, did not constitute an expression of opinion. State v. Crane, 11 N.C. App. 721, 182 S.E.2d 225 (1971).

Use of Phrase "We Are Trying the Defendant". — In a prosecution for armed robbery, where the judge's instruction to the jury included "Now, members of the jury, in the case in which we are trying the defendant. . .," the use of the word "we" was proper and did not convey to the jury that the trial judge was part of the solicitor's (now prosecutor's) machinery for prosecution. State v. Wallace, 21 N.C. App. 523, 204 S.E.2d 855 (1974).

Question as to Verdict. — The question of the court as to whether the verdict of guilty referred to first degree burglary held to be an inquiry and not an expression of opinion. State v. Walls, 211 N.C. 487, 191 S.E. 232, cert. denied, 302 U.S. 635, 58 S. Ct. 18, 82 L. Ed. 494 (1937).

Statement after Verdict Excusing Jurors for Term. — When the trial judge has stated to a jury after rendering a verdict in a criminal action, that from their verdict their attention was evidently attracted by important business matters at home, and therefore he would excuse them for the term, it cannot be construed as an expression of opinion forbidden by this section though one of the same jurors sat upon this case. State v. Pugh, 183 N.C. 800, 111 S.E. 849 (1922).

Question to Counsel. — Where the judge asked defendant's counsel in the hearing of the jury, if he thought that an objection to certain proof in the case "would be fair," it was held that the remark of the judge was no violation of this section. State v. Brown, 100 N.C. 519, 6 S.E. 568 (1888).

Response to Request of Counsel. — Where the prisoner's counsel called attention to the judge's failure to state in his summary that the prosecutrix had said that she did not know a certain woman, to which the judge said, "Yes, I believe that she did say that," it was held, that such remarks were a sufficient response to the request of the prisoner's counsel, and did not convey an opinion of the judge in violation of this section. State v. Freeman, 100 N.C. 429, 5 S.E. 921 (1888).

Matters Subject to Mathematical Calculation. — Where the answers to the issues as to the amounts recoverable, in case the defendants were found liable to the plaintiffs, is merely a matter of mathematical calculation, preemptory instructions in regard thereto do not constitute prejudicial or reversible error under this section. State v. Gant, 201 N.C. 211, 159 S.E. 427 (1931).

Opinion on One Count Applies to Others. — Where the verdict of the jury has acquitted the defendant under a count charging an unlawful sale of intoxicating liquors, but has convicted him of having the unlawful possession of the liquor for the purpose of sale, an expression of his opinion by the trial judge upon the evidence that the defendant had made the unlawful sale, applies also to the count charging that he had the unlawful possession for the purposes of sale, and constitutes error. State v. Sparks, 184 N.C. 745, 114 S.E. 755 (1922).

Statement of judge that he had only stated

that part of the evidence as seemed to be necessary to enable him to explain and apply the law did not constitute an expression of opinion but was in strict compliance with this section. State v. Tyson, 242 N.C. 574, 89 S.E.2d 138 (1955).

2. Remarks Held Erroneous.

a. Remarks Concerning a Party to the Trial.

Character of Accused. — It was held to be error for a judge to tell the jury that, "in a plain case, a good character would not help the prisoner; but in a doubtful case, he had a right to have it cast into the scales and weighed in his behalf"; the true rule being that in all cases a good character is to be considered. State v. Henry, 50 N.C. 66 (1857).

Motive. — A charge, "While it is permissible to show a motive as a circumstance to be considered by the jury, it is not necessary. All the State has to do is to satisfy the jury beyond a reasonable doubt that the defendants did the acts charged in the indictment," was held to be error under this section. State v. Morgan, 136 N.C. 628, 48 S.E. 670 (1904).

Identification of Defendant. — Where the only evidence connecting the defendant with operating a still was a coat found there with a receipt with defendant's name on it in one of the pockets, an instruction that the name on the receipt was sufficient evidence that it was the property of defendant, is an expression of an opinion. State v. Allen, 190 N.C. 498, 130 S.E. 163 (1925).

Where the State relied upon testimony that tracks had been followed from the scene of the crime to the defendant's room, but did not prove them to be the defendant's, the expression of the court, "You tracked the defendant to whose house?" was held prejudicial, and especially so as the evidence of the State was circumstantial. State v. Oakley, 210 N.C. 206, 186 S.E. 244 (1936).

Reference by court to defendants as "three black cats in a white Buick" was prejudicial error affecting the credibility of the defendants as witnesses and injecting a prejudicial opinion of the court into the court's instructions. State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

Duty to Find Defendant Guilty of Manslaughter. — The instruction "If you find the defendant, Mr. Hardee, guilty of murder in the second degree, you need not consider whether he is guilty of manslaughter. But if you find him not guilty of murder in the second degree, then it would be your duty to find him guilty of manslaughter, as charged in the bill of indictment," constitutes an expression of opinion by the judge which is prohibited by this section. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

Assumption That Defendant Fired Fatal Shot. — In homicide prosecution, instruction which assumed that defendant fired the fatal shot is erroneous as an expression of opinion by the trial court, since defendant's admission that he shot at the deceased and his stipulation that the cause of death resulted from gunshot wounds of the chest do not constitute an admission by defendant that he fired the fatal shot. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

Instruction Where Defendants Pleaded Not Guilty and Made No Judicial Admission. — Where defendants entered pleas of not guilty to charges of armed robbery and there is nothing in the record to show that they made any judicial admission that the offense had actually occurred, a trial court's instruction to the jury that defendants "do not deny that somebody did this, but they say they are not the men, and some other men did it, not themselves," is an unauthorized expression of opinion on the evidence in violation of this section. State v. Brinkley, 10 N.C. App. 160, 177 S.E.2d 727 (1970).

Parties as Witnesses. — A judge expressed an opinion as to the credibility and probative value of the defendant's testimony when he said to the defendant, in the presence of the jury, that if he (the judge) "had some witnesses who saw what you say they saw, I would have them here." State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 738 (1970).

"You Were in the Car When You Were Raped?" — In rape prosecution, the trial judge's asking the prosecuting witness ". . . you were in the car when you were raped?" was held to be a prejudicial opinion of the court on the facts. State v. McEachern, 283 N.C. 57, 194 S.E.2d 787 (1973).

b. Remarks Concerning Witnesses.

Remarks Having Effect of Impeaching Witnesses. — Where questions propounded by the court have the effect of impeaching witnesses they are in violation of this section and defendants' exceptive assignments of error thereto must be sustained. State v. Winckler, 210 N.C. 556, 187 S.E. 792 (1936).

In a prosecution for crime against nature, the trial judge expressed an opinion in violation of this section when he interrogated defendant's medical witness concerning the witness's opinion that the alleged victim had not been sexually violated per anum on the day of the alleged crime and tended to impeach defendant's witness or cast doubt on his credibility by his line of questioning. State v. Pinkham, 18 N.C. App. 130, 196 S.E.2d 290 (1973).

Remark That Witness Was "Admirably Lucid". — The expression of the opinion of the court as to the "admirably lucid" testimony of a medical expert witness constituted reversible

error. State v. Horne, 171 N.C. 787, 88 S.E. 433 (1916).

Comments on Witnesses. — The expression, "This witness has the weakest voice or the shortest memory of any witness I ever saw," is clearly susceptible of the construction that the testimony of the witness was at least questioned by the court, if not unworthy of credit. State v. Bryant, 189 N.C. 112, 126 S.E. 107 (1925).

In a prosecution for carnal knowledge of a female child over twelve and under sixteen years of age, the repeated remark of the court in directing the sheriff to quiet the spectators, made immediately after cross-examination of prosecutrix to impeach her testimony, that "you people cannot laugh at the predicament of this poor little girl; the only difference between you and she is that you have not been caught," was held to violate this section, as tending to invoke sympathy for prosecutrix and thereby bolster her testimony and as tending to impair the effect of defendant's plea of not guilty. State v. Woolard, 227 N.C. 645, 44 S.E.2d 29 (1947).

In prosecution for having carnal knowledge of female under sixteen years of age the disparagement of the defendant's witness and the expression of opinion that prosecutrix was not a delinquent, though inadvertently made in the presence of the jury, entitles defendant to another hearing. State v. Owenby, 226 N.C. 521, 39 S.E.2d 378 (1946).

Witness Included in Same Indictment. — Where there is a severance on the trial of defendants, and another party charged in the bill testifies in behalf of the accused, it is error, as indicating the opinion of the court on the facts, to charge that the very fact that the witness is included in the same indictment will impair his testimony, and that the same should not be placed on the same plane or footing with that of a witness of undoubted character who is disinterested. State v. Jenkins, 85 N.C. 544 (1881).

Instruction That Arresting Officer Had No Personal Interest or Bias. — In a prosecution for driving while under the influence of intoxicating liquor, an instruction to the jury, based on a contention by the State, that the police officer who apprehended defendant had no personal interest in the case or bias toward defendant and that the officer's only interest was in seeing that the law was complied with and in protecting innocent people operating their automobiles on the highway, was a prohibited expression of opinion by the court, and its repetition by the judge, even though stated as a contention, gave it an emphasis that would weigh too heavily upon the defendant. State v. Maready, 269 N.C. 750, 153 S.E.2d 483 (1967).

Questioning of witness by judge, going beyond an effort to obtain a proper understanding and clarification of the witness's testimony, held to have conveyed to the jury an impression that he had an opinion on the facts in evidence adverse to the defendant. State v. McRae, 240 N.C. 334, 82 S.E.2d 67 (1954).

c. Remarks Concerning Weight and Credibility of Testimony.

Contentions of the Parties. — The manner of stating the contentions of the parties, if indicative of the court's opinion, is within the prohibition of this section, and where court in stating State's contentions in regard to the disinterestedness of officers who testified and the weight to be given the testimony of a doctor as an expert witness, together with a later statement that the evidence was "rather clear" was held error as an expression of opinion by court upon weight of the evidence. State v. Benton, 226 N.C. 745, 40 S.E.2d 617 (1946).

Remarks as to Testimony of Officer. — Where an officer purchased liquor in order to obtain evidence against a suspect, and voluntarily testified for the prosecution, an instruction which left the impression that his credibility was enhanced by the fact that he was an officer in the performance of his duty, and that he was protected from prosecution by § 18-8, was held erroneous as an expression of opinion on the credibility of the testimony. State v. Love, 229 N.C. 99, 47 S.E.2d 712 (1948).

Instruction as to Former Marriage. — In an indictment for bigamy an instruction that the weight of the evidence was that there had been no first marriage, is a violation of this section. State v. Parker, 106 N.C. 711, 11 S.E. 517 (1890).

Instruction That Guilt is Established. — This section prohibits the court in its charge to the jury from expressing any opinion as to the weight and credibility of the evidence, and, defendant having pleaded not guilty, it is error for the court to charge the jury in effect that the fact of guilt is established by the evidence, even though the evidence be uncontradicted and even though the fact of guilt may be inferred from defendant's own testimony, since the credibility of the evidence is in the exclusive province of the jury. State v. Blue, 219 N.C. 612, 14 S.E.2d 635 (1941).

Concerning Corroboration of Defendant's Testimony. — Where the defendant, charged with homicide, testified as to his version of the fatal killing upon his contention of self-defense, and narrated the actions of himself, his oldest son, and the deceased and where upon the conclusion of his testimony the court by interrogation objected to by defendant's counsel, brought out the fact that the son was seventeen years old, and was present in the courtroom, the charge of the court which set forth as the contention of the State that defendant's testimony could not be relied upon because uncorroborated, notwithstanding the fact that defendant's oldest son, who saw what happened, was present in the courtroom was

held to constitute reversible error. State v. Bean, 211 N.C. 59, 188 S.E. 610 (1936).

Instruction as to Age of Prosecutrix. — Where in prosecution under § 14-26, the court, in summarizing the contentions of defendant, charged that defendant insisted that the jury should not find beyond a reasonable doubt that the prosecutrix was under sixteen years of age, "whereas the Biblical records and the testimony of her father and mother should satisfy you beyond a reasonable doubt that she is under sixteen years of age," the instruction constitutes an expression of opinion on an essential element of the crime charged, prohibited by this section, and the error is not mitigated by construing the charge as a whole, nor may it be upheld as charging that the jury should find that the prosecutrix was under sixteen years of age, if they believed the uncontradicted testimony. State v. Wyont, 218 N.C. 505, 11 S.E.2d 473 (1940).

Court's inadvertent comment that defendant's testimony was incredible and therefore defendant should not be considered a credible witness was a violation of this section. State v. Hopson, 265 N.C. 341, 144 S.E.2d 32 (1965).

Characterizing Statutory Inference as "Deep Presumption". — In characterizing the permissible inference raised by § 18-11 as "a deep presumption," the trail judge expressed an opinion as to the strength of the evidence. Such an expression is prohibited by this section. State v. Tessnear, 265 N.C. 319, 144 S.E.2d 43 (1965).

It is error to intimate an opinion as to the relative strength or weakness of a party's case, or the credibility of his witnesses, or to make any statement such as to invoke sympathy for the prosecuting witness, thereby bolstering that testimony. State v. McLean, 17 N.C. App. 629, 195 S.E.2d 336 (1973).

It is error for the trial judge to intimate that controverted facts have or have not been established, or to place before the jury in a statement of contentions matter which they should not take into consideration in arriving at a verdict. State v. McLean, 17 N.C. App. 629, 195 S.E.2d 336 (1973).

Argument Repeated by Court as Contention. — An argument that would be permissible when made by the solicitor (now prosecutor) may, when repeated by the court as a contention, give emphasis that would weigh too heavily upon defendant, and would constitute a prejudicial charge under this section. State v. Stroud, 10 N.C. App. 30, 177 S.E.2d 912 (1970).

Judge's Questioning of Defendant. — In a prosecution of two defendants for discharging firearms into an occupied building, the trial judge's questioning of the defendants amounted to cross-examination and constituted an expression of opinion on the credibility of defendants' testimony, where the questions included the following: (1) "At the time you fired your shotgun you knew there was someone in the Club, didn't you?"; (2) "If you thought there was trouble brewing outside, why didn't you stay in your house rather than get your gun and go out and get in it?"; and (3) "What have you been tried and convicted for?". State v. Lowery, 12 N.C. App. 538, 183 S.E.2d 797 (1971).

Unnecessary and Laborious Recapitulation of Testimony. — Where, in his charge to the jury the trial judge undertook an unnecessary and laborious recapitulation of the testimony of each witness and reciptulated testimony of the officer which was given only on voir dire in the absence of the jury, inadvertently reviewing for the jury testimony which was material to the charge against defendant, this constituted a misstatement of a material fact not shown in evidence. State v. Logan, 18 N.C. App. 557, 197 S.E.2d 238 (1973), overruled on another point, State v. Harris, 25 N.C. App. 404, 213 S.E.2d 414 (1975).

Opinion as to Guilt of Defendant. — In prosecution for rape and crime against nature, the trial judge committed prejudicial error by expressing his opinion on the evidence when he instructed the jury that there was "considerable evidence" that defendant had committed the crime charged, and when he further went on to say "not satisfied with that, the evidence tends to show that he, the defendant, again had intercourse with her," intimating to the jury that it was his opinion that the defendant was guilty. State v. Head, 24 N.C. App. 564, 211 S.E.2d 534 (1975).

d. Miscellaneous Remarks.

Instruction as to Uncorroborated Testimony in Perjury Trial. — While the uncorroborated testimony of one witness might convince the jury, beyond a reasonable doubt, of the guilt of accused in a criminal trial for perjury, it is not sufficient in law; and instructions, therefore, that if the jury is so satisfied from the evidence, beyond a reasonable doubt, they should return a verdict of guilty, is erroneous as failing to comply with this section. State v. Hill, 223 N.C. 711, 28 S.E.2d 100 (1943).

Charge Based on Contradicted Witness. — It is error in the judge to designate a single witness who is contradicted by other witnesses, and to instruct the jury that if they believe the testimony of such witness, then the prisoner is guilty. State v. Rogers, 93 N.C. 523 (1885).

Degree of Crime. — Although the defendant in a trial for murder introduced no evidence, and all the evidence for the State tended to show only murder in the first degree, it was error to instruct the jury that if they believed the evidence they should find the defendant guilty of murder in the first degree. State v. Gadberry, 117 N.C. 811, 23 S.E. 477 (1895).

Trial for Attempted Rape. — On a trial of an

indictment for an assault with intent to commit rape, where there was evidence that the defendant had been found on the six-year-old child, while on her back with her clothes up, it was held to be error for the court in its charge to the jury to remark with emphasis, "Why was she on her back, and why was he on her?" State v. Dancy, 78 N.C. 437 (1876).

Statement as to Violation of Statute. — In prosecution charging resisting lawful arrest in violation of § 14-223, statement of the trial court during the instructions that "the offense charged here was committed in violation of § 14-223" was held to constitute an expression of opinion. State v. Cooper, 4 N.C. App. 210, 166 S.E.2d 509 (1969).

Remarks Made in Interrogating Prospective Jurors as to Scruples against Capital Punishment. — Where the court, in interrogating prospective jurors in regard to their scruples against capital punishment, refers to several celebrated cases and asks them, in the presence of those immediately thereafter impaneled to try the case, whether they would not render a verdict calling for the death sentence in such cases, defendant must be awarded a new trial notwithstanding that the court thereafter cautions the jurors that he did not mean to compare the case at issue with the other cases. State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954).

An instruction utilizing the expression "the defense of drunkenness is one which is dangerous in its application" is clearly an expression of opinion by a judge in giving a charge to a petit jury, which is prohibited by this section. State v. Oakes, 249 N.C. 282, 106 S.E.2d 206 (1958).

Instructions in Prosecutions for Driving under Influence of Intoxicating Liquors Held Prejudicial Where Defendant Stated to Be Driver. — See State v. Swaringen, 249 N.C. 38, 105 S.E.2d 99 (1958).

Instruction as to Result of Failure to Convict. — In a prosecution for driving a vehicle on a public highway while under the influence of intoxicating liquor, an instruction to the effect that the State contended the statute was enacted to protect life and property and if the jury should fail to "convict on this evidence, then the law or statute commonly referred to as 'the drunken driving' statute, would have no purpose and no effect" was held prejudicial as an expression of opinion by the court on the evidence. State v. Anderson, 263 N.C. 124, 139 S.E.2d 6 (1964).

In a prosecution for violations of the liquor laws the court, in explaining its ruling admitted testimony of a witness that he saw intimacies between girls and men on the occasion he purchased liquor at defendant's house, stated that "they both go hand in hand." The statement of the court was held prejudicial as intimating that evidence of the intimacy of the girls and men was direct proof of liquor dealings by defendant. State v. Williamson, 250 N.C. 204, 108 S.E.2d 443 (1959).

Expressions by Judge Stated as Contentions May Violate Section. — Where expressions by the trial judge, in their warmth and vigor, though stated in the form of contentions, are capable of impressing the jury with the strength of the State's case and the weakness of the alibi of the defendant, such expressions, though unintended by the trial judge to prejudice anyone, are in violation of this section and constitute prejudicial error. State v. Stroud, 10 N.C. App. 30, 177 S.E.2d 912 (1970).

Judge Sustaining His Own Objections. — The trial judge expressed an opinion in violation of this section when he sustained his own objections to seven questions propounded by defense counsel to one State's witness and to nine questions propounded by defense counsel to another State's witness, and told defense counsel on two occasions after sustaining his own objections, "You know better than that." State v. Lemmond, 12 N.C. App. 128, 182 S.E.2d 636 (1971).

Assuming Role of Prosecutor. — Where on several occasions while defendant's counsel was cross-examining the State's witnesses, the trial judge either sustained objections by the solicitor (now prosecutor) or interposed his own objections to block legitimate lines of cross-examination, and where, after the State's witness had completed his testimony as to results of the breathalyzer test, the trial judge asked questions of the witness to bring out the fact that the breathalyzer test had been approved for use in this State since 1965 and to bring before the jury that the witness had given the test to persons suspected of driving under the influence of intoxicants many times, the trial judge, temporarily at least, abandoned his role as an impartial jurist and assumed the role of the prosecutor, and in so doing he violated the provisions of this section. State v. Medlin, 15 N.C. App. 434, 190 S.E.2d 425 (1972).

Unintentional Expression of Opinion on Facts Adverse to Defendant. — Where the judge, in questioning several prospective jurors who had been challenged by the state for cause when they had stated that they had conscientious scruples against capital punishment, inadvertently over-stepped his self-appointed bounds and unintentionally expressed an opinion on the facts adverse to the defendant, the defendant was granted a new trial. State v. McSwain, 15 N.C. App. 675, 190 S.E.2d 682 (1972).

Recapitulation of Testimony and Stating State's Contentions Violated Prohibitions of Section. — In recapitulating the testimony and, more grievously, in stating what was said to be the State's contentions, the judge violated the prohibition against expressing an opinion on the

evidence and merits of the case. Such expressions of opinion entitle the defendant to a new trial. State v. Hall, 11 N.C. App. 410, 181 S.E.2d 240 (1971).

Where part of the court's instructions omitted the single word "if," it resulted in an expression of opinion by the court that the State had already shown that defendant's act was criminally negligent. State v. Williams, 280 N.C. 132, 184 S.E.2d 875 (1971).

Criminal Negligence. — Where a portion of the charge amounted to a statement that, if the stabbing was done, an act of criminal negligence had been committed by defendant, that portion was held to be a statement of opinion. State v. Williams, 280 N.C. 132, 184 S.E.2d 875 (1971).

The showing that defendant was seated at a table, that deceased was standing near him, and that defendant pulled the gun from his pocket after which it fired with the bullet striking deceased in the forehead, would certainly be some evidence that defendant intentionally pointed the gun at the deceased even though it may have fired accidentally. There were sufficient facts presented to support the charge concerning whether defendant handled the gun in a criminally negligent manner. State v. Jones, 15 N.C. App. 537, 190 S.E.2d 278 (1972).

Statement That Jury Would Have to Find Defendant Guilty. — The trial judge's comment that the jury would have to find the defendant guilty of one of the three offenses which he had previously discussed was prejudicial error and was not cured by construing the charge contextually as a whole. State v. Whitley, 22 N.C. App. 666, 207 S.E.2d 328 (1974).

Comments made by a trial judge concerning cases involving marijuana, coming shortly before the defendant's marijuana case was called, entitled defendant to a continuance, and it was error for the trial judge to overrule defendant's motion. State v. Carriker, 287 N.C. 530, 215 S.E.2d 134 (1975).

III. EXPLANATION OF LAW AND EVIDENCE.

A. General Consideration of the Charge.

The Object of Instructions. — The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved. State v. Friddle, 223 N.C. 258, 25 S.E.2d 751 (1943).

The chief purposes of the charge are clarification of the issues, elimination of extraneous matters, and declaration and application of the law arising upon the evidence. State v. Jackson, 228 N.C. 656, 46 S.E.2d 858 (1948); State v. Cameron, 284 N.C. 165, 200 S.E.2d 186 (1973), cert. denied, 418 U.S. 905, 94 S. Ct. 3195, 41 L. Ed. 2d 1153 (1974).

The purposes of the trial judge's charge to the jury are to clarify the issues, eliminate extraneous matters and declare and explain the law arising on the evidence. State v. Cousin, 292 N.C. 461, 233 S.E.2d 554 (1977).

The chief purpose of a charge is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict. State v. Williams, 280 N.C. 132, 184 S.E.2d 875 (1971).

The purpose of an instruction is to clarify the issues for the jury and to apply the law to the facts of the case. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974).

Court, Not Counsel, to Instruct Jury. — It is the function of the court, not of the counsel for either party, to instruct the jury as to the law arising on the evidence. State v. Jackson, 284 N.C. 321, 200 S.E.2d 626 (1973).

A charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect. State v. Ardrey, 232 N.C. 721, 62 S.E.2d 53 (1950); State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969).

The failure of the court to instruct the jury on substantive features of the case arising on the evidence is prejudicial error. This is true even though there is no special prayer for instructions to that effect. State v. Hornbuckle, 265 N.C. 312, 144 S.E.2d 12 (1965).

Every substantial feature of the case arising on the evidence must be presented to the jury even without a special request for instructions on the issue. State v. Best, 31 N.C. App. 389, 229 S.E.2d 202 (1976).

It is prejudicial error when the court fails to instruct the jury on a substantial feature of the case arising on the evidence. State v. Graves, 18 N.C. App. 177, 196 S.E.2d 582 (1973).

Where the charge fully instructs the jury on all substantive features of the case, defines and applies the law thereto and states the contentions of the parties, it complies with this section. State v. Middleton, 25 N.C. App. 632, 214 S.E.2d 248 (1975).

Instruction Must Be Sufficiently Definite. — The trial judge is not required to instruct the jury with any greater particularity upon any element of the offense than is necessary to enable the jury to apply the law with respect to such element to the evidence bearing thereon. State v. Thacker, 5 N.C. App. 197, 167 S.E.2d 879 (1969); State v. Patton, 18 N.C. App. 266, 196 S.E.2d 560 (1973).

New trial must result when ambiguity in the charge affords an opportunity for the jury to act upon a permissible but incorrect interpretation. State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976).

The charge of the court must be read as a whole, in the same connected way that the judge is supposed to have intended it and the jury to have considered it. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970); State v. McCall, 31 N.C. App. 543, 230 S.E.2d 195 (1976).

The judge's words in a charge may not be detached from the context and the incidents of the trial and then critically examined for an interpretation from which erroneous expressions may be inferred. State v. McWilliams, 277 N.C. 680, 178 S.E.2d 476 (1971); State v. Tilley, 292 N.C. 132, 232 S.E.2d 433 (1977).

It is not sufficient to show that a critical examination of the judge's words, detached from the context and the incidents of the trial, are capable of an interpretation from which an expression of opinion may be inferred. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970); State v. Respass, 27 N.C. App. 137, 218 S.E.2d 227 (1975).

A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct. State v. McWilliams, 277 N.C. 680, 178 S.E.2d 476 (1971); State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970); State v. Respass, 27 N.C. App. 137, 218 S.E.2d 227 (1975); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975); State v. Williams, 288 N.C. 680, 220 S.E.2d 558 (1975); State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976); State v. McCall, 31 N.C. App. 543, 230 S.E.2d 195 (1976); State v. Tilley, 292 N.C. 132, 233 S.E.2d 433 (1977).

Where it was clear that some of the errors in a charge resulted from lapus linguae on the part of the trial judge and it was also apparent that many of the errors of omission and commission resulted from the taking and transcription of the record, and the Supreme Court doubted that any part of the charge as challenged by any one assignment of error would constitute prejudicial error, it concluded that the total charge failed to clarify the material issues so as to aid the jury in reaching a verdict. State v. Williams, 280 N.C. 132, 184 S.E.2d 875 (1971).

A charge must be considered contextually as a whole. State v. Lee, 282 N.C. 566, 193 S.E.2d 705 (1973).

The jury charge must be read as a whole and construed contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct. State v. Laws, 16 N.C. App. 129, 191 S.E.2d 416 (1972).

The charge of the court will be construed contextually, and segregated portions will not be held prejudicial error when the charge as a whole is free from any prejudice to defendant. State v. Eisen, 16 N.C. App. 532, 192 S.E.2d 613 (1972).

Defendant cannot be permitted to select portions of the charge — even though objectionable when standing alone — and assign errors to them if those portions can be readily explained by reference to the charge in its entirety, and the charge in its entirety appears to be without prejudicial error. State v. Hubbard, 19 N.C. App. 431, 199 S.E.2d 146 (1973).

Isolated portions of a charge will not be held prejudicial when the charge as a whole is correct. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

On appeal, a charge to a jury must be read and considered in its entirety. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

A charge must be construed as a whole, and isolated portions of a charge will not be held to be prejudicial where the charge as a whole is correct and free from objection. State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976).

It is well-settled that the charge of the court to the jury will be construed contextually, and segregated portions will not be held prejudicial error where the charge as a whole is free from objection. State v. Reese, 31 N.C. App. 575, 230 S.E.2d 213 (1976).

A charge must be read contextually, and when this is done, if it is manifest that the jury understood that each element had to be proved by evidence establishing the same beyond a reasonable doubt, then there is no error. State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976), cert. denied, 429 U.S. 1093, 97 S. Ct. 1106, 51 L. Ed. 2d 539 (1977).

A charge to the jury must be read and considered in its entirety and not in detached fragments. State v. Lankford, 31 N.C. App. 13, 228 S.E.2d 641 (1976).

The fact that some expressions in the charge, standing alone, might be considered erroneous will afford no ground for reversal. State v. McCall, 31 N.C. App. 543, 230 S.E.2d 195 (1976).

Conflicting instructions upon a material aspect of the case must be held for prejudicial error, since the jury may have acted upon the incorrect part of the charge, or to phrase it differently, since it cannot be known which instruction was followed by the jury. State v. Parks, 290 N.C. 748, 228 S.E.2d 248 (1976).

Conflicting instructions on the applicable law or on a substantive feature of the case, particularly on the burden of proof, entitled defendant to a new trial, since it must be assumed on appeal that the jury was influenced in coming to a verdict by that portion of the charge which was erroneous. State v. Jones, 20 N.C. App. 454, 201 S.E.2d 552 (1974).

When there are conflicting instructions upon a material point, there must be a new trial since the jury is not supposed to be able to distinguish between a correct and an incorrect charge. State v. Carver, 286 N.C. 179, 209 S.E.2d 785 (1974).

It must be assumed on appeal of two conflicting instructions to the jury that the jury was influenced by that portion of the charge which is incorrect. State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976).

Charge Failing to Submit an Essential Element of Offense. — Where defendant testifies that he drove a vehicle on the highways of the State on the afternoon in question, then drank some wine and whiskey and became drunk about midafternoon, but denies that he drove a vehicle after becoming intoxicated, a charge to the effect that defendant admitted that he was drunk and that the only question for the jury was whether he drove his vehicle at any time on the afternoon in question, must be held for prejudicial error in failing to submit to the jury the essential element of the offense of whether defendant, while intoxicated, drove on a highway of the State, and in charging that an essential element of the offense had been fully or sufficiently proven when defendant's testimony was not sufficiently broad or comprehensive to constitute an admission of this fact. State v. Hairr, 244 N.C. 506, 94 S.E.2d 472 (1956).

The trial judge committed prejudicial error by failing to explain the essential elements of the crime charged. State v. Wingo, 30 N.C. App. 123, 226 S.E.2d 221 (1976).

Charges Held Not to Impinge on This Section. — See State v. Hester, 209 N.C. 99, 182 S.E. 738 (1935); State v. Hodgin, 210 N.C. 371, 186 S.E. 495 (1936); State v. Atlantic Ice & Coal Co., 210 N.C. 742, 188 S.E. 412 (1936).

Erroneous Instruction Not Cured by Correct Instruction. — An error in giving an erroneous instruction is not cured by subsequently correctly stating the law. State v. Morgan, 136 N.C. 628, 48 S.E. 670 (1904).

Where the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part, particularly when the incorrect portion of the charge is the application of the law to the facts. State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976).

When the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

When Charge Contains a "Powerful Summing up". — Where the trial judge in his general charge gives "every reasonable contention of the State," it is erroneous to give an entirely new charge, containing "a powerful summing up" for the State. State v. McDowell, 129 N.C. 523, 39 S.E. 840 (1901).

The use of the words "you want to find" in charging the jury as to the elements of the offense charged, construing the charge as a whole, merely placed the burden on the State to prove the crime charged and not to constitute an expression of opinion or a direction or intimation that the jury should so find. State v. Smith, 221 N.C. 400, 20 S.E.2d 360 (1942).

The use of the words "the State has offered evidence which tends to show" in a charge to the jury does not constitute an expression of opinion in violation of this section. State v. Howard, 222 N.C. 291, 22 S.E.2d 917 (1942).

Contentions Not Necessarily a Part of Instructions. — The contentions of the parties to an action are not a necessary part of the instruction of the trial judge to the jury upon the law of the case. State v. Whaley, 191 N.C. 387, 132 S.E. 6 (1926).

A statement of contentions by the judge is not required. State v. Watson, 1 N.C. App. 250, 161 S.E.2d 159 (1968).

Taking More Time in Stating State's Contentions. — That the court necessarily takes more time in stating the State's contentions than in stating the defendant's contentions is not ground for objection. State v. Sparrow, 244 N.C. 81, 92 S.E.2d 448 (1956).

The equal stress which this section requires to be given to contentions of the State and the defendant in a criminal action does not mean that the statement of the contentions of the State and of the defendant must be equal in length. State v. King, 256 N.C. 236, 123 S.E.2d 486 (1962).

In a trial where the evidence for the defendant is short, or where he may have chosen not to offer any evidence at all, his contentions will naturally be very few in contrast with those of the State where it may have introduced a great volume of testimony. State v. King, 256 N.C. 236, 123 S.E.2d 486 (1962).

Weight of Defendant's Testimony. — The testimony of defendant if accepted as true by the jury, is given the same credibility as that of a disinterested witness, and a charge to that effect, after a proper instruction as to interest, is not error. State v. Beavers, 188 N.C. 595, 125 S.E. 258 (1924).

Where Charge Favorable to Appellant. — The failure of the court to comply with this section will not be sufficient ground for a new trial, where the case on appeal shows that the charge of the court presented the case in the most favorable light for the defendant. State v. Pritchett, 106 N.C. 667, 11 S.E. 357 (1890).

Inadvertent Statement. — Where the court instructed the jury to disregard an inadvertent statement previously made and then proceeded to charge the jury correctly, the inadvertence was discovered immediately and the correction was prompt and complete, this is sufficient and is all the law requires. State v. Foster, 284 N.C. 259, 200 S.E.2d 782 (1973).

Requests for Instructions. — Where the charge fully instructs the jury on all substantive features of the case, defines and applies the law thereto, and states the contentions of the parties, it complies with this section, and a party desiring further elaboration on a particular point, or of his contentions, or a charge on a subordinate feature of the case, must apply

tender request for special instructions. State v. Floyd, 15 N.C. App. 438, 190 S.E.2d 353 (1972); State v. Nettles, 20 N.C. App. 74, 200 S.E.2d 664 (1973); State v. Murray, 21 N.C. App. 573, 205 S.E.2d 587 (1974); State v. Walker, 31 N.C. App. 199, 228 S.E.2d 772 (1976).

A party desiring further elaboration on a subordinate feature of the case must aptly tender request for further instructions. State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976).

The fact that a limiting instruction was not repeated in the charge is not error in the absence of a request for a special instruction. State v. Spinks, 24 N.C. App. 548, 211 S.E.2d 476 (1975).

It is the general rule that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction, otherwise they are deemed to have been waived and will not be considered on appeal. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

The law requires that any alleged inaccuracies in the trial court's charge to the jury be called to the attention of the court before the jury retires in order to give the trial judge an opportunity to correct any alleged inaccuracy in his review of the evidence and statement of the contentions of the parties. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

A party desiring further elaboration must aptly tender requests for further instructions. State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975), cert. denied, 423 U.S. 1091, 96 S. Ct. 886, 47 L. Ed. 2d 102 (1976).

Where the charge to the jury is not included in the record on appeal, it is presumed that the jury was properly instructed as to the law arising upon the evidence as required by this section. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Insubstantial technical errors in the charge which could not have affected the result will not be held prejudicial. State v. McWilliams, 277 N.C. 680, 178 S.E.2d 476 (1971); State v. Tilley, 292 N.C. 132, 232 S.E.2d 433 (1977).

Presumption That Court Correctly Instructed Jury. — When the judge's charge is not shown in the record of case on appeal, it will be presumed that the court correctly instructed the jury on every principle of law applicable to the facts in evidence. State v. Sears, 235 N.C. 623, 70 S.E.2d 907 (1952); State v. Faison, 246 N.C. 121, 97 S.E.2d 447 (1957).

Broadside Exception Untenable. — An exception that the court "did not charge the jury as to the law on every substantial feature of the case embraced within the issues and arising on the evidence" is untenable as a broadside exception. State v. Triplett, 237 N.C. 604, 75 S.E.2d 517 (1953).

Assignment of error that the judge failed "to explain and apply or correlate the law and highway safety statutes to the different phases of the evidence as provided in § 1-180" is too general and indefinite to present any question for decision. Unpointed, broadside exceptions will not be considered. State v. Woolard, 260 N.C. 133, 132 S.E.2d 364 (1963).

An argument in an appellate brief that the court failed to charge "as to the contentions of the defendant in accordance with § 1-180" is a broadside exception which is not sufficient. State v. McCaskill, 270 N.C. 788, 154 S.E.2d 907 (1967).

An exception to the entire charge of the court is a broadside exception and presents no question for review upon appeal. State v. Jackson, 6 N.C. App. 406, 170 S.E.2d 137 (1969).

An assignment of error to the court's failure to charge the law and explain the evidence as required by statute is a broadside exception and will not be considered. Panhorst v. Panhorst, 9 N.C. App. 258, 175 S.E.2d 609 (1970), rev'd on other grounds, 277 N.C. 664, 178 S.E.2d 387 (1971).

Exception Must Be Specific. — An exception to the charge on the ground that it failed to explain and apply the law to the evidence as required by this section may be disregarded as a broadside exception. State v. Webster, 218 N.C. 692, 12 S.E.2d 272 (1940).

An alleged error in the charge of the court to the jury must be specified, both as to alleged error in the charge actually given and as to an alleged failure to give an instruction required by the law. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

An assignment of error to the charge on the ground that it failed to explain and apply the law to the evidence as required by statute is a broadside exception and ineffectual, it being required that the assignment of error set forth the part of the charge challenged and point out specifically the error complained of. State v. Black, 14 N.C. App. 373, 188 S.E.2d 634 (1972).

And Based on Proper Assignment of Error. — An exception for the failure of the court to comply with the provisions of this section must be based upon a proper assignment of error on this ground. State v. Muse, 230 N.C. 495, 53 S.E.2d 529 (1949).

Specific Prayers for Instructions. — If defendant desires fuller instructions as to the evidence or contentions, he should so request. His failure to do so precludes him from assigning this as error on appeal. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971); State v. McClain, 282 N.C. 396, 193 S.E.2d 113 (1972).

Absent a special request, the judge is not required to instruct the jury that a defendant's failure to testify does not create any presumption against him. State v. Butcher, 13 N.C. App. 97, 185 S.E.2d 11 (1971).

When the trial judge has instructed the jury correctly and adequately on the essential features of the case but defendant desires more elaboration on any point or a more detailed explanation of the law, then he should request further instructions. Otherwise, he cannot complain. State v. Everette, 284 N.C. 81, 199 S.E.2d 462 (1973).

A defendant who desires a more detailed statement of his contentions must request it from the court. State v. Murray, 21 N.C. App. 573, 205 S.E.2d 587 (1974).

Exception and Assignment of Error. — An exception, for failure to charge the jury as required by this section, must be taken in the same manner as any other exception to the charge, and an assignment of error based thereon must particularize and point out specifically wherein the court failed to charge the law arising on the evidence — otherwise it becomes a mere broadside and will not be considered unless pointed out in some other exception. State v. Britt, 225 N.C. 364, 34 S.E.2d 408 (1945).

The Supreme Court will not go "on a voyage of discovery" to ascertain wherein the judge failed to explain adequately the law in the case. State v. Woolard, 260 N.C. 133, 132 S.E.2d 364 (1963).

Errors Should Be Pointed Out at Trial. — Any error or omission in the statement of the evidence by court must be called to the attention of the court at the trial to avail the defendant any relief on his appeal. State v. Thompson, 226 N.C. 651, 39 S.E.2d 823 (1946); State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976).

Objections to the statement of contentions should be brought to the trial judge's attention in order that a misstatement can be corrected by the trial judge before verdict; otherwise they are deemed to have been waived. State v. Wilson, 1 N.C. App. 250, 161 S.E.2d 159 (1968).

Any error or omission by the court in its review of the evidence in the charge to the jury must be then called to the attention of the court so that the court may have an opportunity to make the appropriate correction. State v. McClain, 282 N.C. 396, 193 S.E.2d 113 (1972).

Objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction. State v. Greer, 18 N.C. App. 655, 197 S.E.2d 601 (1973); State v. Flannery, 31 N.C. App. 617, 230 S.E.2d 603 (1976).

The general rule in this State is that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal. State v. West, 21 N.C. App. 58, 203 S.E.2d 86 (1974); State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975), cert. denied, 423 U.S. 1091, 96 S. Ct. 886, 47 L. Ed. 2d 102 (1976).

Objection to the trial court's recapitulation of the evidence should have been made before the jury retired so as to afford the court an opportunity for correction; otherwise, the objections are deemed to have been waived and will not be considered on appeal. State v. Tolley, 30 N.C. App. 213, 226 S.E.2d 672 (1976).

Objections to that portion of the charge which reviews the evidence and states the contentions of the parties must be made before the jury retires so as to give the trial judge an opportunity to correct any misstatements. Otherwise, any objection to the misstatement will be deemed to have been waived and will not be considered on appeal. State v. Womble, 292 N.C. 455, 233 S.E.2d 534 (1977).

Cure of Error in Instruction. — Any error in the instruction excepted to as an expression of the court's opinion on the facts was completely cured by the instruction which followed, that the court had no opinion. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Objections Will Not Be Considered for First Time on Appeal. — Where defendant did not object to the court's statement of the State's contentions at the time they were given, objections thereto will not be considered for the first time on appeal. State v. King, 6 N.C. App. 702, 171 S.E.2d 33 (1969).

Error Cured by Verdict. — Where there are several counts of an indictment, and the charge was correct upon those on which a conviction has been had, the verdict cures the error committed in not giving the principles of law arising from the evidence upon the count which the appealing defendant was acquitted. State v. Church, 192 N.C. 658, 135 S.E. 769 (1926).

Same — Failure to Call Judge's Attention to Error. — The appellant must at the time call the attention of the trial judge to errors he is alleged to have committed in stating the contentions of the parties to the jury, when he has not done so, as an exception after verdict comes too late to be considered on appeal. State v. Beavers, 188 N.C. 595, 125 S.E. 258 (1924); State v. Harvey, 214 N.C. 9, 197 S.E. 620 (1938); State v. Bowser, 214 N.C. 249, 199 S.E. 31 (1938).

B. Explanation Required.

I. In General.

Rule Stated. — It is the duty of the judge, under the provisions of this section, to state in a plain and correct manner the evidence given in the case and to declare and explain the law

arising thereon, without expressing any opinion upon the facts. State v. Owenby, 226 N.C. 521, 39 S.E.2d 378 (1946).

It is the duty of the judge in charging the jury, to segregate the material facts of the case, array the facts on both sides, and apply the principles of law to each, so that the jury may decide the case according to the credibility of the witnesses and the weight of the evidence. State v. Rogers, 93 N.C. 523 (1885), citing State v. Dunlop, 65 N.C. 288 (1871); State v. Jones, 87 N.C. 547 (1882); State v. Friddle, 223 N.C. 258, 25 S.E.2d 751 (1943); State v. Bryant, 282 N.C. 92, 191 S.E.2d 745 (1972), cert. denied, 410 U.S. 958, 93 S. Ct. 1432, 35 L. Ed. 2d 691 (1973).

He is required to state clearly and distinctly the particular issues arising on the evidence, and on which the jury are to pass, and to instruct them as to the law applicable to every state of the facts which upon the evidence they may reasonably find to be a true one. State v. Matthews, 78 N.C. 523 (1878).

And in criminal cases this section requires the court to give to the jury such instructions as will enable them to understand the nature of the crime and properly determine each material fact upon which may depend the guilt or innocence of the accused. State v. Fulford, 124 N.C. 798, 32 S.E. 377 (1899).

An instruction meets the requirements of this section when it clearly applies the law to the evidence introduced upon the trial and gives the position taken by the respective parties as to the prominent and controlling features which make for the ascertainment of the facts. State v. Graham, 194 N.C. 459, 140 S.E. 26 (1927). See State v. Biggs, 224 N.C. 722, 32 S.E.2d 352 (1944).

Where evidence is in the record defendant is entitled to have the law arising thereon explained and applied by the judge. State v. Anderson, 222 N.C. 148, 22 S.E.2d 271 (1942).

This section is complied with where the court fully instructs the jury as to the evidence and the contentions of the parties and defines the law applicable thereto. State v. McLean, 234 N.C. 283, 67 S.E.2d 75 (1951).

This section requires the trial judge to apply the law to the various factual situations presented by the conflicting evidence, thus where defendant's testimony, if the jury found it to be true, would entitle him to a verdict of not guilty, he was entitled to have the legal effect of his evidence explained to them. State v. Keziah, 269 N.C. 681, 153 S.E.2d 365 (1967).

Where the court failed to explain and declare the law arising on the evidence presented by the defendant, this constituted prejudicial error. State v. Hornbuckle, 265 N.C. 312, 144 S.E.2d 12 (1965).

Where defendant's evidence, if accepted, discloses facts sufficient in law to constitute a defense to the crime for which he is indicted, the court is required to instruct the jury as to the legal principles applicable thereto. What weight, if any, is to be given such evidence, is for determination by the jury. State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969).

This section requires the judge to explain the law but give no opinion on the facts. The purpose of the section is to secure the right of every litigant to have his cause considered by an impartial judge and an unbiased jury. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970).

The requirement of this section is met by presentation of the principal features of the evidence relied on respectively by the prosecution and defense. State v. Craig, 11 N.C. App. 196, 180 S.E.2d 376 (1971).

The judge is required to declare and explain the law arising on the evidence. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

It is the duty of the court to state the evidence to the extent necessary to explain the application of the law arising thereon. State v. Pittman, 12 N.C. App. 401, 183 S.E.2d 307 (1971).

This section requires the trial judge to clarify and explain the law arising on the evidence, and a trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial. State v. Cameron, 284 N.C. 165, 200 S.E.2d 186 (1973), cert. denied, 418 U.S. 905, 94 S. Ct. 3195, 41 L. Ed. 2d 1153 (1974).

The presiding judge in his charge to the jury must declare and explain the law arising on the evidence relating to each substantial feature of the case. State v. Everette, 284 N.C. 81, 199 S.E.2d 462 (1973).

Nothing more is required than a clear instruction that applies the law to the evidence and gives the position taken by the parties as to the essential features of the case. State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976).

Discretion of the Court. — In giving instructions the court is not required to follow any particular form and has wide discretion as to the manner in which the case is presented to the jury, but it has the duty to explain, without special request therefor, each essential element of the offense and to apply the law with respect to each element to the evidence bearing thereon. State v. Mundy, 265 N.C. 528, 144 S.E.2d 572 (1965).

Where the content and form of the questions did not clearly apply the law to the facts, and the charge left the jury with no clear choice between second-degree murder and manslaughter, the charge was held erroneous. State v. Rummage, 280 N.C. 51, 185 S.E.2d 221 (1971).

Recital of What Evidence Tended to Show without Instruction on Application of Law. — Where the trial court gives a recital of what some of the evidence tended to show, but no

instruction is given as to how the law applies to it, the jury is left unaided to apply the abstract principles of law to the facts, and this constitutes error requiring a new trial. State v. McKinnon, 9 N.C. App. 724, 177 S.E.2d 299 (1970).

Where the charge of the court fails to point out the distinction between the counts in the indictment, and leaves the jury with the impression that both counts are valid when there is only one question to be answered constitutes reversible error, under this section. State v. Ray, 207 N.C. 642, 178 S.E. 224 (1935).

Failure to Instruct concerning Admissions as to Convictions of Unrelated Prior Criminal Offenses. — The trial court's failure to instruct that admissions as to convictions of unrelated prior criminal offenses were not competent as substantive evidence but were competent as bearing upon defendant's credibility as a witness does not constitute error, absent a request for such instruction. State v. Alexander, 16 N.C. App. 95, 191 S.E.2d 395 (1972).

When two or more defendants are jointly charged with a crime, a charge which can be construed to mean that the jury must convict all if it finds one guilty constitutes reversible error. State v. Mitchell, 20 N.C. App. 437, 201 S.E.2d 720 (1974).

Where Facts Are Simple. — The section does not require the judge to charge the jury where the facts at issue are few and simple, and no principle of law is involved, unless he is requested to do so; but in cases where the witnesses are numerous, or the testimony conflicting or complicated, and different principles of law are applicable to different aspects of the case, it is his duty to conform to the requirement of the statute. State v. Reynolds, 87 N.C. 544 (1882).

Instructions to the jury should be addressed to specific issues, but, where the issues are simple, and they do not appear to have misled the jury, the error in this respect will not be held as reversible. Craig v. Stewart, 163 N.C. 531, 79 S.E. 1100 (1913).

Where the evidence is simple, direct and without equivocation and complication, an explanation of the law and a statement of the evidence in the form of contentions is a sufficient compliance with this section. State v. Williams, 290 N.C. 770, 228 S.E.2d 241 (1976).

Contention of Parties. — Objection to the charge on the ground that the court unduly emphasized the contentions of the State, amounting to an expression of opinion on the facts, held untenable, since the charge construed as a whole stated only contentions legitimately arising on the evidence and inferences properly deducible therefrom. State v. Wilcox, 213 N.C. 665, 197 S.E. 156 (1938).

A trial judge is not required by law to state the contentions of litigants to the jury. When, however, a judge undertakes to state the contentions of one party, he must also give the equally pertinent contentions of the opposing party. State v. King, 256 N.C. 236, 123 S.E.2d 486 (1962).

Where court gave the State's contentions on every phase of the testimony at great length and in detail, but gave the defendant's contentions in very brief, general terms, as though he had offered no evidence at all, the pertinent contentions arising from the defendant's evidence were not given as required by the provisions of this section. State v. Kluckhohn, 243 N.C. 306, 90 S.E.2d 768 (1956).

An exception by the defendant charging that the judge gave unequal stress to the contentions of the State and the defendant, where the defendant offered no evidence, was held to be unfounded. State v. Smith, 238 N.C. 82, 76 S.E.2d 363 (1953).

Where the judge in his charge stated that it had taken longer to give a summary of the State's evidence than the defendants' but the jury were to attach no significance to that, and he gave equal stress to the contentions of the State and of the defendants, this was held not error. State v. Smith, 237 N.C. 1, 74 S.E.2d 291 (1953).

Where the court stated fully the contentions of the State but stated no contentions of defendant, the charge does not meet the requirement of this section as interpreted and applied in our decisions. State v. Crawford, 261 N.C. 658, 135 S.E.2d 652 (1964).

The trial judge failed to comply with the provisions of this section in that, after stating fully the contentions of the State, he failed to give equal stress to the contentions of defendant, and particularly to his contention that the State's evidence did not show any felonious intent to commit larceny. State v. Crawford, 261 N.C. 658, 135 S.E.2d 652 (1964).

Failure of the court to state the contention of defendant that the State's evidence completely failed to show that he had a felonious intent to commit larceny was highly prejudicial to defendant. State v. Crawford, 261 N.C. 658, 135 S.E.2d 652 (1964).

Although the judge is not required to state or recapitulate the contentions of the parties, it is permissible for him to do so. State v. Holway, 8 N.C. App. 340, 174 S.E.2d 54 (1970).

While the trial court is not required to state the contentions of the litigants at all, when the court does undertake to state the contentions of one party it must also give equal pertinent contentions of the opposing party. State v. Billinger, 9 N.C. App. 573, 176 S.E.2d 901 (1970).

Though this section does not require the trial judge to state the contentions of either party, the statute does require that the trial judge give "equal stress to the State and defendant in a criminal action"; therefore, where the court gives the State's contentions but gives no

contentions of the defendant, the mandate of this section is not satisfied. State v. Lane, 18 N.C. App. 316, 196 S.E.2d 597 (1973).

A judge is not required by law to state the contentions of the parties, but when he does give the contention of the State on a particular phase of the case, it is error to fail to give defendant's opposing contention arising out of the evidence on the same aspect of the case. State v. Thomas, 284 N.C. 212, 200 S.E.2d 3 (1973).

The trial judge is not required by this section or other law to give the contention of the parties; but when he does state the contentions of the State on a particular aspect of the case, it is error to fail to state defendant's opposing contentions arising out of the evidence, or lack of the evidence, on the same aspect of the case. State v. Vail, 26 N.C. App. 73, 214 S.E.2d 796 (1975).

Contentions which may be argued properly by counsel may be highly improper when stated by the judge. State v. Moore, 31 N.C. App. 536, 230 S.E.2d 184 (1976).

Misstatement of Contention. — Where the misstatement of a contention upon a material point includes an assumption of evidence entirely unsupported by the record, the misstatement must be held prejudicial, notwithstanding the absence of timely objection. State v. Moore, 31 N.C. App. 536, 230 S.E.2d 184 (1976).

Where the court gives the contentions of the State and then states that it does not know what defendant contends, the instructions must be held prejudicial as contravening this section. State v. Robbins, 243 N.C. 161, 90 S.E.2d 322 (1955).

Explanation of Subordinate Features of Case. — The charge of the court did not fail to comply with the provisions of this section if it sufficiently pointed out and explained the substantive features of the case, and as to subordinate features the prisoner should have aptly tendered prayers for special instructions. State v. Ellis, 203 N.C. 836, 167 S.E. 67 (1933).

In the absence of a special request for instructions, the failure of the charge to define certain terms constituting a subordinate feature of the charge will not be held for error. State v. Puckett, 211 N.C. 66, 189 S.E. 183 (1937).

When a judge has charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it by prayers for instructions or other proper procedure. And where this is not done, objection may not be raised for the first time after trial. State v. Davis, 246 N.C. 73, 97 S.E.2d 444 (1957).

A party desiring further elaboration on a subordinate feature of the case must aptly tender request for further instructions. State v. Guffey, 265 N.C. 331, 144 S.E.2d 14 (1965); State v. Craig, 11 N.C. App. 196, 180 S.E.2d 376 (1971).

Where the charge fully instructs the jury on all substantive features of the case, defines and applies the law thereto, and states the contention of the parties, it complies with this section and a party desiring further elaboration on a particular point, or of his contentions, or a charge on a subordinate feature of the case, must aptly tender request for special instructions. State v. Garrett, 5 N.C. App. 367, 168 S.E.2d 479 (1969).

Instructions to scrutinize the testimony of an alleged accomplice, or that the jury should not consider evidence withdrawn by the court, or explaining the difference between corroborative and substantive evidence, or charging how evidence relating to the credibility of a witness should be considered, or that certain evidence had been admitted solely for the purpose of corroboration, or that the jury should take its own recollection of the evidence, or instructions on defendant's evidence of good character, relate to subordinate features upon which the court is not required to charge in the absence of request for special instruction aptly made. State v. Witherspoon, 5 N.C. App. 268, 168 S.E.2d 243 (1969).

A party desiring further elaboration on a particular point, or of his contention, or a charge on a subordinate feature of the case must aptly tender his request for special instructions. Instructions to scrutinize the testimony of an alleged accomplice are not required when, as here, no request therefor has been made. State v. Dunbar, 8 N.C. App. 17, 173 S.E.2d 543 (1970).

Instructions as to the significance of evidence which do not relate to the elements of the crime itself or defendant's criminal responsibility therefor are subordinate features of the case. In the absence of special request, the trial judge is not required to instruct as to subordinate features. State v. Hunt, 283 N.C. 617, 197 S.E.2d 513 (1973); State v. Williams, 289 N.C. 439, 222 S.E.2d 242, death sentence vacated, 429 U.S. 809, 97 S. Ct. 45, 50 L. Ed. 2d 69.

In the absence of a special request the trial judge is not required to instruct the jury on subordinate features of a case. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Instructions as to the significance of evidence which do not relate to the elements of the crime itself or defendant's criminal responsibility therefor have been considered subordinate features of the case. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Instruction to scrutinize the testimony of a witness on the ground of interest or bias is a subordinate and not a substantive feature of the trial, and the judge's failure to caution the jury with respect to the prejudice, partiality or inclination of a witness will not generally be held for reversible error unless there be a request for such instruction. State v. Eakins, 292 N.C. 445, 233 S.E.2d 387 (1977).

An instruction as to the credibility of an interested witness relates to a subordinate feature of the case and the court is not required to charge thereon absent a request. State v. Eakins, 292 N.C. 445, 233 S.E.2d 387 (1977).

When the trial judge undertakes to instruct on a subordinate feature of a case he must do so accurately and completely. State v. Eakins, 292 N.C. 445, 233 S.E.2d 387 (1977).

Duty Cannot Be Omitted. — The duty of the court to explain technical words used in instructions cannot be omitted because some of the jury may be able to explain them. State v. Clark, 134 N.C. 698, 47 S.E. 36 (1904).

Salutation of Instruction. — The trial judge should instruct "that if the jury find from the evidence" and not "if they believe the evidence." State v. Green, 134 N.C. 658, 46 S.E. 761 (1904); State v. Seaboard Air Line R.R., 145 N.C. 570, 59 S.E. 1048 (1907).

2. Statement of Evidence.

In General. — All that is required of a charge by this section is that the essential evidence offered at the trial be stated in a plain and correct manner, together with an explanation of the law arising thereon. State v. Fleming, 202 N.C. 512, 163 S.E. 453 (1932); In re Beale, 202 N.C. 618, 163 S.E. 684 (1932).

This section requires, on the part of the judge, a statement of the evidence to which he is attempting to apply the law. State v. Best, 265 N.C. 477, 144 S.E.2d 416 (1965).

The trial judge is not required to instruct the jury with any greater particularity upon any element of the offense than is necessary to enable the jury to apply the law with respect to such element to the evidence bearing thereon. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

This section requires a statement of the evidence to the extent necessary to explain the application of the law thereto. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

When instructions which are not based upon a state of facts presented by some reasonable view of the evidence are prejudicial to the accused, he is entitled to a new trial. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

A trial judge should never give instructions to a jury which are not based upon a state of facts presented by some reasonable view of the evidence. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

In reviewing the evidence, the court is not required to give a verbatim recital of the evidence but only a summation sufficiently comprehensive to present every substantial and essential feature of the case. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

It is sufficient for the trial judge to fairly summarize the evidence for the purpose of explaining the law applicable thereto. State v. Bobbitt, 29 N.C. App. 155, 223 S.E.2d 398 (1976).

Slight inaccuracies in the statement of the evidence in the instructions of the court to the jury will not be held for reversible error when not called to the attention of the judge at the time and the charge substantially complies with this section. State v. Sterling, 200 N.C. 18, 156 S.E. 96 (1930).

Objections to minor discrepancies in the trial judge's statement of the evidence to the jury are deemed to be waived and will not be considered on appeal unless called to the attention of the court in time to afford opportunity for correction. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

Slight inaccuracy in stating evidence will not be held reversible error when the matter is not called to the court's attention in apt time to afford opportunity for correction. State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975).

A slight inaccuracy in the statement of the evidence must be called to the court's attention in time to afford opportunity for correction, else an exception thereto will not be considered on appeal. State v. Sanders, 29 N.C. App. 662, 225 S.E.2d 620 (1976).

Any minor misstatement in the trial judge's statement of facts or contentions must be brought to his attention at trial. State v. Monk, 291 N.C. 37, 229 S.E.2d 163 (1976).

An inadvertence in recapitulating the evidence must be called to the attention of the court in time for correction and an objection after verdict comes too late. State v. Davis, 291 N.C. 1, 229 S.E.2d 285 (1976).

And a defendant may not avoid the operation of this rule by contending that the trial judge's misstatements were impermissible expressions of opinion. State v. Monk, 291 N.C. 37, 229 S.E.2d 163 (1976).

Failure to charge the jury as to the degree of circumstantial proof required to convict is not error, charge that jury should be satisfied from the evidence beyond a reasonable doubt of defendant's guilt in order to justify conviction being sufficient on the degree of proof required. State v. Shoup, 226 N.C. 69, 36 S.E.2d 697 (1946).

Repetition of Testimony Insufficient. — This duty is not performed by simply repeating the testimony in the order in which it was delivered, or in a general statement of the principles of law applicable to the case; but it requires the judge to state clearly and distinctly the particular issues arising in the controversy; to eliminate the controverted facts; to arrange the testimony in its bearing on their different aspects, and to instruct the jury as to the law applicable thereto in such manner as will enable them to see and comprehend the matters which are essential to

an intelligent and impartial verdict. State v. Boyle, 104 N.C. 800, 10 S.E. 696 (1889).

This section is not complied with where the court reads to the jury full notes of all the testimony in the cause, and tells them that he does this to refresh, and not to control, their recollection of the testimony, that it is their duty to remember the testimony, and that they ought to rely in the last resort on their own recollection. State v. Boyle, 104 N.C. 800, 10 S.E. 696 (1889).

Possibilities of Fact. — Where there are several possibilities of fact, different from the inference tended to be drawn from the evidence offered, a judge is not required to note one such possibility, and specifically bring it to the attention of the jury. State v. Clara, 53 N.C. 25 (1860).

Restricting Evidence to Purpose for Which Admissible. — It is error to admit evidence, competent for one purpose only, to be considered and acted on generally by the jury, without instructions restricting it to the special purpose for which it is admissible. State v. Ballard, 79 N.C. 627 (1878).

Recapitulation Unnecessary. — The judge is not bound to recapitulate all the evidence in his charge to the jury; it is sufficient for him to direct the attention of the jury to the principal questions they have to try, and explain the law applicable thereto. State v. Gould, 90 N.C. 658 (1884); State v. Thompson, 226 N.C. 651, 39 S.E.2d 823 (1946).

Nor is the judge required to recite the testimony of each witness in the order in which he was examined, but need only give a clear and intelligent statement of the evidence, with its legal bearing upon the issue. State v. Jones, 97 N.C. 469, 1 S.E. 680 (1887).

The recapitulation of all the evidence is not required under this section, and nothing more is required than a clear instruction which applies the law to the evidence and gives the position taken by the parties as to the essential features of the case. State v. Thompson, 257 N.C. 452, 126 S.E.2d 58, cert. denied, 371 U.S. 921, 83 S. Ct. 288, 9 L. Ed. 2d 230 (1962); State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971); State v. Greene, 278 N.C. 649, 180 S.E.2d 789 (1971); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975).

The court is not required to recapitulate the evidence, witness by witness. State v. Guffey, 265 N.C. 331, 144 S.E.2d 14 (1965).

In the instructions to the jury, recapitulation of all the evidence is not required, but the trial judge is required to state the evidence to the extent necessary to explain the application of the law thereto. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

Recapitulation of all the evidence is not required, and the statute is complied with in this respect by presentation of the principal features of the evidence relied on respectively by the prosecution and defense. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969); State v. Garrett, 5 N.C. App. 367, 168 S.E.2d 479 (1969); State v. McClain, 282 N.C. 396, 193 S.E.2d 113 (1972); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976).

In instructing the jury, the court is not required to recapitulate all of the evidence. State v. Craig, 11 N.C. App. 196, 180 S.E.2d 376 (1971).

The trial judge is not required to recapitulate the testimony. He is only required to summarize the evidence sufficiently to permit him to explain and apply the appropriate principles of law. State v. West, 21 N.C. App. 58, 203 S.E.2d 86 (1974).

A recapitulation of the principal features of the evidence relied on satisfies the requirement of this section. State v. Hatch, 21 N.C. App. 148, 203 S.E.2d 334 (1974).

The law does not require the judge to review the facts and take up each witness that has testified one by one and repeat the testimony of the witness. State v. Vickers, 22 N.C. App. 282, 206 S.E.2d 399 (1974).

The duty imposed upon the trial judge is to review only so much of the testimony as is necessary for him to apply the law. State v. Vickers, 22 N.C. App. 282, 206 S.E.2d 399 (1974).

The requirement of this section that the judge state the evidence is met by presentation of the principal features of the evidence relied on by the prosecution and the defense. A "verbatim recital of the evidence" is not required. State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975), cert. denied, 423 U.S. 1091, 96 S. Ct. 886, 47 L. Ed. 2d 102 (1976).

The trial judge is not required to recapitulate the testimony of a witness in the exact words used by the witness. State v. Bobbitt, 29 N.C. App. 155, 223 S.E.2d 398 (1976).

The law does not require the trial judge to review all of the evidence nor to recapitulate the testimony of the witnesses one by one. The duty imposed upon the trial judge is to summarize only so much of the evidence as is necessary for him to apply the law. State v. Moore, 31 N.C. App. 536, 230 S.E.2d 184 (1976).

Recapitulation Must Be with Reasonable Accuracy. — The evidence offered by defendant as well as by the State, together with the contentions, is to be recapitulated with reasonable accuracy. The law requires no more. State v. Gaines, 283 N.C. 33, 194 S.E.2d 839 (1973).

Court May Not Assume That Any Necessary Fact Is Proved. — It is reversible error for the court to assume that any fact necessary to establish the guilt of the defendant has been proved, and thus, by its instructions, to relieve the jury of its obligation to consider that issue.

State v. Butcher, 13 N.C. App. 97, 185 S.E.2d 11 (1971).

Failure to include instructions as to the purposes for which evidence was received is not ground for exception unless counsel has requested such an instruction. State v. Collins, 29 N.C. App. 120, 223 S.E.2d 575 (1976).

Improper Basis for Jury Instructions. — The court should never give the jury instructions based upon a state of facts not presented by some reasonable view of the evidence produced on the trial, nor upon a supposed state of facts. State v. McClain, 282 N.C. 396, 193 S.E.2d 113 (1972).

Effect of a "Slip of the Tongue". — A mere inadevertent "slip of the tongue" in stating the evidence, will not be held as prejudicial error when counsel for defendant might easily have called attention thereto and had it corrected then and there. State v. Sinodis, 189 N.C. 565, 127 S.E. 601 (1925).

Contentions of Parties. — Where the trial judge gives the contentions of the State and of the defendant, clearly stating that they are but contentions in a trial for unintentional manslaughter, and correctly charges the law arising upon the evidence, objection that he has therein impinged upon the provisions of this section, in expressing his opinion upon the weight and credibility of the evidence, is untenable. State v. Durham, 201 N.C. 724, 161 S.E. 398 (1931).

A judge is not required to state the contentions of the parties in his charge to the jury. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

The judge, in his instructions to the jury, must recite the evidence and may not rely solely on the contentions of the parties. State v. Lankford, 31 N.C. App. 13, 228 S.E.2d 641 (1976).

Where the court made no reference in the charge to the evidence except in a short statement as to the contentions of the parties, that was held insufficient to satisfy the requirements of this section. State v. Pittman, 12 N.C. App. 401, 183 S.E.2d 307 (1971).

Where the court referred to the evidence by its substance in the form of contentions rather than by recital of the words of the witnesses, there was a lack of indication that the jurors were in anywise misled or confused. State v. Jennings, 279 N.C. 604, 184 S.E.2d 254 (1971).

It is not error for the trial judge to instruct the jury in terms of the State's contentions where the record discloses evidence from which inferences drawn by the court could legitimately, fairly and logically be drawn by the jury. State v. Lyles, 19 N.C. App. 632, 199 S.E.2d 699 (1973).

Where Parties Waive Recapitulation of Evidence. — Even when the parties waive a recapitulation of the evidence, it is necessary that the court state the evidence to the extent necessary to explain the application of the law thereto. State v. Floyd, 241 N.C. 298, 84 S.E.2d 915 (1954).

Reviewing State's Evidence. — The portion of the charge devoted to reviewing the evidence for the State cannot be held for error as an expression of opinion that certain facts were fully proven when it appears that the court categorically indicated to the jury that it was then engaged in reviewing the State's evidence. State v. Jessup, 219 N.C. 620, 14 S.E.2d 668 (1941). See State v. Johnson, 219 N.C. 757, 14 S.E.2d 792 (1941).

Instruction on Weight of Evidence. — That testimony is admissible does not require the judge, without a request therefor, to instruct the jury as to the weight to be given the evidence. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Discretion of Court as to Jury's Request for Restatement of Evidence. — It is discretionary with the court to grant or refuse the jury's request for restatement of the evidence. State v. Crane, 11 N.C. App. 721, 182 S.E.2d 225 (1971).

3. Explanation of Law.

In General. — This section confers upon litigants a substantial legal right and calls for instructions as to the law upon all substantial features of the case. State v. O'Neal, 187 N.C. 22, 120 S.E. 817 (1924); State v. Ardrey, 232 N.C. 721, 62 S.E.2d 53 (1950); State v. Floyd, 241 N.C. 298, 84 S.E.2d 915 (1954).

As was said in State v. Matthews, 78 N.C. 523 (1878), the requirements of this section are not met by a general statement of legal principles which bear more or less directly, but not with absolute directness upon the issues made by the evidence. State v. Ardrey, 232 N.C. 721, 62 S.E.2d 53 (1950); State v. Floyd, 241 N.C. 298, 84 S.E.2d 915 (1954).

It is insufficient for the court to merely state the contentions of a party without declaring and explaining the law applicable to his version of the occurrence as supported by his evidence. State v. Herbin, 232 N.C. 318, 59 S.E.2d 635 (1950).

The judge is required to declare and explain the law arising on the evidence without being requested to do so. State v. Jeffries, 3 N.C. App. 218, 164 S.E.2d 398 (1968).

The trial judge has great discretion in the manner in which he charges the jury, but he must explain every essential element of the offense charged. State v. Young, 16 N.C. App. 101, 191 S.E.2d 369 (1972).

This section requires that the trial judge clarify and explain the law arising on the evidence. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

It is the duty of the trial judge, not defendant's expert medical witness, to explain

the law and define legal terms such as "intent." State v. Griffin, 288 N.C. 437, 219 S.E.2d 48 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

Court Must Explain Law Arising on Evidence in Particular Case. — This section requires the court, in both criminal and civil actions, to declare and explain the law arising on the evidence in the particular case and not upon a set of hypothetical facts. State v. Street, 241 N.C. 689, 86 S.E.2d 277 (1955); State v. Campbell, 251 N.C. 317, 111 S.E.2d 198 (1959).

It is prejudicial error to instruct in regard to law not presented by the evidence. State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976).

Absence of Request for Special Instructions. — The failure of the court to instruct the jury on substantive features of the case arising on the evidence is prejudicial, even in the absence of a request for special instructions. State v. Ardrey, 232 N.C. 721, 62 S.E.2d 53 (1950); State v. Neagle, 29 N.C. App. 308, 224 S.E.2d 274 (1976).

Under this section it is obligatory for the trial judge to charge the jury as to the law upon every substantial feature of the case embraced within the issue and arising on the evidence without any special prayer for instruction to that effect. State v. Brady, 236 N.C. 295, 72 S.E.2d 675 (1952).

The trial court is required to charge the law upon all substantial features of the case arising on the evidence, even though there is no request for special instructions. State v. Deck, 285 N.C. 209, 203 S.E.2d 830 (1974).

The mandate of this section is not met by a statement of the general principles of law, without application to the specific facts involved in the issue. State v. Ardrey, 232 N.C. 721, 62 S.E.2d 53 (1950).

In charging the jury, the stating of abstract principles of law is not sufficient. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

It has been held to be error to charge on an abstract principle of law not supported by the evidence. Kuyrkendall v. Clarke's Disct. Dep't Store, 5 N.C. App. 200, 167 S.E.2d 833 (1969).

When the evidence is susceptible of several interpretations a failure to give instructions which declare and explain the law in its application to the several phases of the evidence is held for reversible error. State v. Ardrey, 232 N.C. 721, 62 S.E.2d 53 (1950).

Judge Must Explain Law as It Relates to Evidence. — This section requires the presiding judge to declare and explain the law as it relates to the different aspects of the evidence on each side of the case, so as to bring into focus the relations between the different phases of the evidence and the applicable principles of law. State v. Washington, 234 N.C. 531, 67 S.E.2d 498 (1951).

Ordinarily, a statement of the applicable law and the contentions of the parties, without applying the law to the substantive features of the case arising on the evidence, is insufficient under this section. State v. Williams, 290 N.C. 770, 228 S.E.2d 241 (1976).

When a person is on trial for a statutory crime, it is not sufficient for the court merely to read the statute under which he stands indicted. The statute should be explained, the essential elements of the crime thereby created outlined and the law as thus defined should be applied to the evidence in the case. This "calls for instructions as to the law upon all substantial features of the case." State v. Sutton, 230 N.C. 244, 52 S.E.2d 921 (1949); State v. Fain, 229 N.C. 644, 50 S.E.2d 904 (1948).

It is not sufficient merely for the court to read a statute bearing on the issue in controversy and leave the jury unaided to apply the law to the facts. State v. Coggin, 263 N.C. 457, 139 S.E.2d 701 (1965).

Ordinarily, the reading of the pertinent statute, without further explanation, is not sufficient. State v. Mundy, 265 N.C. 528, 144 S.E.2d 572 (1965).

It is not sufficient for the court merely to read the statute under which the accused stands indicted. The statute should be explained, the essential elements of the crime thereby created outlined and the law as thus defined should be applied to the evidence in the case. State v. Pittman, 12 N.C. App. 401, 183 S.E.2d 307 (1971).

But Reading Statute and Pointing Out Material Parts Is Proper. — In a prosecution for conspiracy to defraud the Welfare Department, the act of the court in reading the statute upon which the indictment was based and pointing out the material parts which applied to the charge against the defendants did not amount to a peremptory instruction of guilt, and the instruction was in keeping with the court's duty to declare and explain the law of the case. State v. Butler, 269 N.C. 733, 153 S.E.2d 477 (1967).

Where the court, in charging the jury, read the statute upon which the indictment was based and pointed out the material part of the statute which applied to the charge against the defendant, this instruction was in keeping with the requirements of this section which makes it the duty of the judge to declare and explain the law of the case. State v. Rennick, 8 N.C. App. 270, 174 S.E.2d 122 (1970).

It is not error for the court to fail to define and explain words of common usage and meaning to the general public, in the absence of a request for special instructions, and this applies equally to essential elements of the crime charged as well as to other legal terms contained in a charge. State v. Patton, 18 N.C. App. 266, 196 S.E.2d 560 (1973).

Judge Not Relieved of Duty by Remarks of Prosecutor. — The solicitor's (now prosecutor's) statement at the beginning of the trial that he would ask for a verdict of guilty of rape with a recommendation of life imprisonment, or guilty of an attempt to commit rape, did not relieve the court of its mandatory duty under this section to declare and explain to the jury the law arising on the evidence given in the case. State v. Green, 246 N.C. 717, 100 S.E.2d 52 (1957).

Request for Further Instructions. — Where the court in its charge substantially complies with this section, if defendant desires further elaboration and explanation, he should tender prayers for instructions; otherwise, he cannot complain. State v. Gordon, 224 N.C. 304, 30 S.E.2d 43 (1944); Barnes v. Caulbourne, 240 N.C. 721, 83 S.E.2d 898 (1954).

When a judge has charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it. State v. Johnson, 193 N.C. 701, 138 S.E. 19 (1927); State v. Jordan, 216 N.C. 356, 5 S.E.2d 156 (1939).

Where the charge of the court is sufficiently full to meet the requirements of this section, it will not be held for reversible error on defendant's exceptions, it being incumbent on defendant, if he desires more specific instructions on any point, or a more detailed and complete statement of his contentions to aptly make request therefor. State v. Caudle, 208 N.C. 249, 180 S.E. 91 (1935).

If the indictment fully describes the offense, and this was read to the jury by the court, then the charge is in compliance with this section, it being the duty of the defendant, if he desires more elaborate instruction, to aptly tender a request therefor. State v. Gore, 207 N.C. 618, 178 S.E. 209 (1935).

Defendant desiring more full or detailed instructions as to any particular phase of evidence or law should request special instructions. State v. Hendricks, 207 N.C. 873, 178 S.E. 557 (1935).

The failure of the court to charge the jury as to the credibility to be given the testimony of an accomplice, corroborated in every respect by other evidence, will not be held for error in the absence of a special request, whether such charge should be given being in the sound discretion of the trial court. State v. Kelly, 216 N.C. 627, 6 S.E.2d 533 (1940).

The failure of the court to instruct the jury that the fact that a defendant did not testify in his own behalf raises no presumption against him, will not be held for error in the absence of a request for instructions, the matter being in the sound discretion of the trial court. State v. Kelly, 216 N.C. 627, 6 S.E.2d 533 (1940).

An exception for failure of the court to charge upon the question of manslaughter, without exception to any portion of the charge or exception under this section, on the ground that the court failed to explain the law arising on the evidence and pointing out wherein the court failed to comply with this section does not properly present the question for review. State v. Brooks, 228 N.C. 68, 44 S.E.2d 482 (1947).

Explanation Must Cover Any Authorized Finding. — It is the duty of the judge to explain and adapt the law to any authorized findings which the jury may make upon the evidence. State v. Jones, 87 N.C. 547 (1882).

It is not incumbent upon the trial judge to charge with regard to the law on something that is no longer an issue before the jury. The statute only requires the court to state only such evidence as is necessary to explain and apply the law to the facts in the case. State v. Phillips, 5 N.C. App. 353, 168 S.E.2d 704 (1969).

Substantial Compliance with Request Sufficient. — The trial judge is not required to give special instructions in the precise words asked, even when unobjectionable. A substantial compliance is sufficient. State v. Booker, 123 N.C. 713, 31 S.E. 376 (1898).

The trial court is not required to give instructions in the language of the prayers, provided the instructions given are correct and cover the various phases of the testimony. State v. Wilcox, 132 N.C. 1120, 44 S.E. 625 (1903).

The trial court is not required to give a requested instruction in the exact language of the request. However, when the request is correct in law and supported by the evidence in the case, the court must give the instruction in substance. State v. Monk, 291 N.C. 37, 229 S.E.2d 163 (1976).

If a request is made for a specific instruction which is correct in itself and supported by evidence, the trial judge, while not required to parrot the instructions or to become a mere judicial phonograph for recording the exact and identical words of counsel, must charge the jury in substantial conformity to the prayer. State v. Davis, 291 N.C. 1, 229 S.E.2d 285 (1976).

The trial court did not err by failing to give requested instructions where defendant submitted an exhaustive list of definitions which was repetitious at best, but rather, it was sufficient that the court gave the requested instructions in substance. State v. Travatello, 24 N.C. App. 511, 211 S.E.2d 467 (1975).

Isolated Expressions Afford No Ground for Reversal If Charge as Whole Presents Law Fairly. — If the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal. State v. McWilliams, 277 N.C. 680, 178 S.E.2d 476 (1971); State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970).

Charge on Degrees of Crime. — Where a person indicted for a crime may be convicted of a lesser degree of the same crime and there is evidence tending to support the milder verdict, he is entitled to have the law with respect to the lesser offense submitted to the jury under a correct charge. A statement of the contentions or of certain phases of the evidence accompanied with a mere enunciation of a legal principle is not a compliance with this section. State v. Hardee, 192 N.C. 533, 135 S.E. 345 (1926), citing State v. Williams, 185 N.C. 685, 116 S.E. 736 (1923); Wilson v. Wilson, 190 N.C. 819, 130 S.E. 834 (1925); Watson v. Sylva Tanning Co., 190 N.C. 840, 130 S.E. 833 (1925); State v. Lee, 192 N.C. 225, 134 S.E. 458 (1926).

Where the defendant admits his guilt of murder in the second degree, it is not error for the trial court to act upon the admission, and after fully charging the elements of murder in the first degree, and defining murder in the second degree, to instruct the jury to return a verdict of murder in the second degree if they should fail to find any one of the elements of first degree murder, as defined, beyond a reasonable doubt. State v. Grier, 209 N.C. 298, 183 S.E. 272 (1936).

The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. State v. Foster, 284 N.C. 259, 200 S.E.2d 782 (1973).

When there is some evidence supporting a lesser included offense, a defendant is entitled to a charge thereon even when there is no specific prayer for such instruction, and error in failing to do so will not be cured by a verdict finding defendant guilty of a higher degree of the same crime. State v. Bell, 284 N.C. 416, 200 S.E.2d 601 (1973).

It is not proper for the trial judge to charge the jury on a lesser included offense unless there is some evidence from which a commission of such lesser included offense can be found. State v. Scales, 18 N.C. App. 562, 197 S.E.2d 278 (1973).

Failure to Instruct as to Law of Self-Defense. — See State v. Thornton, 211 N.C. 413, 190 S.E. 758 (1937); State v. Godwin, 211 N.C. 419, 190 S.E. 761 (1937); State v. Greer, 218 N.C. 660, 12 S.E.2d 238 (1940).

Informing Jurors as to Punishment. — In the absence of some compelling reason which makes disclosure as to punishment necessary in order "to keep the trial on an even keel" and to insure complete fairness to all parties, the trial judge should not inform the jurors as to punishment in noncapital cases. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

The amount of punishment which a verdict of guilty will empower the judge to impose is totally irrelevant to the issue of a defendant's guilt, and is therefore no concern of the jurors. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

In noncapital cases where the jury requests information as to punishment, the trial judge should refuse it and explain to them that punishment is totally irrelevant to the issue of guilt or innocence. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

C. Illustrative Cases.

Defendants Charged with Identical Offenses. — Because the defendants were charged with identical offenses and because the evidence adduced at the consolidated trial was identical as to each defendant, it was not necessary for the trial judge to give wholly separate instructions as to each defendant in order to comply with this section. State v. Lockamy, 31 N.C. App. 713, 230 S.E.2d 565 (1976).

It was reasonable for the court to declare and explain the law arising from the evidence in the cases as to both defendants simultaneously. However, the trial judge must either give a separate final mandate as to each defendant or otherwise clearly instruct the jury that the guilt or innocence of one defendant is not dependent upon the guilt or innocence of a codefendant. State v. Lockamy, 31 N.C. App. 713, 230 S.E.2d 565 (1976).

Age and Chastity of Prosecutrix in Prosecution for Carnal Knowledge. — Where defendant, in a prosecution for carnal knowledge of a girl over twelve and under sixteen years of age, offers evidence of the immoral character of the prosecutrix and denies his identity as the perpetrator of the offense, an instruction which omits the age and chastity of prosecutrix as elements of the offense fails to meet the mandatory requirements of this section, and an exception thereto will be sustained. State v. Sutton, 230 N.C. 244, 52 S.E.2d 921 (1949).

Alibi. — Evidence of an alibi is substantive, and defendant is entitled to an instruction as to the legal effect of his evidence of alibi if believed by the jury. State v. Sutton, 230 N.C. 244, 52 S.E.2d 921 (1949).

Where the defendant, charged with murder, introduced evidence of an alibi which was material to his defense, but the judge in his charge to the jury did not refer to this evidence, it was held to be error. State v. Melton, 187 N.C. 481, 122 S.E. 17 (1924).

In the absence of a requested instruction, there is no duty upon the trial court to instruct specifically upon the subject of alibi. Conversely, when there has been sufficient evidence in the case to raise an issue as to alibi and the defendant has specifically requested the trial court to charge the jury in accordance with

proper instructions submitted by him on this subject, it is the duty of the court so to instruct, and the failure, or refusal, to instruct as to alibi under such circumstances constitutes prejudicial and reversible error. State v. Hunt, 283 N.C. 617, 197 S.E.2d 513 (1973).

Notwithstanding the court's instruction that the burden of proof is on the State to satisfy the jury from the evidence beyond a reasonable doubt that the defendant was present and that he committed the crime, if a particular defendant is apprehensive that the jury will be misled unless the court gives an instruction substantially like that approved in prior alibi cases, he will be entitled to such instruction upon special request therefor. State v. Hunt, 283 N.C. 617, 197 S.E.2d 513 (1973).

Defendant and his counsel may determine for themselves whether they would like for the court to give such an instruction. Under certain circumstances, it may be that the giving of such an instruction will so concentrate attention upon the subject of alibi as to divert attention from unrelated weaknesses in the State's case. State v. Hunt, 283 N.C. 617, 197 S.E.2d 513 (1973).

When an instruction as to the legal effect of alibi evidence is given, whether by the court of its own motion or in response to request, such statement must be correct. State v. Hunt, 283 N.C. 617, 197 S.E.2d 513 (1973).

Where the trial judge made it quite clear that the burden was on the State to prove all essential elements of the crime charged and that defendant did not have to prove anything in order to be found not guilty, although the word "alibi" was not mentioned in the charge or in the recapitulation of the evidence, the charge given afforded defendant the same benefits a formal charge on alibi would have afforded. State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974).

Where in the charge, the court failed to instruct the jury that the defendant, who relied on an alibi, did not have the burden of proving it, defendant suffered prejudicial error. State v. Moore, 19 N.C. App. 368, 198 S.E.2d 760 (1973).

A defendant who merely denies that he was at the scene of the crime, without producing any evidence to show that he was at any other place, is not entitled to an alibi instruction. State v. Grant, 19 N.C. App. 401, 199 S.E.2d 14 (1973).

Where the jury was not instructed that defendant, who relied on an alibi, did not have the burden of proving it, and the trial occurred prior to the opinion in State v. Hunt, 283 N.C. 617, 197 S.E.2d 513 (1973), the omission of the instruction constituted prejudicial error. State v. Brown, 20 N.C. App. 483, 201 S.E.2d 577 (1974).

Although the desired form of pattern instruction on the defense of alibi was not offered, in substance, where defendant twice received the benefit of the instruction that witnesses testified that he was not at the scene of the robbery on the date and time in question but was elsewhere, and could not, therefore, have committed the act, alone or in concert, no error in instructions was committed. State v. Shore, 20 N.C. App. 510, 201 S.E.2d 701, aff'd, 285 N.C. 328, 204 S.E.2d 682 (1974).

The trial judge is not required to instruct on legal effect of an alibi unless defendant specifically requests such instruction. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Mere denial that defendant was at the scene of the crime does not require a charge on the legal effect of an alibi, but rather, the general charge that the jury should acquit the defendant unless it is satisfied beyond a reasonable doubt that the defendant committed the crime is sufficient. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Circumstantial Evidence. — The duty imposed upon the trial court by this section to "declare and explain the law" arising in the case on trial does not require the court to instruct the jury upon the law of circumstantial evidence in a criminal action involving both direct and circumstantial testimony, where the State relies principally upon the direct evidence, and the direct evidence is sufficient, if believed, to warrant the conviction of the accused. State v. Hicks, 229 N.C. 345, 49 S.E.2d 639 (1948).

Jury instructions on circumstantial evidence were adequate where defendant requested no additional instructions; and where the State relied primarily on direct evidence, instructions on circumstantial evidence were not required. State v. Griffin, 18 N.C. App. 14, 195 S.E.2d 569 (1973).

Instructions which tend to bolster the witnesses for the State, and to impair the effect of defendant's plea of not guilty, are violative of this section. State v. Shinn, 234 N.C. 397, 67 S.E.2d 270 (1951), aff'd, 238 N.C. 535, 78 S.E.2d 388 (1953).

Failure to State That Intentional Killing Must Be Shown to Raise Implication of Malice. — See State v. Bright, 237 N.C. 475, 75 S.E.2d 407 (1953).

Necessity of Proving Prerequisite Evidential Fact beyond Reasonable Doubt. — Where proof of a particular evidential fact beyond a reasonable doubt is obviously a prerequisite to the establishment of the defendant's guilt, if the circumstantial evidence in its entirety is deemed sufficient to withstand a defendant's motion for judgment as in case of nonsuit, an application of the law to the facts arising on the evidence as provided in this section requires that the presiding judge instruct the jury that proof of such fact beyond a reasonable doubt is a prerequisite to a verdict of guilty. State v. Chavis, 270 N.C. 306, 154 S.E.2d 340 (1967).

Failure to Define Words "Reasonable" and "Doubt". — Where no request was made to define the term "reasonable doubt," the failure to define the words "reasonable" and "doubt" does no violence to this section. State v. Lee, 248 N.C. 327, 103 S.E.2d 295 (1958); State v. Broome, 268 N.C. 298, 150 S.E.2d 416 (1966).

The failure to define the words "reasonable" and "doubt" does no violence to this section. State v. Bailiff, 2 N.C. App. 608, 163 S.E.2d 398 (1968).

Failure to Instruct on Law Applicable to Evidence Offered in Support of Defense. — See State v. Sherian, 234 N.C. 30, 65 S.E.2d 331 (1951).

Duty of Judge to Determine If Evidence or Deducible Inferences Prove Lower Grade of Murder. — It is the duty of the judge to determine, in the first instance, if there is any evidence or any inference fairly deducible therefrom tending to prove one of the lower grades of murder. Having done so, and having concluded that there is no basis for submission of manslaughter to the jury, it is the duty of the judge to instruct it accordingly. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

Where there was no evidence to support a conviction of assault, the trial court did not err in refusing to give instructions on the lesser included offense of assault in a prosecution for aiding and abetting in an attempted robbery with the use of firearms. State v. Parker, 16 N.C. App. 165, 191 S.E.2d 244 (1972).

Prosecution for Manslaughter. — Where in a prosecution for manslaughter the trial judge stated defendant's evidence to the extent necessary to explain the application of the law thereto, particularly with regard to the defense that he was not intoxicated in that his conduct in driving his car and his loss of memory concerning the collision had been caused by being struck on the head in the fight and defendant did not request any additional instructions, there was no prejudicial error. State v. Craig, 11 N.C. App. 196, 180 S.E.2d 376 (1971).

Use of Certain Terms in Manslaughter Instruction. — The frequent and interchangeable use of the terms "intentional killing" and "intentional shooting" constituted error in a manslaughter instruction inasmuch as it pointed to a finding of malice, but the same charge in an instruction on second-degree murder would in no manner be deemed prejudicial. State v. Briggs, 20 N.C. App. 368, 201 S.E.2d 580 (1974).

A trial court's instruction which mistakenly asserted that the defendant took the stand and testified as to material matters of the case was reversible error, even though the defendant did not call this misstatement of the evidence to the court's attention before the jury retired to consider the case. State v. Butcher, 13 N.C. App. 97, 185 S.E.2d 11 (1971).

It was prejudicial for the trial judge, when the defendant did not testify, to inform the jury that the defendant testified that he did shoot "into" the car when in fact a deputy sheriff testified that the defendant told him that he had shot "at" the car. State v. Butcher, 13 N.C. App. 97, 185 S.E.2d 11 (1971).

In a prosecution for assault, where defendant's evidence tends to show that the shooting was accidental or by misadventure caused by a tussle over the pistol which the prosecuting witness had pointed at him, defendant has a substantial legal right to have the judge declare and explain the law arising on this evidence, and failure of the court to do so is prejudicial error. State v. Floyd, 241 N.C. 298, 84 S.E.2d 915 (1954).

Instruction as to Defendant's Failure to Testify. — Absent a special request, the judge is not required to instruct the jury that a defendant's failure to testify creates no presumption against him. State v. Rankin, 282 N.C. 572, 193 S.E.2d 740 (1973).

Where the judge informed the jury that the defendant "told sheriff about it," this was stating as a fact that the defendant had told the sheriff about the matter, and it amounted to an expression of an opinion by the judge on a crucial fact in the case; it was for the jury, not the judge, to determine whether the defendant had in fact told the sheriff about the matter; and if so, what it was that he had told him. State v. Butcher, 13 N.C. App. 97, 185 S.E.2d 11 (1971).

Where the trial judge attributed much of what the deputy sheriff testified that the defendant told him, as having been testified to by the defendant himself, the case of the State was strengthened to the prejudice of the defendant. State v. Butcher, 13 N.C. App. 97, 185 S.E.2d 11 (1971).

Self-Defense. — Where State's evidence tended to show a deliberate, premeditated killing with a deadly weapon, and there was no evidence that the killing was in self-defense, and defendant offered no evidence, the failure of court to instruct the jury upon the right of self-defense was not error. State v. Deaton, 226 N.C. 348, 38 S.E.2d 81 (1946).

Where defendant introduced evidence that deceased was a man of violent character, an instruction during the trial to the effect that such evidence was competent upon the plea of self-defense, without any instruction in the charge or elsewhere applying the evidence to the question of defendants' reasonable apprehension of death or great bodily harm from the attack which their evidence tended to show that deceased had made on them, is insufficient to meet the requirements of this section, notwithstanding the absence of a request for special instructions. State v. Riddle, 228 N.C. 251, 45 S.E.2d 366 (1947).

Instruction omitting reference to self-defense

held prejudicial error. See State v. Messimer, 237 N.C. 617, 75 S.E.2d 540, 884 (1953).

Instruction on law of self-defense held not required under evidence. See State v. Porter, 238 N.C. 735, 78 S.E.2d 910 (1953).

In a prosecution for murder it was held that it was incumbent upon the trial court, even in the absence of prayer for special instructions, to define a home within the meaning of the law of self-defense and to charge upon defendant's legal right to defend himself in his home, to defend his home from attack and to eject trespassers therefrom, as substantive features of the case arising upon the evidence. State v. Poplin, 238 N.C. 728, 78 S.E.2d 777 (1953).

An instruction on self-defense that defendant could use no more force than was reasonably necessary is erroneous, the correct rule being that defendant could use such force as was reasonably or apparently necessary. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

Where, in a murder case, an instruction on self-defense did not require defendant to show that he was not the aggressor and did not use excessive force in order to be acquitted upon his plea of self-defense, this was error favorable to the defendant of which he cannot complain. State v. Jackson, 284 N.C. 383, 200 S.E.2d 596 (1973).

Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence. State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974).

In cases where the defendant has met his burden of production for self-defense, the failure of the trial judge to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury is prejudicial error and entitles the defendant to a new trial. State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974).

Failure to include not guilty by reason of self-defense in the court's final mandate to the jury, where required, is not cured by the discussion of the law of self-defense in the body of the charge to the jury. State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974).

As to the proper charge to the jury on the verdict of not guilty by reason of self-defense, see State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974).

When supported by competent evidence, self-defense unquestionably becomes a substantial and essential feature of a criminal case. State v. Deck, 285 N.C. 209, 203 S.E.2d 830 (1974).

Where State's evidence presents testimony which would permit, but not require, the jury to find that: (1) Defendant was without fault in bringing on the difficulty, (2) deceased was armed with and first assaulted defendant with a deadly weapon, (3) the fatal blow was struck during a struggle for the weapon first used by deceased and (4) the defendant used such force as was necessary or as appeared to him to be necessary to save himself from death or great bodily harm, the evidence was sufficient to require the trial judge to state and apply the law of self-defense to the facts of the case and the court's failure to so do constituted prejudicial error. State v. Deck, 285 N.C. 209, 203 S.E.2d 830 (1974).

Where defendant's evidence, even though contradicted by the State, raised an issue of self-defense, whether the defendant's evidence is less credible than the State's evidence is an issue for the jury, not the trial judge, and the failure of the trial court to charge on self-defense was error. State v. Hickman, 21 N.C. App. 421, 204 S.E.2d 718 (1974).

When the State or defendant produces evidence that defendant acted in self-defense in a prosecution for first-degree murder, the question of self-defense becomes a substantial feature of the case requiring the trial judge to state and apply the law of self-defense to the facts of the case. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

In a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury, an instruction on self-defense was not warranted where defendant never abandoned the fight and never withdrew, but simply drove off a short distance out of sight of the victim and then stepped from his car and shot the victim. State v. Plemmons, 29 N.C. App. 159, 223 S.E.2d 549 (1976).

In a prosecution for first-degree murder, evidence of powder burns on defendant's hands, which at most permitted an inference that defendant struggled for possession of the murder weapon before the fatal shots were fired, was insufficient to require an instruction to the jury on self-defense. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

If the evidence is insufficient to evoke the doctrine of self-defense in a prosecution for first-degree murder, the trial judge is not required to give instructions on that defense even when specifically requested. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

If defendant's evidence raises the issue of self-defense, the court has a duty to instruct the jury on this issue even though defendant neglects to request the instructions. State v. Taylor, 33 N.C. App. 70, 234 S.E.2d 202 (1977).

Failure to Instruct on Right of Defendant to Go to Defense of Third Person. — Where defendant saw the victim force his former girl friend from a dance hall and down the street

several blocks, knew that victim had threatened to kill the girl and that he was a dangerous man with a propensity for violent conduct, observed that the victim was acting in a wild and irrational manner as if he had been drinking or taking some drugs and observed that the victim reached for his pocket just before defendant shot him, the trial court committed prejudicial error in failing to instruct upon the right of defendant to go to the defense of a third person to prevent a felonious assault, since the court must instruct the jury on all substantial features of the case that arise from the evidence. State v. Graves, 18 N.C. App. 177, 196 S.E.2d 582 (1973).

Where trial judge asked questions for clarification with regard to defendant's testimony that deceased was driving fast prior to the shooting, that defendant told deceased to slow down, that deceased threatened to kill defendant, that deceased pulled a pistol, and defendant's reason for reloading the pistol, where the questions appeared to be beneficial rather than prejudicial to defendant's case since they tended to exculpate rather than inculpate her, and where the questions were restricted to statements previously testified to by defendant, there was no error by trial judge in such questions. State v. Griffin, 18 N.C. App. 14, 195 S.E.2d 569 (1973).

Degrees of Crime. — Where in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, verdicts of guilt of less degrees of the crime are permissible under the evidence dependent upon the variant facts as the jury may find them to be, the failure of the court to submit the question of defendant's guilt of such less degrees is erroneous and constitutes a failure to explain the law arising upon the facts in evidence as required by this section. State v. Ardrey, 232 N.C. 721, 62 S.E.2d 53 (1950).

Where all of the evidence indicated that the value of the stolen property exceeded $200.00, the trial court did not err by failing to instruct the jury to consider in addition an issue as to defendant's possible guilt or innocence of the lesser included offense of misdemeanor larceny. State v. Dickerson, 20 N.C. App. 169, 201 S.E.2d 69 (1973).

The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975).

In a prosecution for driving under the influence of intoxicating liquor, where the record was devoid of any evidence tending to show that defendant's consumption of intoxicating liquor directly and visibly affected his operation of his motor vehicle immediately prior to his arrest for driving under the influence, the trial judge was not required to charge the jury on the lesser included offense of reckless driving. State v. Pate, 29 N.C. App. 35, 222 S.E.2d 741 (1976).

Trial judge's charge to the jury in a prosecution for first-degree murder placing the burden on defendant to rebut the presumption of malice so as to reduce the charge from second-degree murder to manslaughter was not error where all the evidence revealed a cold-blooded killing done with malice and with premeditation and deliberation, and the jury returned a verdict of murder in the first degree never reaching the questions raised as to instructions relating to second-degree murder and manslaughter. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Disregard of Previous Inconsistent Instructions. — The action of the trial court in prefacing a special instruction with a charge that the jury should disregard previous instructions if and to the extent of inconsistency with the instructions about to be given, is not approved, but in the instant case it was held not prejudicial. State v. Jackson, 228 N.C. 656, 46 S.E.2d 858 (1948).

Divorce. — Where plaintiff seeking divorce offered evidence tending to show that she left the home because of the indignities heaped upon her person by defendant, it was also necessary for her to satisfy the jury that such acts by her husband were not the result of adequate provocation on her part. The judge's failure to so instruct the jury constituted prejudicial error and requires a new trial. Campbell v. Campbell, 18 N.C. App. 665, 197 S.E.2d 804 (1973).

In a dissemination of obscenity case, the properly denied request for an instruction to the jury that if the jury found the defendant provided notice to the public of the nature of the magazines involved in the case, and if they found the defendant provided reasonable protection against the exposure of the magazines to juveniles, then the jury would have to find that the defendant's conduct was protected under the First and Fourteenth Amendments to the Constitution of the United States, and that it would be the duty of the jury to return a verdict of not guilty. State v. Horn, 18 N.C. App. 377, 197 S.E.2d 274 (1973), aff'd, 285 N.C. 82, 203 S.E.2d 36, cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

Judicial Notice. — In a prosecution for taking a deer between the hours of sunset and sunrise on a public highway by the use of artificial light, the trial court did not express an opinion that the State had proved the time of commission of the offense by its instruction that as a matter of law "a few minutes after seven o'clock on December 9 is after sunset," the instruction amounting to no more than judicial notice of a physical fact of general knowledge. State v. Link, 13 N.C. App. 568, 186 S.E.2d 634 (1972).

Contention That Instruction Inadequate in That Jury Could Return Compromise Verdict. — A contention that the court's instructions in an armed robbery prosecution were inadequate in that the jury could have returned a compromise verdict, even though it followed the court's instructions, was held to be merely speculation and without merit. State v. Stepney, 280 N.C. 306, 185 S.E.2d 844 (1972).

Failure to Accede to Juror's Request for Review of Instructions Given Day Before. — See State v. Horn, 18 N.C. App. 377, 197 S.E.2d 274 (1973), aff'd, 285 N.C. 82, 203 S.E.2d 36, cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

Defining Assault with Intent to Commit Rape. — It was not prejudicial error for the court to describe elements of the crime of rape in defining the crime with which defendant was charged, assault with intent to commit rape. State v. Young, 16 N.C. App. 101, 191 S.E.2d 369 (1972).

Failure to Define Words "Drunk" or "Intoxicated". — In a prosecution for public drunkenness, the trial court erred in failing to define what would constitute being "drunk" or "intoxicated" in order to sustain a conviction for a violation of § 14-335. State v. Patton, 18 N.C. App. 266, 196 S.E.2d 560 (1973).

Driving under Influence of Intoxicating Liquors. — The court did not commit reversible error when it inadvertently used the words "appreciable extent" rather than "appreciable impairment" when referring to the effect which the intoxicating liquors must have upon an individual to sustain a conviction for driving under the influence. State v. Payne, 19 N.C. App. 511, 199 S.E.2d 132 (1973).

Instruction as to Criminal Presumption under § 20-139.1. — Court erred, in a civil case, when it instructed the jury as to the rebuttable criminal presumption created by § 20-139.1, arising from the fact that a person has .10 percent or more by weight of alcohol in his blood. Wood v. Brown, 20 N.C. App. 307, 201 S.E.2d 225 (1973).

Failure to Define "Conspiracy". — Where the court charged the jury that defendant would be guilty of first degree murder even if one of the others fired the fatal shot, if it was fired in the execution of their unlawful conspiracy and agreement and the defendant excepted on the ground that the court did not define "conspiracy," it was held that the exception could not be sustained, in the absence of a special request for instructions, the term "conspiracy" being used synonymously with "agreement," and the charge being clear and easily understood, and defendant being guilty of murder in the first degree under the evidence regardless of the existence of a technical conspiracy. State v. Puckett, 211 N.C. 66, 189 S.E. 183 (1937).

Fornication and Adultery. — Upon trial in the superior court, after appeal by the male defendant only from a conviction of fornication and adultery in the recorder's court, a charge that, if the jury find from the evidence, beyond a reasonable doubt, that the defendant, not being married to the woman, did lewdly and lasciviously bed and cohabit with her and violated the statute, they should bring in a verdict of guilty, and if they should fail to so find, they should bring in a verdict of not guilty, substantially complies with this section in the absence of request for further instructions. State v. Davenport, 225 N.C. 13, 33 S.E.2d 136 (1945).

Force Used in Defense of Home — Eviction of Trespassers. — When, in the trial of a criminal action charging an assault or kindred crime, there is evidence from which it may be inferred that the force used by defendant was in defense of his home, he is entitled to have the evidence considered in the light of applicable principles of law. In such event, it becomes the duty of the court to declare and explain the law arising thereon, and failure to so instruct the jury on such substantive feature is prejudicial error. And the same rule applies to the right to evict trespassers from one's home. State v. Spruill, 225 N.C. 356, 34 S.E.2d 142 (1945); State v. Goodson, 235 N.C. 177, 69 S.E.2d 242 (1952).

Rights of Person on Whom Murderous Assault Is Made. — In a murder prosecution, where self-defense is relied upon, the failure of the trial court to instruct the jury in accordance with a settled principle of law, under which are fixed the rights of a person upon whom a murderous assault is made, undoubtedly weighed heavily against the defendant and constituted error. State v. Washington, 234 N.C. 531, 67 S.E.2d 498 (1951).

Forcible Trespass. — In a prosecution for forcible trespass, a charge to the jury that the defendant's guilt depended on the fact of his presence, without further instructions, is not a compliance with this section. State v. Lawson, 98 N.C. 759, 4 S.E. 134 (1887).

Though the charge is correct as a general essay on homicide, and its propositions taken generally are supported by the authorities, still it is not a full compliance with this section. State v. Dunlop, 65 N.C. 288 (1871).

Obligations of Counsel, Court and Jury. — An instruction that "it is the business of counsel to make their side appear the best side, their reasons the best of reasons; but you and I are under different obligations" is erroneous. State v. Hardy, 189 N.C. 799, 128 S.E. 152 (1925).

Presumption of Good Character. — Where the character of a witness had not been impeached either by contradictory evidence or the manner of his cross-examination, it is presumed to be good, and the testimony of other

witnesses thereto will be excluded; and where in a criminal action the case has been given to the jury, who return to court with a request for a further instruction as to whether a witness's character is considered good until proven bad in court, the judge's reply that it is presumed to be good until the contrary is shown, is free from error. State v. Pugh, 183 N.C. 800, 111 S.E. 849 (1922).

Reckless Driving. — An instruction that if the jury is satisfied beyond a reasonable doubt that defendant is guilty of reckless driving to convict him, otherwise to acquit him, is insufficient, in a prosecution under § 20-140, to meet the requirements of this section since it fails to explain the law or apply the law to the facts as the jury should find them to be. State v. Flinchem, 228 N.C. 149, 44 S.E.2d 724 (1947).

The charge, in a prosecution for reckless driving and driving at an excessive speed, both as to the statement of the evidence and the law arising on the essential features of the evidence, was held to be in substantial compliance with the requirements of this section. State v. Vanhoy, 230 N.C. 162, 52 S.E.2d 278 (1949).

If a party has properly pleaded reckless driving and the judge undertakes to charge upon it, this section requires him to tell the jury what facts they might find from the evidence would constitute reckless driving. It is not sufficient for the judge to read the statute and then leave it to the jury to apply the law to the facts and to decide for themselves what defendant's driver did, if anything, which constituted reckless driving. Ford v. Jones, 6 N.C. App. 722, 171 S.E.2d 103 (1969).

Recommendation of Life Imprisonment. — In a prosecution for burglary in the first degree it is error for the court to fail to charge the jury that it may return a verdict of guilty of burglary in the first degree with recommendation of imprisonment for life. State v. Mathis, 230 N.C. 508, 53 S.E.2d 666 (1949).

Specific Intent in Robbery. — In a prosecution for robbery the court should charge that the taking of the property must be with a specific intent on the part of the taker to deprive the owner of his property permanently and to convert it to his own use, and an instruction merely that the taking must be with felonious intent is insufficient. State v. Lunsford, 229 N.C. 229, 49 S.E.2d 410 (1948).

Where the evidence relied on by defendant tends to admit the taking but to deny that it was with felonious intent, it is essential that the court fully define the "felonious intent" contended for by the State and also explain defendant's theory as to the intent and purpose of the taking, in order that the jury may understandingly decide between the contentions of the State and defendant on that point. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

Subordinate Features. — In the absence of a special request for instruction it is not reversible error under this section for the trial judge to have failed to instruct the jury that they should scrutinize the testimony of detectives who were paid to secure evidence to convict the defendant, the same being as to subordinate and not substantive features of the evidence in the case. State v. O'Neal, 187 N.C. 22, 120 S.E. 817 (1924).

Instruction Applying Law to Facts in Witness' Testimony. — Although defendant did not testify or offer evidence, he was entitled to an instruction applying the law to the facts stated in the testimony of a witness whose testimony, if accepted, disclosed facts sufficient in law to constitute a complete defense to murder committed in the perpetration of the felony created by § 14-34.1. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973).

An instruction on "heat of passion" in a murder case is inappropriate when not supported by the evidence. State v. Briggs, 20 N.C. App. 368, 201 S.E.2d 580 (1974).

The trial court's instruction in a murder prosecution complied with this section where it explained the law arising on the evidence, it correctly defined each element of the crimes of second-degree murder and manslaughter, it explained the law of self-defense, it did not amount to a comment on the evidence, and it properly failed to define proximate cause. State v. Jefferies, 16 N.C. App. 235, 192 S.E.2d 104 (1972).

In a first-degree murder case, the portion of the court's charge to which defendant excepted, in which the court referred to the opinion testimony of the doctors as to the cause of death was not error where the court's charge fairly and accurately reflected the testimony of the medical experts, and no violation of this section was made to appear. State v. Strickland, 21 N.C. App. 545, 204 S.E.2d 888 (1974).

In a prosecution for first-degree murder, trial judge did not err in charging the jury that if the State proved beyond a reasonable doubt that defendant killed deceased with a deadly weapon, the law raised presumptions that the killing was unlawful and that it was done with malice. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Instruction as to When Verdict of First-Degree Murder Could Be Rendered. — Court erred in charging that a verdict of murder in the first degree could be rendered upon a finding beyond a reasonable doubt that the killing was done in the perpetration or in the attempt to perpetrate a robbery, where the robbery was merged in and became a part of the first-degree murder charge. State v. Moore, 284 N.C. 485, 202 S.E.2d 169 (1974).

Instruction for Jury to Deliberate Further. — In a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury, where one juror, after the verdict was first returned and the jury was being polled,

stated that at that time he had some doubt about defendant's mental capacity, the trial judge's instruction to the jury to deliberate further was not error, since the juror's statement was not a vote of guilty, but indicated only that the verdict was not unanimous. State v. Sellers, 29 N.C. App. 22, 222 S.E.2d 750 (1976).

Charge on "Serious Injury". — In a prosecution for assault with a deadly weapon inflicting serious injury, the trial judge's instruction to the jury that a serious injury is any physical injury that causes great pain and suffering was not error since it imposed a greater degree of injury than necessary. State v. Williams, 29 N.C. App. 24, 222 S.E.2d 720 (1976).

In a prosecution for possession of certificates, tickets and orders used in the operation of a numbers lottery, where the court instructed the jury that before it could find defendant guilty of violating the statute it must find from the evidence and beyond a reasonable doubt that (1) the defendant possessed the tickets and orders and (2) that such tickets, orders and paraphernalia were used in a numbers lottery, the charge, when considered contextually as a whole, complies with the requirements of this section. State v. Roberson, 29 N.C. App. 152, 223 S.E.2d 551 (1976).

In a prosecution for first-degree murder, a new trial was required where the trial judge twice and at crucial times in the charge to the jury gave an incorrect instruction as to the definition of voluntary manslaughter and related it to the evidence in a manner which would not disclose patent error to the average juror, despite the fact that the trial judge properly defined voluntary manslaughter in another portion of the charge. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976), aff'd, 292 N.C. 461, 233 S.E.2d 554 (1977).

"Delivery" under § 90-87. — In a prosecution for felonious sale and delivery of marijuana, and felonious possession of marijuana with intent to sell, trial judge's charge to the jury placing the burden on the State to prove that defendant "transferred" the marijuana was not prejudicial error, since "delivery" means "transfer" under § 90-87. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

In a prosecution for armed robbery, where the indictment referred only to the robbery of a single victim but the trial judge in his charge to the jury referred to another victim, there was no prejudicial variance since there was only a single criminal transaction, and defendant therefore was in no danger of a subsequent prosecution for the robbery of the other victim. State v. Martin, 29 N.C. App. 17, 222 S.E.2d 718 (1976).

An erroneous instruction on the burden of proof is not ordinarily corrected by subsequent correct instructions upon the point. State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976).

Flight from Scene of Crime. — Trial judge did not err in failing to instruct, without request, on the weight to be given evidence of flight from the scene of a crime since flight is not an element of the State's case nor is its absence a defense, but is rather a circumstance to be considered by the jury in determining a general mens rea in a criminal case. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Difference between First- and Second-Degree Murder. — Trial judge did not err in instructing the jury that second-degree murder differs from first-degree murder in that a specific intent to kill is not an element of second-degree murder. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Instruction as to Punishment. — Absent compelling reasons for disclosure, the trial judge should not inform a jury as to punishment. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974).

In a capital case, there may be a compelling reason which makes disclosure as to punishment necessary in order "to keep the trial on an even keel" and to insure complete fairness to all parties. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974).

If the trial judge observes that the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence, sufficient compelling reason exists to justify his informing the jury of the consequence of their possible verdicts. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974).

Entrapment. — The court did not commit prejudicial error in failing to charge the jury on the law of entrapment. In order for the defense of entrapment to be available to defendant, there must be an intent to commit a crime and such intent must originate from the inducements of a law officer or his agent and not in the mind of the defendant. State v. Stanback, 19 N.C. App. 375, 198 S.E.2d 759, cert. denied, 415 U.S. 990, 94 S. Ct. 1589, 39 L. Ed. 2d 887 (1974).

Where police action did not involve persuasion, fraud, or trickery but rather merely provided defendant with an exposure to temptation, there was no prejudicial error in the failure of the trial judge to instruct on the defense of entrapment. State v. Stanback, 19 N.C. App. 375, 198 S.E.2d 759, cert. denied, 415 U.S. 990, 94 S. Ct. 1589, 39 L. Ed. 2d 887 (1974).

Section Complied with. — See State v. Thompson, 227 N.C. 19, 40 S.E.2d 620 (1946); State v. Roman, 235 N.C. 627, 70 S.E.2d 857 (1952); State v. Smith, 237 N.C. 1, 74 S.E.2d 291 (1953).

Section Not Complied with. — See State v. King, 256 N.C. 236, 123 S.E.2d 486 (1962).

§ 15A-1233. Review of testimony; use of evidence by the jury. — (a) If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

(b) Upon request by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence. If the judge permits the jury to take to the jury room requested exhibits and writings, he may have the jury take additional material or first review other evidence relating to the same issue so as not to give undue prominence to the exhibits or writings taken to the jury room. If the judge permits an exhibit to be taken to the jury room, he must, upon request, instruct the jury not to conduct any experiments with the exhibit. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Subsection (a) is based upon A.B.A. Standards, Trial by Jury § 5.2. Subsection (b) is a substantial modification of material covered by A.B.A. Standards, Trial by Jury § 5.1.

§ 15A-1234. Additional instructions. — (a) After the jury retires for deliberation, the judge may give appropriate additional instructions to:

(1) Respond to an inquiry of the jury made in open court; or
(2) Correct or withdraw an erroneous instruction; or
(3) Clarify an ambiguous instruction; or
(4) Instruct the jury on a point of law which should have been covered in the original instructions.

(b) At any time the judge gives additional instructions, he may also give or repeat other instructions to avoid giving undue prominence to the additional instructions.

(c) Before the judge gives additional instructions, he must inform the parties generally of the instructions he intends to give and afford them an opportunity to be heard. The parties upon request must be permitted additional argument to the jury if the additional instructions change, by restriction or enlargement, the permissible verdicts of the jury. Otherwise, the allowance of additional argument is within the discretion of the judge.

(d) All additional instructions must be given in open court and must be made a part of the record. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section is based upon A.B.A. Standards, Trial by Jury § 5.3.

§ 15A-1235. Length of deliberations; deadlocked jury. — (a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.

(b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:

(1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The Commission considered three possible approaches to the deadlocked jury:

(1) the "weak" charge set out in the A.B.A. Standards;

(2) the "strong" Allen charge traditionally used in the federal courts; and

(3) the even stronger charges authorized under North Carolina case law.

After much discussion, the Commission approved this section, which in its essentials follows A.B.A. Standards, Trial by Jury § 5.4. The Commission deleted from its draft a provision previously sanctioned under North Carolina case law which would have authorized the judge to inform the jurors that if they do not agree upon a verdict another jury may be called upon to try the case.

The four subdivisions of subsection (b) are linked together with the conjunction "and." This reflects the Commission's view that whenever the judge gives any of the instructions authorized by subsection (b), he must give all of them.

Subsection (c) requires that the instructions to a deadlocked jury must contain all the provisions of subsections (a) and (b).

§ 15A-1236. Admonitions to jurors; regulation and separation of jurors. — (a) The judge at appropriate times must admonish the jurors that it is their duty:

(1) Not to talk among themselves about the case except in the jury room after their deliberations have begun;

(2) Not to talk to anyone else, or to allow anyone else to talk with them or in their presence about the case and that they must report to the judge immediately the attempt of anyone to communicate with them about the case;

(3) Not to form an opinion about the guilt or innocence of the defendant, or express any opinion about the case;

(4) To avoid reading, watching, or listening to accounts of the trial; and

(5) Not to talk during trial to parties, witnesses, or counsel.

The judge may also admonish them with respect to other matters which he considers appropriate.

(b) The judge in his discretion may direct that the jurors be sequestered.

(c) If the jurors are committed to the charge of an officer, he must be sworn by the clerk to keep the jurors together and not to permit any person to speak or otherwise communicate with them on any subject connected with the trial nor to do so himself, and to return the jurors to the courtroom as directed by the judge. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Compare A.B.A. Standards, Function of the Trial Judge § 5.2.

The Commission considered inserting in subsection (a) an admonition that the jurors should not go and view the place where the offense was alleged to have occurred, but omitted it because in some instances the place may be a public one difficult to avoid. In cases in which viewing the scene may present a problem, the last sentence of subsection (a) may be utilized by the judge.

The Commission directed that the Commentary reflect its interpretation of the word "sequestered" in subsection (b). It intended to authorize either complete sequestration, including separate lodging facilities at night, or partial sequestration during lunch or while in the vicinity of the courthouse.

A companion provision is the amendment to G.S. 9-17 providing that the State will pay all the expenses of sequestration of jurors.

§ 15A-1237. Verdict. — (a) The verdict must be in writing, signed by the foreman, and made a part of the record of the case.

(b) The verdict must be unanimous, and must be returned by the jury in open court.

(c) If the jurors find the defendant not guilty on the ground that he was insane at the time of the commission of the offense charged, their verdict must so state.

(d) If there are two or more defendants, the jury must return a separate verdict with respect to each defendant. If the jury agrees upon a verdict for one defendant but not another, it must return that verdict upon which it agrees.

(e) If there are two or more offenses for which the jury could return a verdict, it may return a verdict with respect to any offense, including a lesser included offense on which the judge charged, as to which it agrees. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The provision in subsection (a) requiring written verdicts is new. It is contemplated that the jury will be given a verdict form setting out the permissible verdicts recited by the judge in his instructions. This procedure should cure a great many defects that occur when the foreman of the jury inadvertently omits some essential element of a verdict in stating it orally.

The provision in subsection (c) is also new, but was thought to be quite desirable by the Commission.

The Commission briefly considered and then abandoned any attempt to define a lesser included offense. It determined that this task may be more appropriately tackled during the consideration of revision of the substantive law. Until that time, the Commission recommends the retention of G.S. 15-169 and G.S. 15-170.

§ 15A-1238. Polling the jury. — Upon the motion of any party made after a verdict has been returned and before the jury has dispersed, the jury must be polled. The judge may also upon his own motion require the polling of the jury. The poll may be conducted by the judge or by the clerk by asking each juror individually whether the verdict announced is his verdict. If upon the poll there is not unanimous concurrence, the jury must be directed to retire for further deliberations. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section is based upon A.B.A. Standards, Trial by Jury § 5.5. As noted in the commentary to G.S. 15A-1063, this section does not state that the judge may in his discretion declare a mistrial if the poll indicates that the verdict is not unanimous, but leaves the matter to be determined under other principles of law governing mistrials.

§ 15A-1239. Judicial comment on verdict. — The trial judge may not comment upon the verdict of a jury in open court in the presence or hearing of any member of the jury panel. If he does so, any defendant whose case is calendared for that session of court is entitled, upon motion, to a continuance of his case to a time when all members of the entire jury panel are no longer serving. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section is in accord with G.S. 1A-1, Rule 51(c). Compare A.B.A. Standards, Trial by Jury § 5.6.

§ 15A-1240. Impeachment of the verdict. — (a) Upon an inquiry into the validity of a verdict, no evidence may be received to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined.

(b) The limitations in subsection (a) do not bar evidence concerning whether the verdict was reached by lot.

(c) After the jury has dispersed, the testimony of a juror may be received to impeach the verdict of the jury on which he served, subject to the limitations in subsection (a), only when it concerns:

(1) Matters not in evidence which came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him; or

(2) Bribery, intimidation, or attempted bribery or intimidation of a juror. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Subsections (a), (b), and (c) are based on A.B.A. Standards, Trial by Jury § 5.7. Subsections (a) and (b) are almost identical to the wording of the A.B.A. Standard, but subsection (c) is somewhat more restrictive. As the A.B.A. commentary indicates, this is a most troublesome area. The traditional rule has been to disallow almost all attempts by a juror to impeach his verdict because to do otherwise would place the finality of verdicts in great jeopardy and subject jurors after the close of the case to intense pressures to come forward and impeach their verdicts.

It is noteworthy that this section is silent on impeaching verdicts by means other than the testimony of the juror himself.

The General Assembly deleted subsection (d) from the Commission's draft, which allowed counsel to ask jurors about their verdict so long as there was no harassment or embarrassment of jurors or any tendency to influence the jurors' actions in future cases. The members of the General Assembly apparently thought a positive statement of the right of counsel to approach jurors about their verdict immediately after a case could encourage abuse by at least a few attorneys. Omission of this subsection apparently makes little difference in the light of North Carolina State Bar, Code of Professional Responsibility, DR7-108(D), (E), (F), and (G).

§ 15A-1241. Record of proceedings. — (a) The trial judge must require that the reporter make a true, complete, and accurate record of all statements from the bench and all other proceedings except:

(1) Selection of the jury in noncapital cases;

(2) Opening statements and final arguments of counsel to the jury; and

(3) Arguments of counsel on questions of law.

(b) Upon motion of any party or on the judge's own motion, proceedings excepted under subdivisions (1) and (2) of subsection (a) must be recorded. The motion for recordation of jury arguments must be made before the

commencement of any argument and if one argument is recorded all must be. Upon suggestion of improper argument, when no recordation has been requested or ordered, the judge in his discretion may require the remainder to be recorded.

(c) When a party makes an objection to unrecorded statements or other conduct in the presence of the jury, upon motion of either party the judge must reconstruct for the record, as accurately as possible, the matter to which objection was made.

(d) The trial judge may review the accuracy of the reporter's record of the proceedings, but may not make substantive changes in the transcript concerning his charge, rulings, and comments without notice to the State, the defense, and the reporter. When any correction of a transcript is ordered made by a judge, each party is entitled to receive, upon request, a copy of the transcript indicating the text as submitted by the reporter and as changed by the judge. Upon motion of any party, the judge must afford the parties a hearing upon any change ordered by the judge. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Although the provisions of this section had not been spelled out in statutes before, the Commission had no special difficulty except with subsection (d). The Commission initially considered in the event of a dispute as to a transcript that a party should be allowed to submit the raw transcript of a challenged part of the record to the appellate court as an addendum to the record. It determined that interests of finality outweighed other considerations, and rejected the idea. In a case of serious abuse by a judge with respect to changes in a transcript, the Commission determined that the matter appropriately should be referred to the Judicial Standards Commission.

§ 15A-1242. Defendant's election to represent himself at trial. — A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

(1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
(2) Understands and appreciates the consequences of this decision; and
(3) Comprehends the nature of the charges and proceedings and the range of permissible punishments. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section is based upon A.B.A. Standards, Function of the Trial Judge § 6.6.

After adoption of this section by the Commission the Supreme Court of the United States decided Faretta v. California, 422 U.S. 806 (1975), holding that a person has a constitutional right to refuse counsel and represent himself. As written, the section does not conflict with Faretta, as the case stresses that the waiver of counsel must be knowing and intelligent. The case does require that the judge exercise his discretion to allow self-representation, however, once he finds that the criteria for waiver have been met.

§ 15A-1243. Standby counsel for defendant representing himself. — When a defendant has elected to proceed without the assistance of counsel, the trial judge in his discretion may appoint standby counsel to assist the defendant when called upon and to bring to the judge's attention matters favorable to the defendant upon which the judge should rule upon his own motion. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section is based upon A.B.A. Standards, Function of the Trial Judge § 6.7.

A concurrent amendment to G.S. 7A-452 provides for compensation of standby counsel.

§§ 15A-1244 to 15A-1250: Reserved for future codification purposes.

ARTICLE 74.

§§ 15A-1251 to 15A-1260: Reserved for future codification purposes.

ARTICLE 75.

§§ 15A-1261 to 15A-1280: Reserved for future codification purposes.

ARTICLE 76.

§§ 15A-1281 to 15A-1290: Reserved for future codification purposes.

ARTICLE 77.

§§ 15A-1291 to 15A-1300: Reserved for future codification purposes.

SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS.

OFFICIAL COMMENTARY

This Subchapter attempts to gather in one place many of the provisions relating to sentencing and correctional procedures which previously were scattered among Chapter 15, Chapter 148 and case law. In addition it makes some substantial modification in current law or practice. Although in many provisions there is no longer any substantial identity between the two, this Subchapter used as a starting point the sentencing provisions of the Study Draft of the Federal Criminal Code. It might be helpful to point out some of the approaches incorporated in that federal study draft which were rejected by the Commission. Among these are the possibility of unconditional discharge of a person who had been convicted of an offense, a requirement that to place a defendant in prison rather than on probation required an affirmative finding of particular reasons by the court, the prohibition of a suspended sentence at the time probation was imposed and the use instead of a hearing to determine whether imprisonment should be imposed in case of a probation violation, and very substantial (as much as five years) mandatory parole as part of the sentence to imprisonment.

This Subchapter does not attempt to deal with "sentencing" that occurs without a judgment, particularly the matters of continuing prayer for judgment or the entry of a pre-judgment conditional discharge under G.S. 90-96.

Although unrelated to sentencing, it was felt that provisions for commitment of persons found not guilty by reason of insanity appropriately could be located here as a "disposition of defendants."

ARTICLE 78.

Order of Commitment to Imprisonment.

§ 15A-1301. Order of commitment to imprisonment when not otherwise specified. — When a judicial official orders that a defendant be imprisoned he must issue an appropriate written commitment order. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section provides a blanket authorization for the preparation of orders of commitment when there is no other specific authorization. Specific provision for pretrial commitment is contained in G.S. 15A-521. G.S. 15A-1353 provides for the commitment of convicted defendants. This general provision would provide authority for commitment orders in connection with imprisonment for contempt and other instances when no specific provision is made.

Editor's Note. — Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

The "Official Comments" under this Article are reprinted from the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly.

§§ 15A-1302 to 15A-1310: Reserved for future codification purposes.

ARTICLE 79.

§§ 15A-1311 to 15A-1320: Reserved for future codification purposes.

ARTICLE 80.

Defendants Found Not Guilty by Reason of Insanity.

§ 15A-1321. Civil commitment of defendants found not guilty by reason of insanity. — When a defendant charged with a crime is found not guilty by reason of insanity by jury verdict or upon motion pursuant to G.S. 15A-959(c), the trial court, upon such additional hearing as it determines to be necessary, may direct that there be civil proceedings to determine whether the person should be involuntarily committed pursuant to Article 5A of Chapter 122 of the General Statutes. The trial judge may issue an order in the same manner, upon the same grounds, and with the same effect as an order issued by a clerk or magistrate pursuant to G.S. 122-58.3 or G.S. 122-58.18. Proceedings thereafter are in accordance with Article 5A, of Chapter 122 of the General Statutes. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

At the same time that recent constitutional decisions have focused on the commitment for incapacity of persons charged with crimes, parallel developments in the area of purely civil commitment have resulted in substantially modified and improved civil commitment procedure. This Article will take advantage of that new procedure.

There are three occasions for the consideration of standards of mental competency, each to be measured by a different test. Thus, in chronological order, the first test relates to the person's mental capacity to commit the crime, that is whether he has sufficient understanding and competency for society to hold him accountable for his acts. The second time at which a question of mental capacity is raised is when the trial occurs. The entirely different question then is whether the person has sufficient competency and understanding to participate in the trial and understand the significance of the events. For a person to have

been found not guilty by reason of insanity, he must have failed the first test and passed the second test. At this juncture, society is faced with an individual who has been determined not responsible for a crime, but who is competent for some purposes. There must then be a determination whether that person is mentally incompetent and dangerous so that he must be committed on a basis unrelated to the fact that he has been accused of a crime and found not guilty. This is the third occasion.

Since the individual has been found not guilty of the crime, he is free from the criminal charge and is free to go if no other procedures are initiated. This Article provides that if it does appear to the judge that there is a question as to whether the person is mentally ill and dangerous, he may take the initial steps required to begin the standard procedures for determining whether or not a person should be civilly committed in accordance with the normal civil commitment procedure.

Editor's Note. — Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

The "Official Comments" under this Article are reprinted from the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly.

§ 15A-1322. Temporary restraint. — If the judge finds that there are reasonable grounds to believe that the defendant-respondent is mentally ill, as defined in G.S. 122-36, and is imminently dangerous to himself or others, and the judge determines upon appropriate findings of fact that it is appropriate to proceed under the provisions of this Article, he may order that the respondent be held under appropriate restraint pending proceedings under G.S. 15A-1321. (1977, c. 711, s. 1.)

§§ 15A-1323 to 15A-1330: Reserved for future codification purposes.

ARTICLE 81.

General Sentencing Provisions.

OFFICIAL COMMENTARY

This Article collects various provisions that apply to sentencing without regard to the nature of the sentence.

§ 15A-1331. Authorized sentences; conviction. — (a) The criminal judgment entered against a person in either district or superior court may, unless the offense for which his guilt has been established is a capital offense, or unless a statute otherwise specifically provides, include a sentence in accordance with the provision of this Article to one or a combination of the following alternatives:

(1) Probation as authorized by Article 82, Probation, or a term of imprisonment as authorized by Article 83, Imprisonment; or

(2) A fine as authorized by Article 84, Fines; or

(3) Other punishment authorized or required by law.

(b) For the purpose of imposing sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section collects in one place the possible sentence alternatives available upon conviction, but is intended to have no substantive impact. For example, if a provision defining an offense provided only a fine upon conviction, this section would not override it and permit improvement as well.

Editor's Note. — Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly, as revised by the Commission prior to the reprinting of this volume.

Sentence fixing identical minimum and maximum terms of imprisonment is invalid. State v. Teat, 24 N.C. App. 621, 211 S.E.2d 816 (1975); State v. Teachey, 26 N.C. App. 338, 215 S.E.2d 805 (1975).

§ 15A-1332. Presentence reports. — (a) Presentence Reports Generally. — To obtain a presentence report, the court may order either a presentence investigation as provided in subsection (b) or a presentence commitment for study as provided in subsection (c).

(b) Presentence Investigation. — The court may order a probation officer to make a presentence investigation of any defendant. The court may order the investigation only after conviction unless the defendant moves for an earlier presentence investigation. A motion for an earlier presentence investigation may be addressed only to the judge of the session of court for which the defendant's case is calendared or, if the case has not been calendared, to a resident superior court judge if the case is in the jurisdiction of the superior court or to the chief district court judge if the case is in the jurisdiction of the district court. When the court orders a presentence investigation, the probation officer must promptly investigate all circumstances relevant to sentencing and submit either a written report or an oral report either on the record or with defense counsel and the prosecutor present. The report may include sentence recommendations only if such recommendations are requested by the court.

(c) Presentence Commitment for Study. — When the court desires more detailed information as a basis for determining the sentence to be imposed than can be provided by a presentence investigation, the court may, after conviction of a crime or crimes for which the defendant may be imprisoned for more than six months, and with the consent of the defendant, commit him for study to the Department of Correction for the shortest period necessary to complete the study, not to exceed 90 days. The period of commitment must end when the study is completed, and may not exceed 90 days. The Department must conduct a complete study of a defendant committed to it under this subsection, inquiring into such matters as the defendant's previous delinquency or criminal experience, his social background, his capabilities, his mental, emotional and physical health, and the availability of resources or programs appropriate to the defendant. Upon completion of the study or the end of the 90-day period, whichever occurs first, the Department of Correction must release the defendant to the sheriff of the county in which his case is docketed. The Department must forward the study to the clerk in that county, including whatever recommendations the Department believes will be helpful to a proper

resolution of the case. When a defendant is returned from a presentence commitment for study, the conditions of pretrial release which obtained for the defendant before the commitment continue until judgment is entered, unless the conditions are modified under the provisions of G.S. 15A-534(e). (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section provides for two kinds of presentence reports: A presentence report rendered by a probation officer, (referred to in this Article as a "presentence investigation") and a presentence in-custody study of the defendant by the Department of Correction (referred to in this Article as a "presentence commitment for study"). The provisions in subsection (b) on presentence investigation by a probation officer are substantially similar to present law, except this subsection makes presentence reports entirely discretionary with the judge, and permits the investigation only after guilt has been established, unless the defendant moves for an earlier presentence investigation. The Commission was concerned about the outcome of the trial being affected by the gathering of evidence which, although inadmissible, might still be influential. Since the defendant in many cases, however, might be interested in obtaining sentencing as soon as possible following determination of guilt, the defendant should have the option of having the presentence report available immediately upon conviction if he so desires.

As a further safeguard, any presentence report must be known, or capable of being known, to the defendant or his lawyer. Thus, there can be no off-the-record oral report to the judge out of the presence of the defense counsel and district attorney. Subsection (c) is also similar to the provisions in present law except for the restriction that the presentence commitment for study be used only with the consent of the defendant. The Commission felt that the possibility of depriving the defendant of his liberty for a substantial period in a case in which he might be expected to be placed on probation was a possibility which should be avoided; therefore the procedure was made available only if the defendant consents.

§ 15A-1333. Availability of presentence report. — (a) Presentence Reports Not Public Records. — A written presentence report and the record of an oral presentence report are not public records and may not be made available to any person except as provided in this section.

(b) Access to Reports. — The defendant, his counsel, the prosecutor, or the court may have access at any reasonable time to a written presentence report or to any record of an oral presentence report.

(c) Expunging Reports. — On motion of the defendant, the court in its discretion may order a written presentence report or the record of an oral presentence report expunged from the court record. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section is aimed at forbidding any use of the presentence report except in connection with the case for which it was made. Under subsection (b) only the defendant, his counsel, the prosecutor, or the court may obtain access to the report and the court may later expunge any report if the defendant seeks such expunction.

§ 15A-1334. The sentencing hearing. — (a) Time of Hearing. — Unless the defendant waives the hearing, the court must hold a hearing on the sentence. Either the defendant or the State may, upon a showing which the judge determines to be good cause, obtain a continuance of the sentencing hearing.

(b) Proceeding at Hearing. — The defendant at the hearing may make a statement in his own behalf. The defendant and prosecutor may present witnesses and arguments on facts relevant to the sentencing decision and may cross-examine the other party's witnesses. No person other than the defendant,

his counsel, the prosecutor, and one making a presentence report may comment to the court on sentencing unless called as a witness by the defendant, the prosecutor, or the court. Formal rules of evidence do not apply at the hearing.

(c) Sentence Hearing in Other District. — The judge who orders a presentence report may, in his discretion, direct that the sentencing hearing be held before him in another county or another judicial district during or after the session in which the defendant was convicted. If sentence is imposed in a county other than the one where the defendant was convicted, the clerk of the county where sentence is imposed must forward the records of the sentencing proceeding to the clerk of the county of conviction.

(d) Sentencing in capital cases shall be as set out in [G.S. 15A-2000 through 15A-2003]. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Primarily, this section codifies common law and constitutional provisions. It is not intended to require that the sentencing hearing be distinct from the trial itself. Under this section a sentencing hearing may be held immediately upon the return of the verdict or other determination of guilt. Subsection (b) contains a provision prohibiting in-court comments on sentencing by anyone other than one called as a witness. This was aimed at deterring incidents which sometimes occur in the more informal setting of a sentencing hearing. Subsection (c) presents the innovation of a sentencing hearing in a district other than the one where the trial was held, but only in cases in which the judge has ordered a presentence report.

§ 15A-1335. Resentencing after appellate review. — When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section embodies generally the rule of North Carolina v. Pearce, 395 U.S. 711 (1969), but does not allow a more severe sentence even if intervening factors would argue for a more severe sentence, as the Pearce decision permits.

§§ 15A-1336 to 15A-1340: Reserved for future codification purposes.

ARTICLE 82.

Probation.

OFFICIAL COMMENTARY

This Article consolidates the various provisions on probation.

§ 15A-1341. Probation generally. — (a) Use of Probation. — A person who has been convicted of any noncapital criminal offense not punishable by a minimum term of life imprisonment may be placed on probation as provided in this Article.

(b) Supervised and Unsupervised Probation. — The court may place a person on supervised or unsupervised probation. A person on unsupervised probation is subject to all incidents of probation except supervision by a probation officer.

(c) Election to Serve Sentence. — Any person placed on probation may at any time during the probationary period elect to serve his suspended sentence of imprisonment in lieu of the remainder of his probation. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Subsection (b) specifies both supervised and unsupervised probation. These two categories replace the present probation and release on suspended sentence; in this Article unsupervised probation is the equivalent of the present release on suspended sentence without probation. The Commission felt that any convicted person should be able to choose to serve a sentence rather than probation, and thus drafted subsection (c).

Cross References. — As to restoration of citizenship in case of discharge or pardon, see § 13-1 et seq. As to probation in cases of prostitution, see § 14-208. As to suspension of sentence in bastardy proceedings, see § 49-8.

Editor's Note. — Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly, as revised by the Commission prior to the reprinting of this volume.

The annotations set out below are from cases decided under former §§ 15-197, 15-200.

For article on probation and parole revocation procedures and related issues, see 13 Wake Forest L. Rev. 5 (1977).

History. — For nearly half a century prior to 1937, the trial judges in North Carolina operated a system of probation on their own initiative, permitted convicted criminals to go at large on specified conditions, and arrested them upon bench warrants if the terms of probation were violated. Either the sentence of imprisonment would be formally entered and execution suspended on conditions, or prayer for judgment would be continued in like manner. Since 1937 this power has been expressly continued by this Article as a part of the State's probation system. Pelley v. Colpoys, 122 F.2d 12 (D.C. Cir.), cert. denied, 314 U.S. 622, 62 S. Ct. 70, 86 L. Ed. 499 (1941).

The purpose of probation is to avoid imprisonment so long as the guilty man gives promise of reform. Clearly, therefore, probation is not intended to be the equivalent of imprisonment. The aim of the statute is reformatory. Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975), cert. denied, 425 U.S. 954, 96 S. Ct. 1733, 48 L. Ed. 2d 199 (1976).

The primary purpose of a suspended sentence or parole is to further the reform of the defendant. State v. Baynard, 4 N.C. App. 645, 167 S.E.2d 514 (1969); State v. Simpson, 25 N.C. App. 176, 212 S.E.2d 566 (1975); Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975), cert. denied, 425 U.S. 954, 96 S. Ct. 1733, 48 L. Ed. 2d 199 (1976).

Inherent Power of Court. — A court has the inherent power to suspend a judgment or stay of execution of a sentence in a criminal case. This Article did not withdraw this authority from the courts. It provides a procedure which is cumulative and concurrent rather than exclusive. State v. Simmington, 235 N.C. 612, 70 S.E.2d 842 (1952).

Courts having jurisdiction may pronounce judgment as by law provided; and then, with the defendant's consent, express or implied, suspend execution thereof upon prescribed conditions. Long recognized as an inherent power of the court, such authority is now recognized expressly by statute. State v. Cole, 241 N.C. 576, 86 S.E.2d 203 (1955).

The inherent power of a court having jurisdiction to suspend judgment or stay execution of sentence on conviction in a criminal case for a determinate period and for a reasonable length of time has been recognized and upheld in this jurisdiction. State v. Miller, 225 N.C. 213, 34 S.E.2d 143 (1945); State v. Griffin, 246 N.C. 680, 100 S.E.2d 49 (1957).

Probation and Parole Distinguished. — Probation relates to judicial action taken before the prison door is closed, whereas parole relates to executive action taken after the door has closed on a convict. State v. Hewett, 270 N.C. 348, 154 S.E.2d 476 (1967).

Where the judgment does not specify the period of time that execution of the sentence is suspended upon conditions, execution of the sentence is suspended or stayed for the period of time that the court is empowered by this section to suspend the sentence. State v. Simpson, 25 N.C. App. 176, 212 S.E.2d 566, cert. denied, 287 N.C. 263, 214 S.E.2d 436 (1975).

Suspension May Be for Five Years Although Maximum Imprisonment Is Two Years. — The superior court has the power to suspend execution of a sentence in a criminal prosecution for a period of five years, notwithstanding that the maximum imprisonment authorized for the offense of which defendant is convicted is two years. State v. Wilson, 216 N.C. 130, 4 S.E.2d 440 (1939); State v. McMilliam, 243 N.C. 775, 92 S.E.2d 205 (1956).

The period during which the execution of a sentence in a criminal case may be suspended on conditions has been fixed as five years, regardless of the term of imprisonment authorized by the law. State v. Gibson, 233 N.C. 691, 65 S.E.2d 508 (1951).

The provision of this section wherein it is stated "the period of probation or suspension of sentence shall not exceed a period of five years" has nothing to do with the length of a sentence that may be suspended but limits the period of time for which it may be suspended. State v. Ray, 12 N.C. App. 646, 184 S.E.2d 391 (1971).

Suspension of sentence for a period of five years is within the limits provided by law. State v. Baynard, 4 N.C. App. 645, 167 S.E.2d 514 (1969).

The maximum period during which the execution of a sentence in a criminal case may be suspended on conditions is five years. A suspension of sentence for a period in excess of that authorized by this section is not void in toto. Ordinarily it is valid to the extent the court had power to suspend or stay execution and void merely as to the excess. State v. McBride, 240 N.C. 619, 83 S.E.2d 488 (1954); State v. Rowland, 32 N.C. App. 756, 233 S.E.2d 682 (1977).

Assumption of Obligations with Acceptance of Probation. — Defendant is not required to accept a suspended sentence or probationary judgment, but if he does, he voluntarily assumes the obligations imposed. State v. Young, 21 N.C. App. 316, 204 S.E.2d 185 (1974).

Prisoner Has Right to Rely on Conditions of Suspension. — Where a sentence in a criminal case is suspended upon certain valid conditions expressed in the sentence imposed, the prisoner has a right to rely upon such conditions. State v. Seagraves, 266 N.C. 112, 145 S.E.2d 327 (1965); State v. Young, 21 N.C. App. 316, 204 S.E.2d 185 (1974).

And so long as he complies with such conditions, the suspension should stand. State v. Seagraves, 266 N.C. 112, 145 S.E.2d 327 (1965); State v. Young, 21 N.C. App. 316, 204 S.E.2d 185 (1974).

A person does not serve a prison sentence while on probation or parole any more than he does while free on bail. In both instances, there are certain restrictions generally on the person's movements but the person's condition is very different from that of confinement in a prison. Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975), cert. denied, 425 U.S. 954, 96 S. Ct. 1733, 48 L. Ed. 2d 199 (1976).

Probation or suspension of sentence is not a right granted by either the Constitution of the United States or the Constitution of this State, but is an act of grace to one convicted of crime. State v. Hewett, 270 N.C. 348, 154 S.E.2d 476 (1967).

Probation Must Be Consistent with Right of Appeal. — Where the privilege of probation, granted by this Article, is so conditioned as to be inconsistent with a defendant's right of appeal, the judgment is erroneous. State v. Calcutt, 219 N.C. 545, 15 S.E.2d 9 (1941).

An order suspending the imposition or execution of sentence on condition is favorable to the defendant, and when he sits by as the order is entered and does not appeal, he impliedly consents and thereby waives or abandons his right to appeal on the principal issue of his guilt or innocence and commits himself to abide by the stipulated conditions. He may not thereafter complain that his conviction was not in accord with due process of law. He is relegated to his right to contest imposition of judgment or execution of sentence for want of evidence to support a finding that conditions imposed have been breached, or that the conditions are unreasonable or unenforceable, or are for an unreasonable length of time. And the court may not pronounce judgment or invoke execution, after adjournment of the term, so long as defendant observes the conditions imposed. State v. Miller, 225 N.C. 213, 34 S.E.2d 143 (1945).

When a sentence of imprisonment in a criminal case is suspended upon certain valid conditions expressed in a probation judgment, defendant has a right to rely upon such conditions, and as long as he complies therewith the suspension must stand. In such a case, defendant carries the keys to his freedom in his willingness to comply with the court's sentence. State v. Hewett, 270 N.C. 348, 154 S.E.2d 476 (1967).

Where on conviction of defendant in a criminal case and judgment and execution are suspended on condition, without appeal taken, the court moves to impose sentence on the grounds of conditions broken, the defenses available to defendant involve questions of fact for the judge and not issues of fact for the jury, and no appeal is provided by statute from an adverse ruling, so that defendant's remedy is by certiorari or recordari. State v. Miller, 225 N.C. 213, 34 S.E.2d 143 (1945).

Where there is a conviction and a sentence imposed, the fact that the court may suspend the judgment or its execution upon payment of costs or other conditions, and no appeal is taken, the judgment will be considered final when the time for appealing the case has expired, and the defendant may not be heard thereafter to complain on the ground that his conviction was not in accord with due process of law. Barbour v. Scheidt, 246 N.C. 169, 97 S.E.2d 855 (1957).

Discretion of Trial Judge. — The propriety of suspending the sentence, ordinarily, is a matter resting in the sound discretion of the trial judge. The General Assembly has endeavored to implement the power of the court in this respect by making further provisions for probation and supervision in this and the following sections. State v. Stallings, 234 N.C. 265, 66 S.E.2d 822 (1951).

Suspension of Sentence on Condition Defendant Not Operate Motor Vehicle during Period of Suspension. — Upon defendant's conviction of operating a motor vehicle while under the influence of intoxicating beverage, the court may not suspend judgment upon condition that the defendant not operate a motor vehicle upon the public roads during the period of suspension unless defendant consents thereto, expressly or by implication. State v. Cole, 241 N.C. 576, 86 S.E.2d 203 (1955); State v. Green, 251 N.C. 141, 110 S.E.2d 805 (1959).

§ 15A-1342. Incidents of probation. — (a) Period. — The court may place an offender on probation for a maximum of five years. The probation remains conditional and subject to revocation during the period of probation imposed, unless terminated as provided in subsection (b) or G.S. 15A-1341(c).

(b) Early Termination. — The court may terminate a period of probation and discharge the defendant at any time earlier than that provided in subsection (a) if warranted by the conduct of the defendant and the ends of justice.

(c) Conditions; Suspended Sentence. — When the court places an offender on probation, it must determine conditions of probation as provided in G.S. 15A-1343. In addition, it must impose a suspended sentence of imprisonment, determined as provided in Article 83, Imprisonment, which may be activated upon violation of conditions of probation.

(d) Mandatory Review of Probation. — Each probation officer must bring all probationers assigned to him before a court with jurisdiction to review the probation when the probationer has served three years of a probationary period greater than three years. The court must review the case file of probationer so brought before it and determine whether to terminate his probation.

(e) Out-of-State Supervision. — Probationers are subject to out-of-state supervision under the provisions of G.S. 148-65.1.

(f) Appeal from Judgment of Probation. — A defendant may seek post-trial relief from a judgment which includes probation notwithstanding the authority of the court to modify or revoke the probation.

(g) Invalid Conditions; Timing of Objection. — A court may not revoke probation for violation of an invalid condition. The failure of a defendant to object to a condition of probation at the time it is imposed does not constitute a waiver of the right to object at a later time to the condition.

(h) Limitation on Jurisdiction to Alter or Revoke Unsupervised Probation. — In the judgment placing a person on unsupervised probation, the judge may limit jurisdiction to alter or revoke the sentence under G.S. 15A-1344. When jurisdiction to alter or revoke is limited, the effect is as provided in G.S. 15A-1344(b). (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Subsections (a) to (f) codify prior law and practice. Subsection (g) seeks to make clear the resolution of the dilemma a defendant is placed in when he is placed on probation with invalid conditions. The defendant wishes to contest the conditions but is afraid that if he does so he will be given an active sentence. Subsection (g) makes it clear that he may accept the probation and still contest the validity of the condition if his probation is later sought to be revoked for its violation. Prior law provided that alteration or revocation of probation is possible by any

judge, but only a judge who enters the order may alter a suspended sentence without probation. Subsection (h), coupled with the concomitant § 15A-1344 strikes a balance between members of the Commission who felt that both supervised and unsupervised probation should be treated the same, and those who felt the traditional arrangement should be retained (because of the lack of knowledge about an unsupervised probationer available to anyone other than the sentencing judge). The compromise is that a judge placing a defendant on unsupervised probation may specify that only he is to be able to alter the unsupervised probation. In the absence of such specification, however, any judge may do so.

§ 15A-1343. Conditions of probation. — (a) In General. — The court may impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so.

(b) Appropriate Conditions. — When placing a defendant on probation, the court may, as a condition of the probation, require that during the period of probation the defendant comply with one or more of the following conditions:

(1) Not commit any criminal offense.

(2) Work faithfully at suitable employment or faithfully pursue a course of study or of vocational training that will equip him for suitable employment.

(3) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(4) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on probation.

(5) Support his dependents and meet other family responsibilities.

(6) Make restitution or reparation for loss or injury resulting from the crime for which the defendant is convicted. When restitution or reparation is a condition of the sentence, the amount must be limited to that supported by the evidence. The court may direct a probation officer to fix the manner of performing the restitution or reparation.

(7) Pay a fine authorized by Article 84, Fines.

(8) Refrain from possessing a firearm or destructive device or other dangerous weapon unless granted written permission by the court or the probation officer.

(9) Report to a probation officer at reasonable times and in a reasonable manner, as directed by the court or the probation officer.

(10) Permit the probation officer to visit him at reasonable times at his home or elsewhere.

(11) Remain within the jurisdiction of the court, unless granted permission to leave by the court or the probation officer.

(12) Answer all reasonable inquiries by the probation officer and obtain prior approval from the probation officer for any change in address or employment.

(13) Promptly notify the probation officer of any change in address or employment.

(14) Pay court costs and costs for appointed counsel or public defender to represent him in the case in which he was convicted.

(15) Submit at reasonable times to warrantless searches by a probation officer of his person, and of his vehicle and premises while he is present, for purposes reasonably related to his probation supervision. The court may not require as a condition of probation that the probationer submit to any other search that would otherwise be unlawful.

(16) Submit to imprisonment required for special probation under G.S. 15A-1351(a) or G.S. 15A-1344(e).

(17) Satisfy any other conditions reasonably related to his rehabilitation.

(c) Statement of Conditions. — A defendant released on supervised probation must be given a written statement explicitly setting forth the conditions on which he is being released. If any modification of the terms of that probation

is subsequently made, he must be given a written statement setting forth the modifications. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section specifies a number of conditions of probation, primarily ones that will be used fairly frequently, that may be imposed. The list is meant neither to be exclusive nor to suggest that these conditions should be imposed in all cases. Condition (15), dealing with searches, recognizes that the ability to search a probationer in some instances is an essential element of successful probation. It includes two important limits: (1) only a probation officer, and not a law-enforcement officer, may search the probationer under this condition, and (2) the search may be only for purposes reasonably related to the probation supervision.

Editor's Note. — The annotations set out below are from cases decided under former § 15-199.

A condition which is a violation of the defendant's constitutional rights and, therefore, beyond the power of the court to impose is per se unreasonable. State v. Simpson, 25 N.C. App. 176, 212 S.E.2d 566, cert. denied, 287 N.C. 263, 214 S.E.2d 436 (1975).

Condition directly related to and growing out of the offense for which the defendant is convicted, and consistent with proper punishment for the crime, neither violates the defendant's constitutional rights nor is otherwise unreasonable. State v. Simpson, 25 N.C. App. 176, 212 S.E.2d 566, cert. denied, 287 N.C. 263, 214 S.E.2d 436 (1975).

Defendant must not be oppressed or unduly burdened by the suspension. State v. Simpson, 25 N.C. App. 176, 212 S.E.2d 566, cert. denied, 287 N.C. 263, 214 S.E.2d 436 (1975).

Defendant's consent does not preclude him from contesting reasonableness of condition which he has broken when such breach is made the ground for putting the prison sentence into effect. State v. Simpson, 25 N.C. App. 176, 212 S.E.2d 566, cert. denied, 287 N.C. 263, 214 S.E.2d 436 (1975).

Where defendants agreed to consent to a warrantless search of their premises as a condition of a suspended sentence, officers appearing to conduct the search did not have the right to break unannounced into defendants' home. They should have first announced their presence and requested entry. Had entry been refused, defendants as probationers could have been cited for violation of the terms of their probation, and upon a finding that the conditions had been violated, the previously suspended sentences could have been put into effect. State v. Mitchell, 22 N.C. App. 663, 207 S.E.2d 263 (1974).

Condition that Defendant Remain Law-Abiding. — Upon conviction of a misdemeanor, judgment was entered that defendant be imprisoned in the county jail for a term of eight months, with further provision that execution of the judgment should be suspended upon the payment of a fine and upon further condition that defendant remain law-abiding for a period of five years. It was held that the condition upon which execution was suspended was twofold; first, the payment of the fine and, second, that defendant remain law-abiding for a term of five years; and upon conviction of defendant of a subsequent violation of the criminal law within the period of five years, the order of the court putting into effect the suspended execution is proper, notwithstanding defendant had paid the fine, defendant's contention that judgment suspending execution did not contemplate imprisonment if the fine should be paid, being untenable. State v. Wilson, 216 N.C. 130, 4 S.E.2d 440 (1939).

The condition that a probationer avoid injurious or vicious habits is a valid condition of probation. State v. Hewett, 270 N.C. 348, 154 S.E.2d 476 (1967).

The condition that probationer shall avoid persons or places of disreputable or harmful character, is within the power of the court to impose. State v. Boggs, 16 N.C. App. 403, 192 S.E.2d 29 (1972).

Interpretation of Disreputable or Harmful Character. — In the exercise of common reasoning in the interpretation and understanding of the meaning of the English language, persons who use heroin and marijuana and who have been convicted of a conspiracy to bomb an occupied building are "persons of a disreputable or harmful character." State v. Boggs, 16 N.C. App. 403, 192 S.E.2d 29 (1972).

Condition That Defendant Reimburse State for Cost of Court-Appointed Counsel. — A condition of probation requiring the defendant to reimburse the State for the cost of court-appointed counsel is permissible under this section. State v. Foust, 13 N.C. App. 382, 185 S.E.2d 718 (1972).

Reparation of injuries to a party aggrieved as a result of or incident to an offense committed by a criminal defendant as a condition to suspension of sentence has long been recognized in North Carolina judicially and by statute. State v. Gallamore, 6 N.C. App. 608, 170 S.E.2d 573 (1969).

Conditions Which Curtail Constitutional Rights. — This section recognizes a wide variety of conditions which may be imposed upon suspension of sentence, many of which touch upon and curtail rights guaranteed by State and federal Constitutions. State v. Mitchell, 22 N.C. App. 663, 207 S.E.2d 263 (1974).

Condition of Consent to Warrantless Search. — Conditions of the prior suspended sentences by which defendants gave consent to search of their premises at reasonable hours without a search warrant were valid. State v. Mitchell, 22 N.C. App. 663, 207 S.E.2d 263 (1974).

Voluntary waiver and consent to a warrantless search of one's premises may effectively be given by agreeing thereto as one of the conditions of a suspended sentence, and this should especially be true where such a condition is clearly designed to facilitate the State's supervision of the probationer's rehabilitation. State v. Mitchell, 22 N.C. App. 663, 207 S.E.2d 263 (1974).

§ 15A-1344. Response to violations; alteration and revocation. — (a) Authority to Alter or Revoke. — Except as provided in subsection (b), probation may be reduced, terminated, continued, extended, modified, or revoked by any judge entitled to sit in the court which imposed probation and who is resident or presiding in the district where the sentence of probation was imposed, where the probationer violates probation, or where the probationer resides. The district attorney of the district in which probation was imposed must be given reasonable notice if the hearing is to be held in any other district.

(b) Limits on Jurisdiction to Alter or Revoke Unsupervised Probation. — If the sentencing judge has entered an order to limit jurisdiction to consider a sentence of unsupervised probation under G.S. 15A-1342(h), a sentence of unsupervised probation may be reduced, terminated, continued, extended, modified, or revoked only by the sentencing judge or, if the sentencing judge is no longer on the bench, by a presiding judge in the court where the defendant was sentenced.

(c) Procedure on Altering or Revoking Probation; Returning Probationer to District Where Sentenced. — When a judge reduces, terminates, extends, modifies, or revokes probation outside the county where the judgment was entered, the clerk must send a copy of the order and any other records to the court where probation was originally imposed. A court on its own motion may return the probationer to the district where probation was imposed or where the probationer resides for reduction, termination, continuation, extension, modification, or revocation of probation.

(d) Extension and Modification; Response to Violations. — At any time prior to the expiration or termination of the probation period, the court may after notice and hearing and for good cause shown extend the period of probation up to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of probation. The hearing may be held in the absence of the defendant, if he fails to appear for the hearing after a reasonable effort to notify him. If a defendant violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court, in accordance with the provisions of G.S. 15A-1345, may continue him on probation, with or without modifying the conditions, may place the defendant on special probation as provided in subsection (e), or, if continuation, modification, or special probation is not appropriate, may revoke the probation and activate the suspended sentence imposed at the time of initial sentencing. The court, before activating a sentence to imprisonment established when the defendant was placed on probation, may reduce the sentence. A sentence activated upon revocation of probation commences on the day probation is revoked and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period unless the revoking judge specifies that it is to run consecutively with the other period.

(e) Special Probation in Response to Violation. — When a defendant has violated a condition of probation, the court may modify his probation to place him on special probation as provided in this subsection. In placing him on special probation, the court may continue or modify the conditions of his probation and in addition require that he submit to a period or periods of imprisonment, either consecutive or nonconsecutive, at whatever time or intervals within the period of probation the court determines. If imprisonment is for consecutive periods, the confinement may be in either the custody of the Department of Correction or a local confinement facility. Nonconsecutive periods of imprisonment under special probation may only be served in a designated local confinement or treatment facility. The total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed six months or one fourth the maximum penalty allowed by law for the offense, whichever is less. No confinement other than an activated suspended sentence may be required beyond the period of probation or beyond two years of the time the special probation is imposed, whichever comes first.

(f) Revocation after Period of Probation. — The court may revoke probation after the expiration of the period of probation if:

(1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and

(2) The court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Except for subsection (b), discussed in the commentary to G.S. 15A-1342, the first several subsections codified prior law and practice. Subsection (e) permits the imposition of special probation, of the same kind that may be imposed in sentencing in the first instance under § 15A-1351(a), following a probation violation. Subsection (f) provides that probation can be revoked and the probationer made to serve a period of active imprisonment even after the period of probation has expired if a violation occurred during the period and if the court was unable to bring the probationer before it in order to revoke at that time.

§ 15A-1345. Arrest and hearing on probation violation. — (a) Arrest for Violation of Probation. — A probationer is subject to arrest for violation of conditions of probation upon either an order for arrest issued by the court or upon the written request of a probation officer, accompanied by a written statement signed by the probation officer that the probationer has violated specified conditions of his probation. However, a probation revocation hearing under subsection (e) may be held without first arresting the probationer.

(b) Bail Following Arrest for Probation Violation. — If at any time during the period of probation the probationer is arrested for a violation of any of the conditions of probation, he must be taken without unnecessary delay before a judicial official to have conditions of release pending a revocation hearing set in the same manner as provided in G.S. 15A-534.

(c) When Preliminary Hearing on Probation Violation Required. — Unless the hearing required by subsection (e) is first held or the probationer waives the hearing, a preliminary hearing on probation violation must be held within five working days of an arrest of a probationer to determine whether there is probable cause to believe that he violated a condition of probation. Otherwise, the probationer must be released four working days after his arrest to continue on probation pending a hearing.

(d) Procedure for Preliminary Hearing on Probation Violation. — The preliminary hearing on probation violation must be conducted by a judge who

is sitting in the county where the probationer was arrested or where probation was imposed. If no judge is sitting in the county where the hearing would otherwise be held, the hearing may be held anywhere in the judicial district. The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged. At the hearing the probationer may appear and speak in his own behalf, may present relevant information, and may, on request, personally question adverse informants unless the court finds good cause for not allowing confrontation. Formal rules of evidence do not apply at the hearing. If probable cause is found or if the probable cause hearing is waived, the probationer may be held for a revocation hearing, subject to release under the provisions of subsection (b). If the hearing is held and probable cause is not found, the probationer must be released to continue on probation.

(e) Revocation Hearing. — Before revoking or extending probation, the court must, unless the probationer waives the hearing, hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision and a summary record of the proceedings. The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged. The notice, unless waived by the probationer, must be given at least 24 hours before the hearing. At the hearing, evidence against the probationer must be disclosed to him, and the probationer may appear and speak in his own behalf, may present relevant information, and may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation. The probationer is entitled to be represented by counsel at the hearing and, if indigent, to have counsel appointed. Formal rules of evidence do not apply at the hearing, but the record or recollection of evidence or testimony introduced at the preliminary hearing on probation violation are inadmissible as evidence at the revocation hearing. When the violation alleged is the nonpayment of fine or costs, the issues and procedures at the hearing include those specified in G.S. 15A-1364 for response to nonpayment of fine. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section also codifies prior law and practice. Subsections (c) and (d) in particular respond primarily to the dictates of Gagnon v. Scarpelli, 411 U.S. 778 (1973) which applies the due process requirements first stated in Morrissey v. Brewer, 408 U.S. 471 (1972) to probation revocation. An important point to notice is that the provisions permit the consolidation of the preliminary hearing on revocation and the revocation hearing if the revocation hearing is held within five working days of the probationer's arrest. The preliminary hearing on a probation violation may, of course, be omitted if the probationer is not taken into custody before his revocation hearing, since the preliminary hearing serves roughly the same purpose as the appearance before a magistrate following a conventional arrest for a crime. In granting entitlement to the probationer to representation by counsel at the revocation hearing, subsection (e) goes beyond the Supreme Court requirement and beyond the present requirements of G.S. 7A-451 which provides counsel only "if confinement is likely to be adjudged."

Editor's Note. — The annotations set out below are from cases decided under former § 15-200.

For article on probation and parole revocation procedures and related issues, see 13 Wake Forest L. Rev. 5 (1977).

Common-Law System. — Under the North Carolina law the trial court had authority to issue its capias for petitioner's arrest on the suspended sentence either under the common-law system which prevailed in 1935 or under the provisions of this Article. Pelley v. Colpoys, 122 F.2d 12 (D.C. Cir.), cert. denied, 314 U.S. 622, 62 S. Ct. 70, 86 L. Ed. 499 (1941).

This section authorizes issuance of a probation violation warrant at any time

during the period of probation. State v. Best, 10 N.C. App. 62, 177 S.E.2d 772 (1970).

But it does not require that the defendant be apprehended and brought into court for hearing within that time. State v. Best, 10 N.C. App. 62, 177 S.E.2d 772 (1970).

To argue that the language of this section must be interpreted to require that the warrant not only be issued but that it also be actually served on the defendant and he be taken into custody during the probationary period, else the court lacks power to hear the matter, obviously rewards the defaulting probationer for his skill in eluding the officers, and is required neither by reason nor authority. State v. Best, 10 N.C. App. 62, 177 S.E.2d 772 (1970).

Absence from State after Service of Capias. — Defendant was convicted upon an indictment containing two counts. Execution of sentence on one count was suspended upon specified conditions for a period of five years and prayer for judgment was continued on the other count for a like period. Thereafter, upon alleged violation of conditions of probation, capias was issued under this section, and alias capias subsequently served upon defendant out of the State before the expiration of the period of probation. Defendant refused to appear, and by habeas corpus and numerous appeals in his fight against extradition, delayed his appearance in court for hearing upon the alleged violation of conditions of probation beyond the period of probation. It was held that upon issuance of notice of service of capias the defendant was under duty to respond and appear and time ceased to run against the period of probation during the period defendant absented himself from the State and was a fugitive from justice. State v. Pelley, 221 N.C. 487, 20 S.E.2d 850 (1942).

Jurisdiction of Judge to Conduct Revocation Hearing. — The resident judge of a judicial district, the judge holding the courts of a judicial district, or any judge commissioned at the time to hold court in a judicial district, is clothed with jurisdiction to conduct a revocation hearing with respect to all probationers who reside in the district or who were placed on probation in any county in the district or who violated the conditions of probation in any county in the district. State v. Braswell, 283 N.C. 332, 196 S.E.2d 185 (1973).

Hearing May Be Held after Period of Probation Has Expired. — If a probation violation warrant and order of arrest is issued during the probationary period, a valid probation revocation hearing may be held and order entered after the period of probation has expired, at least in situations where the delay is not due to any lack of diligence on the part of the probation authorities or the court. State v. Best, 10 N.C. App. 62, 177 S.E.2d 772 (1970).

Written Notice of Hearing. — The courts of this State recognize the principle that a defendant on probation or a defendant under a suspended sentence, before any sentence of imprisonment is put into effect and activated, shall be given notice in writing of the hearing in apt time and an opportunity to be heard. State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 730 (1970); State v. Pratt, 21 N.C. App. 538, 204 S.E.2d 906 (1974).

A proceeding to revoke probation is not a criminal prosecution. State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 924 (1970); State v. Young, 21 N.C. App. 316, 204 S.E.2d 185 (1974); State v. Pratt, 21 N.C. App. 538, 204 S.E.2d 906 (1974).

But is a proceeding solely for the determination whether there has been a violation of a valid condition of probation so as to warrant putting into effect a sentence theretofore entered. State v. Pratt, 21 N.C. App. 538, 204 S.E.2d 906 (1974).

And Formal Trial Is Not Required. — There is no statute in this State requiring a formal trial in a proceeding to revoke probation. State v. Duncan, 270 N.C. 241, 154 S.E.2d 53 (1967); State v. Hewett, 270 N.C. 348, 154 S.E.2d 476 (1967); State v. Young, 21 N.C. App. 316, 204 S.E.2d 185 (1974).

Proceedings to revoke probation are often regarded as informal or summary. State v. Duncan, 270 N.C. 241, 154 S.E.2d 53 (1967); State v. Hewett, 270 N.C. 348, 154 S.E.2d 476 (1967); State v. Young, 21 N.C. App. 316, 204 S.E.2d 185 (1974).

But substantial rights are litigated in every revocation of probation proceeding, irrespective of the preciseness of the claimed violation or the complexity of the factual inquiry. Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969).

At stake in a revocation of probation proceeding is individual liberty, and the substantiality of this right may not be disputed. Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969).

And appointment of counsel is constitutionally required when proceedings to revoke probation are conducted. Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969).

A defendant charged with the violation of conditions of a probation sentence is entitled to representation by an attorney. State v. Atkinson, 7 N.C. App. 355, 172 S.E.2d 249 (1970).

While the right to counsel applies to "criminal proceedings," there is little doubt that the revocation of probation is a stage of criminal proceedings. Even if a new sentence is not imposed, it is the event which makes operative the loss of liberty. Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969).

The judge has discretion whether to revoke a probation upon his finding that a condition of probation has been violated. Thus, liberty hangs in the balance. Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969).

In hearings under this section the findings of fact and the judgment entered thereupon are matters to be determined in the sound discretion of the court, and the exercise of that discretion in the absence of gross abuse cannot be reviewed. State v. Simpson, 25 N.C. App. 176, 212 S.E.2d 566 (1975).

The inquiry of the court at such a hearing is not directed to the probationer's guilt or innocence, but to the truth of the accusation of a violation of probation. The crucial question is: "Has the probationer abused the privilege of grace extended to him by the court?" State v. Young, 21 N.C. App. 316, 204 S.E.2d 185 (1974).

This section does not involve defendant's Sixth Amendment rights since a hearing to determine whether the terms of a suspended sentence have been violated is not a criminal prosecution and is not a jury matter. State v. Braswell, 283 N.C. 332, 196 S.E.2d 185 (1973).

Whether defendant has violated valid conditions of probation is not an issue of fact for a jury, but is a question of fact for the judge to be determined in the exercise of his sound discretion. State v. Hewett, 270 N.C. 348, 154 S.E.2d 476 (1967); State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

Violation of Terms of Sentence Is Not a Jury Matter. — A hearing to determine whether or not the terms of a suspended sentence have been violated is not a jury matter, but is to be determined in the sound discretion of the judge. State v. Coffey, 255 N.C. 293, 121 S.E.2d 736 (1961).

In a probation hearing, the court is not bound by strict rules of evidence. State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 924 (1970); State v. Young, 21 N.C. App. 316, 204 S.E.2d 185 (1974); State v. Pratt, 21 N.C. App. 538, 204 S.E.2d 906 (1974).

At a hearing to revoke the suspension of a prison sentence for the alleged violation of a valid condition of suspension, the court is not bound by strict rules of evidence. All that is required in a hearing of this character is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. State v. Simpson, 25 N.C. App. 176, 212 S.E.2d 566, cert. denied, 287 N.C. 263, 214 S.E.2d 436 (1975).

Violation Need Not Be Proved beyond Reasonable Doubt. — The alleged violation of the terms of a suspended sentence need not be proven beyond a reasonable doubt. All that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended. State v. Coffey, 255 N.C. 293, 121 S.E.2d 736 (1961).

Upon a hearing to determine whether or not probation should be revoked, and a sentence previously suspended should be activated, all that is required is that the evidence be such as reasonably to satisfy the judge, in the exercise of his sound discretion, that the defendant has violated a valid condition upon which the sentence was so suspended. State v. Seagraves, 266 N.C. 112, 145 S.E.2d 327 (1965).

The alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt. State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

Burden of proof is upon the State to show that the defendant has violated one of the conditions of his probation. State v. Seagraves, 266 N.C. 112, 145 S.E.2d 327 (1965).

Breach of Condition Need Not Be "Willful". — It is not necessary for a court to find that a defendant's breach of a condition of his probation was "willful" in order to activate defendant's suspended sentence where the court found that such breach was without lawful excuse. State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

But Must Be without Lawful Excuse. — If a court concludes that a breach of a probationary condition by a defendant is without lawful excuse, this is sufficient to support the activation of a suspended sentence. State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

All that is required in a probation hearing is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated, without lawful excuse, a valid condition upon which the sentence was suspended. State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 924 (1970); State v. Pratt, 21 N.C. App. 538, 204 S.E.2d 906 (1974).

It is not incumbent upon a court in a probation revocation proceeding to find that a defendant's voluntary payment of certain expenses was a "lawful excuse" for his failure to make periodic payments into the office of the clerk of court as required by a condition of his probation. State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

Conduct Violating Condition of Suspension on Good Behavior. — Behavior such as will warrant a finding that a defendant has breached the condition of suspension on good behavior must be conduct which constitutes a violation of some criminal law of the State. State v. Seagraves, 266 N.C. 112, 145 S.E.2d 327 (1965).

Effect of Conviction in Another State. — Order suspending a sentence on condition "that the defendant be of good behavior and violate none of the laws of the State" was not violated by proof that defendant was convicted of a criminal law in another state. State v. McBride, 240 N.C. 619, 83 S.E.2d 488 (1954). See State v. Millner, 240 N.C. 602, 83 S.E.2d 546 (1954).

Sentence upon Revocation of Probation Is Punishment for Original Crime. — Although revocation of probation results in the deprivation of a probationer's liberty, the sentence he may be required to serve is the punishment for the crime of which he had previously been found guilty. State v. Young, 21 N.C. App. 316, 204 S.E.2d 185 (1974).

The provision that the judge "shall proceed to deal with the case as if there had been no probation or suspension of sentence" is not statutory authority for the judge, at a probation revocation hearing, to order the sentence imposed by the trial judge to run consecutively with some other sentence unless the trial judge ordered it at the time the sentence was imposed. State v. Fields, 11 N.C. App. 708, 182 S.E.2d 213 (1971).

Question Not Moot. — The fact that whether or not a person was actually incarcerated will have an effect upon the time at which he may, under state law, petition the courts for restoration of his civil rights is a sufficiently important legal distinction to preserve his case, as to the constitutionality of his probation revocation, from being moot, although he had served his prison term. Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969).

The probationary judgment does not have to be formally introduced into evidence at the revocation hearing if the record indicates, as in the case at bar, that the judge has the order before him, and where reference is made in the judgment to specific conditions that defendant allegedly violated. State v. Hogan, 27 N.C. App. 34, 217 S.E.2d 712 (1975).

Imprisonment Is for Original Crime. — A petitioner, upon revocation of his suspended sentence, suffers imprisonment under a sentence, not for the matters that may have caused the revocation of his probation, but for the crime for which he was originally found guilty. Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975), cert. denied, 425 U.S. 954, 96 S. Ct. 1733, 48 L. Ed. 2d 199 (1976).

There is nothing unusual in the denial by North Carolina law of credit for probation or parole time against a prison sentence; it is common to both State and federal probation and parole systems and the validity of such denial has been universally recognized both in federal and State decisions. Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975), cert. denied, 425 U.S. 954, 96 S. Ct. 1733, 48 L. Ed. 2d 199 (1976).

The refusal to credit probation time against the prison sentence is not double jeopardy, or an extension or enlargement of the original sentence of imprisonment, since the period of probation is not counted as a part of the period of imprisonment. Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975), cert. denied, 425 U.S. 954, 96 S. Ct. 1733, 48 L. Ed. 2d 199 (1976).

Sufficiency of Evidence. — All that is required in a hearing to revoke probation is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. State v. Duncan, 270 N.C. 241, 154 S.E.2d 53 (1967); State v. Hewett, 270 N.C. 348, 154 S.E.2d 476 (1967); State v. Martin, 27 N.C. App. 666, 220 S.E.2d 94 (1975).

Scope of Inquiry into Changed Circumstances Surrounding Terms of Suspended Sentence. — Where the superior court finds that the terms of the suspended sentence have been violated, it "shall enforce the judgment unless" it finds that the circumstances surrounding the conditions have changed so much that revocation would be unjust. However, the inquiry into changed circumstances is directed only to circumstances which are relevant to the conditions of suspension. State v. Cash, 30 N.C. App. 677, 228 S.E.2d 85 (1976).

§ 15A-1346. Commencement of probation; multiple sentence. — (a) Commencement of Probation. — Except as provided in subsection (b), a period of probation commences on the day it is imposed and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period.

(b) Consecutive and Concurrent Sentences. — If a period of probation is being imposed at the same time a period of imprisonment is being imposed or if it is being imposed on a person already subject to an undischarged term of imprisonment, the period of probation may run either concurrently or consecutively with the term of imprisonment, as determined by the court. If not specified, it runs concurrently. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Probation would be stayed pending appeal under G.S. 15A-1451(a)(4), although under subsection (a) it would start on imposition of sentence. Subsection (b) clarifies the point that a probationary sentence may be imposed to run consecutively after a period of active imprisonment for a different crime.

§ 15A-1347. Appeal from revocation of probation or imposition of special probation upon violation. — When a district court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, the defendant may appeal to the superior court for a de novo revocation hearing. At the hearing the probationer has all rights and the court has all authority they have in a revocation hearing held before the superior court in the first instance. Appeals from lower courts to the superior courts from judgments revoking probation may be heard in term or out of term, in the county or out of the county by the resident superior court judge of the district or the superior court judge assigned to hold the courts of the district, or a judge of the superior court commissioned to hold court in the district, or a special superior court judge residing in the district. When a superior court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, either in the first instance or upon a de novo hearing after appeal from a district court, the defendant may appeal under G.S. 7A-27. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section carries forward prior law, except that under prior law, upon appeal to superior court from a revocation in the district court, the superior court, upon a finding that a violation occurred, must simply affirm the response to the violation imposed by the lower court judge. This section intends that the superior court judge at the hearing have complete freedom if he finds a violation; even if the lower court judge revoked the probation, the superior court judge may instead continue the probationer on probation or alter the terms of his probation.

Editor's Note. — The annotations set out below are from cases decided under former § 15-200.1.

Superior Court Is Not Limited to Evidence Heard in Inferior Court. — Since the hearing on appeal must be de novo in superior court, that court is not limited to the evidence heard in the inferior court, and may hear and consider any competent evidence so long as it bears on the issue of whether or not there has been a violation of the terms of the suspended sentence. State v. Coffey, 255 N.C. 293, 121 S.E.2d 736 (1961).

Where matter was not heard de novo by the superior court, on appeal thereto, as required by this section, the judgment putting the sentence into execution was set aside, and the cause remanded to the superior court for further hearing in accordance with law. State v. Thompson, 244 N.C. 282, 93 S.E.2d 158 (1956).

Collateral Attack on Original Judgment Is Impermissible. — Questioning the validity of the original judgment where sentence was suspended, on appeal from an order activating the sentence, is an impermissible collateral attack. State v. Noles, 12 N.C. App. 676, 184 S.E.2d 409 (1971).

A defendant on appeal from an order revoking probation may not challenge his adjudication of guilt. State v. Cordon, 21 N.C. App. 394, 204 S.E.2d 715 (1974).

Court Is without Authority to Try Defendant Anew. — The jurisdiction of the superior court under this section is derivative and that court is without authority to try defendant anew. State v. Riddle, 18 N.C. App. 490, 197 S.E.2d 8 (1973).

Where there was no factual basis for any change in the sentence imposed by the trial judge, it was error for the judge at the probation revocation hearing, after finding that the conditions were violated, to do anything other than enforce the judgment of the lower court. State v. Fields, 11 N.C. App. 708, 182 S.E.2d 213 (1971).

§§ 15A-1348 to 15A-1350: Reserved for future codification purposes.

ARTICLE 83.

Imprisonment.

§ 15A-1351. Sentence of imprisonment; incidents; special probation. — (a) The judge may sentence a defendant convicted of an offense for which the maximum penalty does not exceed 10 years to special probation. Under a sentence of special probation, the court may suspend the term of imprisonment and place the defendant on probation as provided in Article 82, Probation, and in addition require that the defendant submit to a period or periods of imprisonment in the custody of the Department of Correction or a designated local confinement or treatment facility at whatever time or intervals within the period of probation, consecutive or nonconsecutive, the court determines. The total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed six months or one fourth the maximum penalty allowed by law for the offense, whichever is less, and no confinement other than an activated suspended sentence may be required beyond two years of conviction. In imposing a sentence of special probation, the judge may credit any time spent committed or confined, as a result of the charge, to either the suspended sentence or to the imprisonment required for special probation. The period of probation, including the period of imprisonment required for special probation, may not exceed five years. The court may revoke, modify, or terminate special probation as otherwise provided for probationary sentences.

(b) A sentence to imprisonment must impose maximum term and may impose a minimum term. The judgment may state the minimum term or may state that a term constitutes both the minimum and maximum terms. If the judgment states no minimum term, the defendant becomes eligible for parole in accordance with G.S. 15A-1371(a).

(c) Reduction of Minimum. — A superior court judge, or any district court judge if the offender is serving a sentence imposed in district court, sitting or resident in the district where the offender was sentenced may remove or reduce an imposed minimum term at any time upon motion of the Department of Correction and Parole Commission. When the Department of Correction moves that a minimum sentence be removed or reduced, it must send a copy of the motion to the district attorney in the district where the defendant was convicted.

(d) Alternative to Minimum Term. — In lieu of imposing a minimum term, the court may recommend to the Parole Commission a minimum period of imprisonment the offender should serve before being granted parole. The recommendation has the effect provided in G.S. 15A-1371(c).

(e) Youthful Offenders. — If an offender is under the age of 21 years at the time of conviction, the court may sentence the offender as a youthful offender under the provisions of Article 3A of Chapter 148 of the General Statutes.

(f) Work Release. — The sentencing court may recommend that the sentenced offender be granted work release as authorized in G.S. 148-33.1. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The idea of subsection (a), similar to the former G.S. 15-197.1, is to permit a "taste of jail" to the convicted offender without subjecting him to a full term of imprisonment. A number of points about this provision are worthy of note: the judgment may designate that the active time be served either in the Department of Correction or in a local jail; the active time can be either

consecutive or nonconsecutive (that is, the judge may direct that the defendant serve a three weeks' imprisonment immediately after conviction or he may direct that the defendant serve 10 two-day weekends over a 10-week period); the total length of time that may be served is limited — only if the maximum allowable imprisonment for the offense is two years or more may the defender serve as much as six months in prison under special probation; otherwise he is limited to one fourth the maximum penalty allowed by law (in the case of the six-month misdemeanor, for example, the period of imprisonment under special probation would be limited to one and one-half months); no imprisonment as part of special probation may occur more than two years after a person's conviction (that is, one of the weekends in jail an offender is supposed to serve could not occur in February, 1980, if he were convicted in January, 1978); credit for time in confinement prior to conviction does *not* have to be credited to the time of imprisonment under special probation — it may be credited instead to the suspended sentence.

Subsection (b) contemplates the end of "flat time"; every sentence either by the terms of the judgment or by operation of law will have a minimum and a maximum term (although the judgment could specify that the minimum and maximum are the same). An especially important point is that by operation of law if the judge specifies no minimum term and if no minimum term is required by law, the minimum will automatically be regarded as zero years (which means under the terms of G.S. 15A-1371 the prisoner would be eligible for parole immediately). The significance of the minimum is drastically altered from prior law. Under prior law a minimum term served only to prevent parole of the person before he served one fourth of that minimum term; its real effect under prior law was to give authority to the Secretary of Correction to grant conditional release to the inmate during the period following service of the minimum term. That effect has been totally obliterated by the provisions of this Subchapter. Instead, the minimum term serves as a much more substantial limit on the authority of the Parole Commission to parole a sentenced offender and the device of conditional release is abolished, an effect resulting from the provisions of G.S. 15A-1371(a). Since the minimum term of imprisonment is a more limiting factor, subsection (c) permits reduction of a minimum sentence. It is intended to be used when the Department of Correction has determined from its experience with an inmate that earlier release than that allowed by the minimum sentence would be appropriate. The requirement that a copy of the motion for reduction of a minimum sentence go to the district attorney is intended to deter abuses of the power.

Subsection (d) in conjunction with the provisions of G.S. 15A-1371(c), gives the judge a somewhat more flexible alternative to the imposition of a minimum sentence; he may recommend a minimum that the sentenced offender should serve before parole, but the Parole Commission may override that recommendation if, and only if, it makes a written statement of its reasons for doing so.

Editor's Note. — Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly, as revised by the Commission prior to the reprinting of this volume.

§ 15A-1352. Commitment to Department of Correction or local confinement facility. — A person sentenced to imprisonment for a felony or a misdemeanor under this Article or for nonpayment of a fine under Article 84, Fines, must be committed for the term designated by the court to the custody of the Department of Correction or to a local confinement facility. If the sentence imposed is for a period less than 180 days, the commitment must be to a facility other than one maintained by the Department of Correction. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section makes clear that a commitment is only to the custody of the Department of Correction, not to any particular facility, including Central Prison, operated by that Department. It also provides that short sentences of imprisonment must be to local jails.

§ 15A-1353. Order of commitment when imprisonment imposed; release pending appeal. — (a) When a sentence includes a term or terms of imprisonment, the court must issue an order of commitment setting forth the judgment. Unless otherwise specified in the order of commitment, the date of the order is the date service of the sentence is to begin.

(b) There must be included in the commitment, or in a separate order referred to in the commitment, any provisions with regard to release under Article 26, Bail, if an appeal is taken, and the conditions of the release. If the commitment has been entered before appeal or the setting of the conditions for release, appropriate copies of those documents must be forwarded to the agency having custody of the defendant.

(c) Unless a later time is directed in the order of commitment or the defendant has been released from custody pursuant to Article 26, Bail, the sheriff must cause the defendant to be placed in the custody of the agency specified in the judgment on the day service of the sentence is to begin or as soon thereafter as practicable.

(d) A certified copy of the order of commitment, together with any separate order providing for release of the defendant pending appeal, must be delivered to the custodian of the confinement facility.

(e) When a defendant has been committed pursuant to this section:

(1) If appeal has been entered and conditions of release have been set as provided in Article 26, Bail, the agency having custody of the defendant may effect his release in the manner provided in G.S. 15A-537; or

(2) If appeal is entered and the conditions of release are not set until after the order of commitment has been issued, and the defendant has been placed in the custody of the agency directed therein, appropriate copies of the conditions of release must be certified by the clerk and forwarded to the agency, which then may effect his release in the manner provided in G.S. 15A-537. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Subsection (a) applies both to an initial sentence to imprisonment and to the activation of a sentence following probation revocation. Although the presumptive beginning date for the term of imprisonment is the date of the commitment order, the judge may specify a delayed beginning dated to permit the defendant to get his affairs in order.

§ 15A-1354. Concurrent and consecutive terms of imprisonment. — (a) Authority of Court. — When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. If not specified, sentences shall run concurrently.

(b) Effect of Consecutive Terms. — In determining the effect of consecutive sentences imposed under authority of this Article and the manner in which they will be served, the Department of Correction must treat the defendant as though he has been committed for a single term with the following incidents:

(1) The maximum prison sentence consists of the total of the maximum terms of the consecutive sentences; and
(2) The minimum term, if any, consists of the total of the minimum terms of the consecutive sentences. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section authorizes consecutive sentences and carries forward the prior law that sentences are to run concurrently unless otherwise specified. Subsection (b) sets out the rules for calculating the effect of consecutive terms, primarily on minimum terms, in order to determine parole eligibility.

§ 15A-1355. Calculation of terms of imprisonment. — (a) Commencement of Sentence. — The commencement date of a sentence of imprisonment under authority of this Article is as provided in G.S. 15A-1353(a), except when the sentence is a consecutive sentence. When it is a consecutive sentence, it commences to run when the State has custody of the defendant following completion of the prior sentence.

(b) Credit. — To the extent that credit has not been given in the judgment or parole revocation order, the Department of Correction must give credit toward service of the maximum term and any minimum term of a sentence to imprisonment for:

(1) All time spent committed to or in confinement in any State or local correctional, mental, or other institution as a result of the charge that culminated in the sentence or for all time spent in a mental institution following a civil commitment arising from the criminal proceedings; and
(2) All time spent in confinement in another jurisdiction as a result of conviction for an offense which is based on the same facts and which contains all the elements of the offense for which sentence is being served in this State or of a lesser included offense.

(c) Credit for Good Behavior. — The Department of Correction may give credit toward service of the maximum term and any minimum term of imprisonment for allowances of time as provided in rules and regulations made under G.S. 148-11 and G.S. 148-13. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Subsection (b) allows direct crediting by the Department of Correction for appropriate time which was not credited at judgment. Crediting by the judge is left to the provisions of Article 19A of General Statutes Chapter 15.

§§ 15A-1356 to 15A-1360: Reserved for future codification purposes.

ARTICLE 84.

Fines.

§ 15A-1361. Authorized fines. — A person who has been convicted of an offense may be ordered to pay a fine as provided by law. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section merely states that payment of a fine is an appropriate penalty when law otherwise provides for a fine as a punishment available for that offense.

Editor's Note. — Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly, as revised by the Commission prior to the reprinting of this volume.

§ 15A-1362. Imposition of fines. — (a) General Criteria. — In determining the method of payment of a fine, the court should consider the burden that payment will impose in view of the financial resources of the defendant.

(b) Installment or Delayed Payments. — When a defendant is ordered to pay a fine, the court may provide for the payment to be made within a specified period of time or in specified installments. If no such provision is made a part of the sentence, the fine is payable forthwith.

(c) Nonpayment. — When a defendant is ordered, other than as a condition of probation, to pay a fine, costs, or both, the court may impose at the same time a sentence to be served in the event that the fine is not paid. The court also may impose an order that the defendant appear, if he fails to make the required payment, at a specified time to show cause why he should not be imprisoned. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Subsection (a) is a precatory provision urging that fines be tailored to the financial resources of the defendant and not be always imposed at the same amount for the same offense.

Subsection (b) specifically authorizes the practice of permitting installment payment of the fine or deferred payment of a fine, but only if such payment is specified in the judgment.

Subsection (c) specifically authorizes the suspended sentence to encourage payment of the fine. Although this section does not say so, it is intended that the suspended sentence is terminated upon payment of the fine unless the fine is merely one condition of a probationary sentence.

§ 15A-1363. Remission of a fine or costs. — A defendant who has been required to pay a fine or costs, including a requirement to pay fine or costs as a condition of probation, or a prosecutor, may at any time petition the sentencing court for a remission or revocation of the fine or costs or any unpaid portion of it. If it appears to the satisfaction of the court that the circumstances which warranted the imposition of the fine or costs no longer exist, that it would otherwise be unjust to require payment, or that the proper administration of justice requires resolution of the case, the court may remit or revoke the fine or costs or the unpaid portion in whole or in part or may modify the method of payment. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section gives specific approval to the practice of removing or reducing an unpaid fine that is due. Three grounds for this act are stated: that the circumstances warranting imposition of the fine no longer exist; that to require payment would be unjust; or the proper administrator of justice declares resolution of the case. The first two grounds go to changed factual circumstances or changed ability of the defendant to pay. That last ground is aimed at the situation in which an unpaid fine will apparently go unpaid forever and the court wishes to close the case.

§ 15A-1364. Response to nonpayment. — (a) Response to Default. — When a defendant who has been required to pay a fine or costs or both defaults in payment or in any installment, the court, upon the motion of the prosecutor or upon its own motion, may require the defendant to appear and show cause why he should not be imprisoned or may rely upon a conditional show cause order entered under G.S. 15A-1362(c). If the defendant fails to appear, an order for his arrest may be issued.

(b) Imprisonment; Criteria. — Following a requirement to show cause under subsection (a), unless the defendant shows inability to comply and that his nonpayment was not attributable to a failure on his part to make a good faith effort to obtain the necessary funds for payment, the court may order the suspended sentence, if any, activated, or, if the law provides no term of imprisonment for the offense for which the defendant was convicted or if no suspended sentence was imposed, the court may order the defendant imprisoned for a term not to exceed 30 days. The court, before activating a sentence of imprisonment, may reduce the sentence. The court may provide in its order that payment or satisfaction at any time of the fine and costs imposed by the court will entitled the defendant to his release from the imprisonment or, after entering the order, may at any time reduce the sentence for good cause shown, including payment or satisfaction of the fine.

(c) Modification of Fine or Costs. — If it appears that the default in the payment of a fine or costs is not attributable to failure on the defendant's part to make a good faith effort to obtain the necessary funds for payment, the court may enter an order:

(1) Allowing the defendant additional time for payment; or

(2) Reducing the amount of the fine or costs or of each installment; or

(3) Revoking the fine or costs or the unpaid portion in whole or in part.

(d) Organizations. — When an organization is required to pay a fine or costs or both, it is the duty of the person or persons authorized to make disbursement of the assets of the organization to make payment from assets of the organization, and a failure to do so constitutes contempt of court. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section is intended to respond to the demands of Tate v. Short, 401 U.S. 395 (1970), holding unconstitutional the imprisonment of a defendant who does not pay his fine because he is unable to. When imprisonment is appropriate it is for the period specified in the suspended sentence. If there is no suspended sentence it is an automatic 30-day jail term. Even after being jailed, however, the defendant may be released if he pays the fine.

Subsection (d) provides jailing of a corporate officer who refuses to pay a fine imposed against the corporation.

§ 15A-1365. Judgment for fines docketed; lien and execution. — When a defendant has defaulted in payment of a fine or costs, the judge may order that the judgment be docketed. Upon being docketed, the judgment becomes a lien

on the real estate of the defendant in the same manner as do judgments in civil actions. Executions on docketed judgments may be stayed only when an appeal is taken and security is given as required in civil cases. If the judgment is affirmed on appeal to the appellate division, the clerk of the superior court, on receipt of the certificate from the appellate division, must issue execution on the judgment. No execution may issue if the defendant elects to serve the suspended sentence or, if no suspended sentence was imposed, a term of 30 days. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section largely carries forward prior law except for the last sentence. That provision is new and essentially gives the defendant in any case an election to serve a term of imprisonment rather than pay a fine. It also tries to make clear that the judgment need not be docketed until default.

§§ 15A-1366 to 15A-1370: Reserved for future codification purposes.

ARTICLE 85.

Parole.

§ 15A-1371. Parole eligibility, consideration, and refusal. — (a) Eligibility. — Unless his sentence includes a minimum sentence, a prisoner serving a term other than life imprisonment or one included in a sentence of special probation imposed under authority of this Subchapter is eligible for release on parole at any time. A prisoner whose sentence includes a minimum term of imprisonment imposed under authority of this Subchapter is eligible for release on parole only upon completion of the service of that minimum term or one fifth of the maximum penalty allowed by law for the offense for which the prisoner is sentenced, whichever is less, less any credit allowed under G.S. 15A-1355(b) and (c). Under this section, when the maximum allowed by law for the offense is life imprisonment, one fifth of the maximum is calculated as 20 years. A prisoner whose sentence includes a minimum sentence imposed only because required by law is eligible for release upon completion of one fourth of the minimum time.

(b) Consideration for Parole. — The Parole Commission must consider the desirability of parole for each person sentenced for a maximum term of 18 months or longer:

(1) At least 60 days prior to his eligibility for parole, if he is ineligible for parole until he has served more than a year; or

(2) At least 60 days prior to the expiration of the first year of the sentence, if he is eligible for parole at any time. Whenever the Parole Commission will be considering for parole a prisoner who, if released, would have served less than half of the maximum term of his sentence, the Commission must notify the district attorney of the district where the prisoner was convicted at least 30 days in advance of considering the parole. If the district attorney makes a written request in such cases, the Commission must publicly conduct its consideration of parole. Following its consideration, the Commission must issue a formal order granting or denying parole. If parole is denied, the Commission must consider its decision while the prisoner is eligible for parole at least once a year until parole is granted and must issue a formal order granting or denying parole at least once a year.

(c) Statement of Reasons for Release before Minimum. — If parole is granted before the expiration of a minimum period of imprisonment imposed by the court

under G.S. 15A-1351(b) or recommended by the court under G.S. 15A-1351(d), the Commission must state in writing the reasons why the imposed or recommended minimum was not followed.

(d) Criteria. — The Parole Commission may refuse to release on parole a prisoner it is considering for parole if it believes:

(1) There is a substantial risk that he will not conform to reasonable conditions of parole; or

(2) His release at that time would unduly depreciate the seriousness of his crime or promote disrespect for law; or

(3) His continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date; or

(4) There is a substantial risk that he would engage in further criminal conduct.

(e) Refusal of Parole. — A prisoner who has been granted parole may elect to refuse parole and to serve the remainder of his term of imprisonment.

(f) Mandatory Parole at End of Felony Term. — No later than six months prior to completion of his maximum term, the Parole Commission must parole every person convicted of a felony and sentenced to a maximum term of not less than 18 months of imprisonment, unless:

(1) The person is to serve a period of probation following his imprisonment;

(2) The person has been reimprisoned following parole as provided in G.S. 15A-1373(e); or

(3) The Parole Commission finds facts demonstrating a strong likelihood that the health or safety of the person or public would be endangered by his release at that time.

(g) Automatic Parole in Absence of Finding. — A prisoner eligible for parole under subsection (a) and serving a sentence of not less than six months for a misdemeanor or serving a sentence not less than six months nor as great as 18 months for a felony must be released on parole when he completes service of one third of his maximum sentence unless the Parole Commission finds in writing that:

(1) There is a substantial risk that he will not conform to reasonable conditions of parole; or

(2) His release at that time would unduly depreciate the seriousness of his crime or promote disrespect for law; or

(3) His continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date; or

(4) There is a substantial risk that he would engage in further criminal conduct.

If a prisoner is released on parole by operation of this subsection, the term of parole is the unserved portion of the sentence to imprisonment, and the conditions of parole, unless otherwise specified by the Parole Commission, are those authorized in G.S. 15A-1374(b)(4) through (10). (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Subsection (a) encompasses the important provision which gives the judge's minimum term considerably more bite than it has under present law. Unless the minimum term of imprisonment is particularly long, the Parole Commission must respect that minimum and the inmate cannot be paroled before that minimum is served. This subsection does place a limit on the effective minimum, however. If the minimum which the judge imposes is greater than one fifth of the maximum penalty allowed by law, then the inmate is eligible for release when he has served one fifth of that maximum. Notice that the limit is based on the maximum penalty allowed by law and not on the maximum term which the judge actually imposes. The Commission wished to

avoid the circumstance which occurs under present law in which the judge manipulates the length of the sentence imposed in order to affect the date for which the defendant is eligible for release on parole. This means that a judge if he wished could sentence a safecracker to a prison term of six to 10 years and the offender could not be released on parole until he had served the full six years, since six years is one fifth of the maximum penalty allowed by law. On the other hand, if a judge sentenced the offender to a term of nine to 10 years, the practical effect would be the same as the earlier example. Since the minimum term exceeded one fifth of the maximum allowed by law, he would continue to be eligible for release after serving six years. The prior parole eligibility standard, one fourth of the minimum sentences, has been retained for those crimes which have a mandatory minimum sentence since these mandatory sentences were enacted with the previous parole statutes in mind.

Subsection (b) does two important things: (1) it requires review of each inmate's case as soon as he is eligible for parole and annually thereafter until he is released. The subsection does not, however, have anything to say about the procedure to be followed in this consideration for parole. The subsection also requires that any time the Parole Commission is considering for release one who has served less than half the maximum term it must notify the district attorney in advance and he, in turn, may require that the consideration be made publicly. This provision was added in an attempt to provide some assurance against the feeling sometimes expressed that parole is granted without adequate public exposure of the facts of the case.

Subsection (c) was discussed in the commentary on § 15A-1351(d). Subsection (d) states the reasons why parole may be denied, but it does not require a written finding or other written statement. The Commission intended that this be an exclusive list of legitimate bases for denying parole.

Subsection (e) grants the offender the same kind of election to refuse release that he has in the case of probation and fine.

Subsection (f) provides another of the significant changes brought by this proposal. It requires a minimum of six months parole for every person serving a term of 18 months or more for a felony. The Commission believed that the prisoner who is unable to obtain parole earlier is the very one who most needs this period of gradual readjustment to freedom.

Subsection (g) attempts to overcome the inertia that makes it almost impossible for persons with short sentences to obtain parole; it reverses the normal burden — the person must be released unless the Parole Commission finds to the contrary. The final sentence of this subsection attempts to establish an automatic term of parole and automatic conditions of parole, in those cases since, by definition, the Parole Commission will not be considering these matters individually.

Editor's Note. — Session Laws 1977, c. 711, s. 38, provides: "The eligibility for parole and work release of prisoners not specified in G.S. 15A-1371(a) is determined by the law applicable prior to the effective date of this act. In applying G.S. 15A-1371(a) to sentences entered before the effective date of this act, a sentence to an absolute term of years, with no minimum, is regarded as having a minimum term equal to the absolute term."

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly, as revised by the Commission prior to the reprinting of this volume.

The annotations under this section are from cases decided under former §§ 148-58, 148-60, 148-61.1, 148-62.

Purpose of Parole. — Parole is intended to be a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity by clemency — under guidance and control of the Board (now Commission). Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, aff'd, 279 N.C. 556, 184 S.E.2d 259 (1971).

Legislature May Establish Parole System. — In the division of governmental authority the legislature has exclusive power to determine the penalogical system of the State. It alone can prescribe the punishment for crime. It may therefore establish a parole system. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

And Administration of Parole System May Be Delegated. — The granting of parole and the

supervision of parolees are purely administrative functions, and accordingly may be entrusted by the legislature to nonjudicial agencies. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

Power to Grant and to Revoke Paroles Originally Was Function of Executive Branch. — In this State the power to grant and to revoke paroles developed originally as a function of the executive branch of the government. Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, aff'd, 279 N.C. 556, 184 S.E.2d 259 (1971).

Conditions of parole are a restraint upon a parolee's liberty not shared by the public generally. He is still under the supervision of the parole authorities and subject to be remanded if he fails to perform or violates the conditions of the parole. State v. Rhinehart, 267 N.C. 470, 148 S.E.2d 651 (1966).

Hence, Fact of Parole Does Not Affect Right to Review of Post-Conviction Relief Proceedings. — The fact that a defendant is on parole at the time of his application for certiorari to review an order denying him post-conviction relief does not affect his right to review by the Supreme Court (now the Court of Appeals). State v. Rhinehart, 267 N.C. 470, 148 S.E.2d 651 (1966).

Due Process Applicable. — Prisoner's right to consideration for parole eligibility is, at least, an aspect of liberty to which the protection of the due process clause extends. Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974).

The due process clause applies in procedures designed to determine suitability for parole. Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), vacated as moot, 423 U.S. 147, 96 S. Ct. 347, 46 L.Ed.2d 350 (1975).

Sentencing process may not be expressly employed to thwart the parole process, the responsibility for which is vested in another branch of government. State v. Snowden, 26 N.C. App. 45, 215 S.E.2d 157 (1975).

The granting, withholding or frustration of the parole power is not and has never been a responsibility of the judicial branch of government. State v. Snowden, 26 N.C. App. 45, 215 S.E.2d 157 (1975).

Parole Not to Be Anticipated in Sentencing. — Release of a prisoner before completion of his sentence cannot and should not be anticipated with exactness by the trial judge as the basis for the imposition of sentences in cases. State v. Snowden, 26 N.C. App. 45, 215 S.E.2d 157 (1975).

Release of Prisoner before Completion of Sentence. — Whether to release a prisoner before the completion of his sentence is a question with many facets. It cannot be answered by rules of law. Those who have watched the prisoner during his confinement are better qualified than the courts to say if and when he merits parole. Court proceeding would be a poor substitute for the method now employed. Goble v. Bounds, 281 N.C. 307, 188 S.E.2d 347 (1972).

Granting Honor-Grade Status, etc., Is Mitigation of Terms of Judgment. — The granting of honor-grade status, work release, and parole is by way of mitigating the terms of the judgment which the court has entered. The legality and propriety of the trial and sentence have already been determined after the prisoner has been heard and his constitutional rights have been accorded him. The merits of the trial and the validity of the judgment may not again be raised before the Department of Correction and the Board of Paroles (now Parole Commission). Goble v. Bounds, 281 N.C. 307, 188 S.E.2d 347 (1972).

Which Is Not Undeniable Right of Prisoner. — While a prisoner takes with him into the prison certain rights which may not be denied him, the legal right to the mitigation of his punishment is not one of them. It is contemplated as a part of his rehabilitation that he earn his right to honor-grade status, work release, or parole. The decision is not in the nature of an adversary proceeding under rules of evidence. Goble v. Bounds, 281 N.C. 307, 188 S.E.2d 347 (1972).

And Involves Policy Decisions to Be Decided by Department of Correction and Parole Commission. — Whether a prisoner is entitled to honor-grade status, work release, or parole involves policy decisions which should be decided by the Department of Correction and the Board of Paroles (now Parole Commission). These agencies are charged with the duty and are properly given means of discharging it not available to the courts. Goble v. Bounds, 281 N.C. 307, 188 S.E.2d 347 (1972).

Rigid Guidelines Neither Necessary Nor Desirable. — In the matter of paroles, which historically, in this State at least, has been considered a function of the executive branch and which by its nature involves evaluation of a large number of intangibles, rigid guidelines are neither necessary nor desirable. Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788 (1971).

Time spent in jail by a prisoner serving a life sentence, between his first conviction and the dismissal of his final appeal, must be credited toward his parole eligibility date. Wilson v. North Carolina, 438 F.2d 284 (4th Cir. 1971).

A prisoner may have the time he spends in jail pursuing appeals and awaiting retrial taken into account in determining when he can be considered for parole. Wilson v. North Carolina, 438 F.2d 284 (4th Cir. 1971).

The length of time a prisoner serving a life sentence was imprisoned, from the date of his first conviction to the date his sentence began to run following affirmance of his second appeal, must be included in computing the statutory period of 10 years which he must serve before he can be considered for commutation. Wilson v. North Carolina, 438 F.2d 284 (4th Cir. 1971).

Punishment Already Exacted. — The constitutional guarantee against double jeopardy absolutely requires that punishment already exacted must be fully credited in imposing sentence upon a new conviction for the same offense. Wilson v. North Carolina, 438 F.2d 284 (4th Cir. 1971).

Denial of credit to a prisoner for the time he spent in jail from the date of his first conviction until the affirmance of his second appeal is multiple punishment. Such time must be fully credited insofar as possible as "punishment already exacted." Although it cannot be credit against his life sentence, which by its very nature is indefinite, it can be credited toward the 10 years he must wait to be considered for parole. Wilson v. North Carolina, 438 F.2d 284 (4th Cir. 1971).

§ 15A-1372. Length and effect of parole term. — (a) Minimum Term of Parole. — The term of parole for any person released from imprisonment may be no less than:

(1) One year, if the remainder of the maximum term of imprisonment is one year or more; or

(2) The remainder of the maximum term, if the remainder of the term of imprisonment is less than one year.

(b) Maximum Term of Parole. — The maximum term of parole is the lesser of the following:

(1) The remainder of the maximum term; or

(2) Five years when the maximum prison sentence imposed is greater than 20 years; or

(3) Three years when the maximum prison sentence imposed is greater than 10 years but no greater than 20 years; or

(4) Two years when the maximum prison sentence is imposed is not greater than 10 years.

(c) Termination of Sentence. — When a parolee completes his period of parole, the sentence or sentences from which he was paroled are terminated. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section establishes the permissible length of the parole term, which must always be at least one year or the remainder of his term if the remainder of the term is less than a year. Otherwise, the parole term is within the discretion of the Parole Commission as long as it is no greater than the outside limits set forth in this section, which vary according to the length of the maximum prison sentence imposed.

§ 15A-1373. Incidents of parole. — (a) Conditionality of Parole. — Unless terminated sooner as provided in subsection (b), parole remains conditional and subject to revocation.

(b) Early Termination. — The Parole Commission may terminate a period of parole and discharge the parolee at any time after the expiration of one year of successful parole if warranted by the conduct of the parolee and the ends of justice.

(c) Modification of Conditions. — The Parole Commission may for good cause shown modify the conditions of parole at any time prior to the expiration or termination of the period for which the parole remains conditional.

(d) Effect of Violation. — If the parolee violates a condition at any time prior to the expiration or termination of the period, the Commission may continue him on the existing parole, with or without modifying the conditions, or, if continuation or modification is not appropriate, may revoke the parole as provided in G.S. 15A-1376 and reimprison the parolee for a term consistent with the following requirements:

(1) The recommitment must be for the unserved portion of the maximum

term of imprisonment imposed by the court under G.S. 15A-1351, or six months, whichever is greater.

(2) The prisoner must be given credit against the term of reimprisonment for all time spent in custody as a result of revocation proceedings under G.S. 15A-1376.

(e) Re-parole. — A prisoner who has been reimprisoned following parole may be re-paroled by the Parole Commission subject to the provisions which govern initial parole. In the event that a defendant serves the final six months of his maximum imprisonment as a result of being recommitted for violation of parole, he may not be required to serve a further period on parole.

(f) Timing of Revocation. — The Parole Commission may revoke parole for violation of a condition during the period of parole. The Commission also may revoke following the period of parole if:

(1) Before the expiration of the period of parole, the Commission has recorded its intent to conduct a revocation hearing, and

(2) The Commission finds that every reasonable effort has been made to notify the parolee and conduct the hearing earlier. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section does not give to the parolee whose parole is revoked credit against the remainder of his sentence when he is reimprisoned for the period of time spent on parole prior to revocation. There is at least a minimum six months period on reimprisonment so that even if the parolee has very little time remaining on his active sentence, he still must serve six months in prison upon revocation. Under subsection (e) the recommitted parolee is still subject to the provisions of automatic parole at the end of his term unless he has served out the entire period of his imprisonment.

Subsection (f) provides for revocation and reimprisonment for a parolee after the period of parole if a parole violation occurred during the period of parole. This provision is aimed at the situation in which the violator is outside the jurisdiction and inaccessible earlier. As a precaution against abuse, the subsection requires that the intention to hold a revocation hearing be recorded prior to the expiration of the period of parole and requires a finding that every reasonable effort was made to conduct the hearing earlier.

§ 15A-1374. Conditions of parole. — (a) In General. — The Parole Commission may in its discretion impose conditions of parole it believes reasonably necessary to insure that the parolee will lead a law-abiding life or to assist him to do so. The Commission must provide as an express condition of every parole that the parolee not commit another crime during the period for which the parole remains subject to revocation. When the Commission releases a person on parole, it must give him a written statement of the conditions on which he is being released.

(b) Appropriate Conditions. — As conditions of parole, the Commission may require that the parolee comply with one or more of the following conditions:

(1) Work faithfully at suitable employment or faithfully pursue a course of study or vocational training that will equip him for suitable employment.

(2) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(3) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on parole.

(4) Support his dependents and meet other family responsibilities.

(5) Refrain from possessing a firearm, destructive device, or other dangerous weapon unless granted written permission by the Commission or the parole officer.

(6) Report to a parole officer at reasonable times and in a reasonable manner, as directed by the Commission or the parole officer.

(7) Permit the parole officer to visit him at reasonable times at his home or elsewhere.
(8) Remain within the geographic limits fixed by the Commission unless granted written permission to leave by the Commission or the parole officer.
(9) Answer all reasonable inquiries by the parole officer and obtain prior approval from the parole officer for any change in address or employment.
(10) Promptly notify the parole officer of any change in address or employment.
(11) Submit at reasonable times to searches of his person by a parole officer for purposes reasonably related to his parole supervision. The Commission may not require as a condition of parole that the parolee submit to any other searches that would otherwise be unlawful.
(12) Satisfy other conditions reasonably related to his rehabilitation. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The provisions on conditions of parole are parallel to those on conditions of probation, including the provision on search. The search as a condition of parole may be made only by a parole officer, and must be reasonably related to the parole supervision.

§ 15A-1375. Commencement of parole; multiple sentences. — A period of parole commences on the day the prisoner is released from imprisonment. Periods of parole run concurrently with any federal or State prison, jail, probation, or parole term to which the defendant is subject during the period. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

A person on parole who is during that time sentenced to a term of imprisonment or to a term of probation or parole continues to satisfy his parole term during the period when he is serving the other sentence.

§ 15A-1376. Arrest and hearing on parole violation. — (a) Arrest for Violation of Parole. — A parolee is subject to arrest for violation of conditions of parole only upon the issuance of an order of temporary or conditional revocation of parole by the Parole Commission. However, a parole revocation hearing under subsection (e) may be held without first arresting the parolee.

(b) When and Where Preliminary Hearing on Parole Violation Required. — Unless the hearing required by subsection (e) is first held or the parolee waives the hearing, a preliminary hearing on parole violation must be held reasonably near the place of the alleged violation or arrest and within four working days of the arrest of a parolee to determine whether there is probable cause to believe that he violated a condition of parole. Otherwise, the parolee must be released four working days after his arrest to continue on parole pending a hearing.

(c) Officers to Conduct Hearing. — The preliminary hearing on parole violation must be conducted by a judicial official, or by a hearing officer designated by the Parole Commission. No person employed by the Department of Correction may serve as a hearing officer at a hearing provided in this section unless he is a member of the Parole Commission or is employed solely as a hearing officer.

(d) Procedure for Preliminary Hearing on Parole Violation. — The Department of Correction must give the parolee notice of the preliminary hearing and its purpose, including a statement of the violations alleged. At the hearing, the parolee may appear and speak in his own behalf, may present relevant information, and may, on request, personally question witnesses and adverse informants, unless the court finds good cause for not allowing confrontation. If the person holding the hearing determines there is probable cause to believe the parolee violated his parole, he must summarize the reasons for his determination and the evidence he relied on. Formal rules of evidence do not apply at the hearing. If probable cause is found, the parolee may be held in the custody of the Department of Correction to serve the appropriate term of imprisonment, subject to the outcome of a revocation hearing under subsection (e).

(e) Revocation Hearing. — Before finally revoking parole, the Parole Commission must, unless the parolee waived the hearing or the time limit, provide a hearing within 45 days of the parolee's reconfinement to determine whether to revoke parole finally. The hearing is governed by the provisions of Article 3 of Chapter 150A of the General Statutes except:

(1) The parolee is entitled to appear and speak in his own behalf and to confront and cross-examine adverse witnesses unless good cause is found for not allowing confrontation; and

(2) The hearing examiner must meet the requirements of subsection (c). (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Like the parallel provisions on probation, this section carries forward prior law and practice and conforms procedure requirements for those demanded by the United States Supreme Court in Morrissey v. Brewer, 408 U.S. 471 (1972). The parolee's right to counsel is left to the provisions of G.S. 148-62.1. The provision of subsection (c) goes beyond the constitutional requirements and directs that the hearing examiner in any of the required hearings not be a person who holds some other job with the Department of Correction which might be seen as creating a kind of "conflict of interest." The only instance in which an employee of the Department of Correction may be used as the hearing examiner is either if he is a member of the Parole Commission or if his sole job is being hearing examiner.

Subsection (e) turns to North Carolina's Administrative Procedure Act for the hearing prescribed except for those exceptions noted, but does not intend otherwise to affect the 1975 exemption for the Department of Correction.

Editor's Note. — For article on probation and parole revocation procedures and related issues, see 13 Wake Forest L. Rev. 5 (1977).

§ 15A-1377. Appeal from revocation of parole. — A person whose parole has been revoked may appeal the revocation under the provisions of Article 4 of Chapter 150A of the General Statutes. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section relies upon the provisions of the Administrative Procedure Act for appeals from parole revocations.

§§ 15A-1378 to 15A-1380: Reserved for future codification purposes.

ARTICLE 86.

§§ 15A-1381 to 15A-1390: Reserved for future codification purposes.

ARTICLE 87.

§§ 15A-1391 to 15A-1400: Reserved for future codification purposes.

SUBCHAPTER XIV. CORRECTION OF ERRORS AND APPEAL.

ARTICLE 88.

Post-Trial Motions and Appeal.

§ 15A-1401. Post-trial motions and appeal. — Relief from errors committed in criminal trials and proceedings and other post-trial relief may be sought by:

(1) Motion for appropriate relief, as provided in Article 89.
(2) Appeal and trial de novo in misdemeanor cases, as provided in Article 90.
(3) Appeal, as provided in Article 91. (1977, c. 711, s. 1.)

Editor's Note. — Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

§§ 15A-1402 to 15A-1410: Reserved for future codification purposes.

ARTICLE 89.

Motion for Appropriate Relief and Other Post-Trial Relief.

OFFICIAL COMMENTARY

The motion for appropriate relief provided in this Article provides a single, unified procedure for raising at the trial level errors which are asserted to have been made during the trial. The Article provides a "motion in the cause" which may be used to seek any of the relief formerly available by motions in arrest of judgment, motions to set aside the verdict, motions for new trial, post-conviction proceedings, *coram nobis* and all other post-trial motions or procedures.

Under this procedure no significance will attach to the name given a motion made at the end of the trial or after the trial, but rather the essential tasks will be to point out the error which is asserted to have been committed and to ask for relief appropriate to correct that error. To this end this Article lists errors which may be raised by motions made in the trial court, sets out the time limits for seeking particular types of relief by motion, and enumerates relief available.

One objective is the elimination of formal lists of motions to be recited at the end of the trial and to move more directly to the problem and its solution. This statute, designed to make the practice simple and eliminate traps for the unwary, appears more complicated in statutory statement than our former codifications. The reason is obvious. Where we may have provided before, for example, for a "motion for a new

trial," with a very simple statement in the statute, it was necessary to look to case law, other statutes, and in some instances the rules of civil procedure, for a more complete exposition of what those terms meant. This Article is designed to substantially reduce that search and bring most of these ideas together in one place.

It should be noted that the "post trial motions" Article was drawn with an eye to the "Appeals" Article which follows in Article 91. An attempt was made to maximize the capability of correcting errors at trial level in order to avoid the necessity of appeal. On the other hand, when an error has been pointed out in the trial by appropriate objection, there is no requirement for making formal motions after trial solely for the purpose of preserving the right to appeal.

As the phrase in the title, "and Other Post Trial Relief," indicates, this "motion in the cause" also may be used for post-trial functions other than the correction of errors. For instance, a defendant who has served his sentence to confinement could, pursuant to § 15A-1415(d)(9) utilize this procedure to assert his right to release.

Editor's Note. — The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly, as revised by the Commission prior to the reprinting of this volume.

§ 15A-1411. Motion for appropriate relief. — (a) Relief from errors committed in the trial division, or other post-trial relief, may be sought by a motion for appropriate relief. Procedure for the making of the motion is as set out in G.S. 15A-1420.

(b) A motion for appropriate relief, whether made before or after the entry of judgment, is a motion in the original cause and not a new proceeding.

(c) The relief formerly available by motion in arrest of judgment, motion to set aside the verdict, motion for new trial, post-conviction proceedings, *coram nobis* and all other post-trial motions is available by motion for appropriate relief. The availability of relief by motion for appropriate relief is not a bar to relief by writ of habeas corpus. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section is designed to make clear that the simple motion in the original proceeding provided for here is available for assertion of the right to relief which formerly could have been provided by any of a variety of procedures, as prescribed in subsection (c). Of course it would be impossible to eliminate the writ of habeas corpus as the means of seeking relief where that writ is applicable. However, there should be substantial overlap in some areas and the system here, because of its simplicity, is likely to be the easier method of presenting an issue in many cases.

Editor's Note. — Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

The "Official Comments" under this Article are reprinted from the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly.

§ 15A-1412. Provisions of Article procedural. — The provision in this Article for the right to seek relief by motion for appropriate relief is procedural and

is not determinative of the question of whether the moving party is entitled to the relief sought or to other appropriate relief. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section makes clear that this Article creates a procedural device by which asserted errors can be raised. That necessitates, at some points, the listing of errors which may be asserted at certain times. A casual reading might create the false impression that providing the procedural device for litigating the question in some way implies that there is a right to relief simply by reason of the error's assertion. Of course, that is not true and the question of whether there was some error, and if so, whether it warrants the relief sought, are questions to be determined on the merits, utilizing the procedural device provided here.

§ 15A-1413. Trial judges empowered to act. — (a) A motion for appropriate relief made pursuant to G.S. 15A-1415 may be heard and determined in the trial division by any judge who is empowered to act in criminal matters in the judicial district and trial division in which the judgment was entered.

(b) The judge who presided at the trial is empowered to act upon a motion for appropriate relief made pursuant to G.S. 15A-1414. He may act even though he is in another district or even though his commission has expired.

(c) When a motion for appropriate relief may be made before a judge who did not hear the case, he may, if it is practicable to do so, refer all or a part of the matter for decision to the judge who heard the case. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Motions made at the end of trial pursuant to G.S. 15A-1414 will be heard by the judge who presided. As has been true in *coram nobis,* post-conviction proceedings and habeas corpus, matters which may be raised some time after the trial must in some instances be heard by a different judge, and appropriate authority is granted for that judge to act. However, it frequently will be preferable for the judge who heard the case to hear the motion because of the possibility of eliminating lengthy familiarization proceedings and papers. This section provides as fully as possible for that practice.

§ 15A-1414. Motion by defendant for appropriate relief made within 10 days after verdict. — (a) After the verdict but not more than 10 days after entry of judgment, the defendant by motion may seek appropriate relief for any error committed during or prior to the trial.

(b) Unless included in G.S. 15A-1415, all errors, including but not limited to the following, must be asserted within 10 days after entry of judgment:

(1) Any error of law, including the following:
   a. The court erroneously failed to dismiss the charge prior to trial pursuant to G.S. 15A-954.
   b. The court's ruling was contrary to law with regard to motions made before or during the trial, or with regard to the admission or exclusion of evidence.
   c. The evidence, at the close of all the evidence, was insufficient to justify submission of the case to the jury, whether or not a motion so asserting was made before verdict.
   d. The court erroneously instructed the jury.
(2) The verdict is contrary to the weight of the evidence.
(3) For any other cause the defendant did not receive a fair and impartial trial.

(c) The motion may be made and acted upon in the trial court whether or not notice of appeal has been given. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

As subsection (a) indicates, during the period beginning with the verdict and ending 10 days after the entry of the judgment, the defendant may utilize this motion procedure to seek relief from any error committed prior to or during the trial. Thus there is no limitation as to errors which may be asserted during that period of time. The listing of possible errors, in subsection (b), is designed as a helpful checklist but not in any sense as a limitation.

As subdivision (b)(1) indicates, the procedure may be used to correct errors of law. As subdivisions (b)(2) and (b)(3) indicate, the trial court's discretionary authority is preserved in this revision.

G.S. 15A-1415 lists the errors which may be asserted by motion for appropriate relief after the expiration of the 10-day period. Of course they may also be raised before the expiration of the 10-day period, pursuant to this section.

Giving notice of appeal does not divest the jurisdiction of the trial court to act on a motion. G.S. 15A-1448, relating to appeals, provides that even though notice of appeal is given, the case is not sent forward until a later time, after any additional matters have been disposed of at the trial level. (It is possible that the disposition of the motion could make it desirable to withdraw the appeal.) See the more complete discussion in the Commentary at G.S. 15A-1448.

Cross Reference. — As to new trial in civil cases, see Rule 59 of the Rules of Civil Procedure (§ 1A-1).

Editor's Note. — The annotations set out below are from cases decided under former § 15-174.

Motion for Continuance. — A new trial will be awarded because of a denial of a motion for continuance only if the defendant shows that there was error in the denial and that the defendant was prejudiced thereby. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Incorrect Charge to Jury. — A new trial is necessary where the court charges the jury correctly at one point and incorrectly at another, particularly when the incorrect portion of the charge is contained in the application of the law to the facts. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

New trial must result when ambiguity in the charge affords an opportunity for the jury to act upon a permissible but incorrect interpretation. State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976).

A defendant who, himself, injects incompetent evidence into the trial, may not urge its admission as ground for a new trial. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

Defendant Must Show Prejudice. — New trials are not given, even in capital cases, where there is no reasonable basis for supposing that, but for the error, a different result would have been reached. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

§ 15A-1415. Grounds for appropriate relief which may be asserted by defendant after verdict and without limitation as to time. — (a) At any time after verdict, the defendant by motion may seek appropriate relief upon any of the grounds enumerated in this section.

(b) The following are the only grounds which the defendant may assert by a motion for appropriate relief made more than 10 days after entry of judgment:

(1) The acts charged in the criminal pleading did not at the time they were committed constitute a violation of criminal law.

(2) The trial court lacked jurisdiction over the person of the defendant or over the subject matter.

(3) The conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina.

(4) The defendant was convicted or sentenced under a statute that was in violation of the Constitution of the United States or the Constitution of North Carolina.

(5) The conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina.

(6) Evidence is available which was unknown or unavailable to the defendant at the time of the trial, which could not with due diligence have been discovered or made available at that time, and which has a direct and material bearing upon the guilt or innocence of the defendant.

(7) There has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required.

(8) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.

(9) The defendant is in confinement and is entitled to release because his sentence has been fully served. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

After the 10 days provided in G.S. 15A-1414 have passed, use of the motion for appropriate relief to assert errors committed during or before the trial is limited to those listed in this section. (Of course these grounds may be asserted prior to the expiration of the 10-day period as well as after.)

The question faced by the Commission at this point was the identification of those errors in a trial which are so basic that one should be able to go back into the courts at any time, even many years after conviction, and seek relief. The resolution of this question requires the balancing of concepts of basic fairness with the desire for finality in criminal cases. The grounds stated here incorporate traditional notions of matters which may be asserted at a later time, together with several new items. It should also be taken into account with the latter consideration that additional finality has been added in G.S. 15A-1419 by making it clear that there is but one chance to raise available matters after the case is over, and if there has been a previous assertion of the error, or opportunity to assert the error, by motion or appeal, a later motion may be denied on that basis.

The constitutional grounds have become familiar under the state post-conviction statutes (G.S. 15-217 et seq.). Familiar as well are the jurisdictional grounds and the fact that it is necessary in certain instances to make retroactive applications of changes in the law. (As mentioned above, this statute provides a procedural device to be used when other decisions or statutes impose the requirement of retroactivity, it does not create such a requirement.)

The provision in G.S. 15A-1415(b)(6) making it possible to raise the question of newly discovered evidence without time limitation constitutes a change. G.S. 15-174 has provided that new trials will be granted in criminal cases under the same rules and regulations as new trials in civil cases. That clearly makes it possible to make a motion for new trial within 10 days after entry of judgment on the grounds of newly discovered evidence as is provided in the Rules of Civil Procedure in G.S. 1A-1, Rule 59(4). Less clear is the applicability of Rule 60 permitting relief from a final judgment within one year on the basis of newly discovered evidence. The Commission concluded that the better route was always to permit a hearing on the question and rely on a strict statement of the rule and the idea of "one chance to be heard" described above as fairer limitations than an arbitrary time limitation in criminal cases. Different considerations make the fixed time desirable in civil cases.

The "Motion for appropriate relief and other post trial relief" is not limited to the correction of error. It is a device which may be used for any additional matters which relate to the original case. That is reflected in the authorization to use this motion to raise the question of whether or not a sentence has been served or probation has been unlawfully revoked.

Granting of New Trial Is in Discretion of Trial Court. — The granting of a new trial in a criminal case on the ground of newly discovered evidence rests in the sound discretion of the trial court. State v. Blalock, 13 N.C. App. 711, 187 S.E.2d 404 (1972); State v. Shelton, 21 N.C. App. 662, 205 S.E.2d 316 (1974).

A motion for new trial on the grounds of newly discovered evidence is addressed to the sound discretion of the trial court and is not subject to review absent a showing of an abuse of discretion. State v. Hammock, 25 N.C. App. 97, 212 S.E.2d 180, cert. denied, 423 U.S. 894, 96 S. Ct. 193, 46 L. Ed. 2d 126 (1975); State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976).

And is not subject to review absent a showing of an abuse of discretion. State v. Shelton, 21 N.C. App. 662, 205 S.E.2d 316 (1974).

Newly Discovered Evidence. — A motion for new trial for newly discovered evidence will not be granted even in a civil case, where the evidence is merely cumulative or where it was withheld by the party moving. State v. Lilliston, 141 N.C. 857, 54 S.E. 427 (1906).

Motions for new trials for newly discovered evidence cannot be entertained in the Supreme Court in criminal cases. State v. Lilliston, 141 N.C. 857, 54 S.E. 427 (1906).

In order for a new trial to be granted on the ground of newly discovered evidence, it must appear by affidavit that (1) the witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial. State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976).

Disqualification of Jurors and Newly Discovered Evidence. — Where a judgment of the Supreme Court in a criminal case has been certified to the clerk of the superior court, the case is in the latter court for execution of the sentence, and a motion for a new trial may be there entertained for disqualification of jurors and for newly discovered evidence. State v. Casey, 201 N.C. 620, 161 S.E. 81 (1931).

§ 15A-1416. Motion by the State for appropriate relief. — (a) After the verdict but not more than 10 days after entry of judgment, the State by motion may seek appropriate relief for any error which it may assert upon appeal.

(b) At any time after verdict the State may make a motion for appropriate relief for:

(1) The imposition of sentence when prayer for judgment has been continued and grounds for the imposition of sentence are asserted.

(2) The initiation of any proceeding authorized under Article 82, Probation; Article 83, Imprisonment; and Article 84, Fines, with regard to the modification of sentences. The procedural provisions of those Articles are controlling. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Subsection (a) gives the State the right to raise by motion for appropriate relief matters which it is entitled to assert upon appeal. Compare G.S. 15A-1445 relating to the State's right to appeal.

Subsection (b) reflects the fact that the motion for appropriate relief is available for any additional steps which are needed in a case. Thus the State is here authorized to utilize this procedure without limitation as to time, to seek imposition of sentence when prayer for judgment has been continued or when provision has been made in Article 81 for modification of sentences.

§ 15A-1417. Relief available. — (a) The following relief is available when the court grants a motion for appropriate relief:

(1) New trial on all or any of the charges.

(2) Dismissal of all or any of the charges.

(3) The relief sought by the State pursuant to G.S. 15A-1416.

(4) Any other appropriate relief.

(b) When relief is granted in the trial court and the offense is divided into degrees or necessarily includes lesser offenses, and the court is of the opinion that the evidence does not sustain the verdict but is sufficient to sustain a finding of guilty of a lesser degree or of a lesser offense necessarily included in the one charged, the court may, with consent of the State, accept a plea of guilty to the lesser degree or lesser offense.

(c) If resentencing is required, the trial division may enter an appropriate sentence. If a motion is granted in the appellate division and resentencing is required, the case must be remanded to the trial division for entry of a new sentence. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

As the general commentary at the beginning of this Article indicates, the emphasis is to be placed upon identifying the error sought to be corrected and the relief which is appropriate. Thus it will no longer be necessary to make a "motion for a new trial" in order to assert one ground for relief and to make a "motion in arrest of judgment" to assert another ground for relief. Using the name of a type of relief as the name of the motion, which in turn identifies the errors which may be asserted, imposes unnecessary complications and limitations. Here one motion, stating what is wrong and asking for the relief desired, will suffice.

The provisions in subsection (b) contemplate that there may be circumstances in which the trial court is of the opinion that the evidence was not sufficient to support the verdict, but would sustain a lower degree or a lesser included offense. The court could, of course, simply grant a new trial in accordance with G.S. 15A-1414(b)(2) and G.S. 15A-1417(a)(1), but it is possible that the necessity of a new trial may be avoided if a finding of the lesser degree or offense can be made on the facts already passed upon by the jury. The defendant, of course, would be prejudiced if the finding, submitted to the jury on the basis of the greater offense, were made sufficient in and of itself. Thus consent of the defendant is required, by a plea of guilty to the lesser included offense. Since it is so treated the consent of the State is required. Subsection (c) grants the authority to appropriately modify the sentence when "appropriate relief" requires it.

§ 15A-1418. Motion for appropriate relief in the appellate division. — (a) When a case is in the appellate division for review, a motion for appropriate relief based upon grounds set out in G.S. 15A-1415 must be made in the appellate division. For the purpose of this section a case is in the appellate division when the jurisdiction of the trial court has been divested as provided in G.S. 15A-1448, or when a petition for a writ of certiorari has been granted. When a petition for a writ of certiorari has been filed but not granted, a copy or written statement of any motion made in the trial court, and of any disposition of the motion, must be filed in the appellate division.

(b) When a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be determined on the basis of the materials before it, or whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings. If the appellate court does not remand the case for proceedings on the motion, it may determine the motion in conjunction with the appeal and enter its ruling on the motion with its determination of the case.

(c) The order of remand must provide that the time periods for perfecting or proceeding with the appeal are tolled, and direct that the order of the trial division with regard to the motion be transmitted to the appellate division so that it may proceed with the appeal or enter an appropriate order terminating it. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

G.S. 15A-1415 contemplates that a number of items may be the subject of a motion for appropriate relief after the 10-day period following entry of judgment has elapsed. Examples would include rights arising by reason of later constitutional decisions in the Courts or the discovery of new evidence which meets the requirements of G.S. 15A-1415(b)(6). Since "legal" grounds for relief can as well be decided by the appellate court as the trial court, it is appropriate to authorize the making of the motion in the appellate division. (This is contrary to prior practice. See State v. Nance, 253 N.C. 424, 117 S.E.2d 3.) It is possible that some factual matters could be decided as well in the appellate division, but frequently they would require that the trial court hold an additional evidentiary hearing. Thus the appellate division

is also given authority to remand the case to the trial division for a hearing. It is possible that the hearing could determine the disposition of the case and eliminate the necessity for going forward with the review.

It should be noted that in G.S. 15A-1446 a number of items which formerly could be raised in the appellate court by "motion" now are simply listed as matters which can be raised on appeal even though they have not been brought to the attention of the trial court. For example, the insufficiency of the pleading presently may be raised in the appellate division by motion in arrest of judgment, without having been brought to the attention of the trial court. This revision would permit it to be asserted upon appeal, thus eliminating one procedural step. The existence of that authority to assert matters on appeal will mean that this section will be used primarily in asserting matters which have developed since the trial, rather than as a device for raising in the appellate court matters which were not brought to the attention of the trial judge.

§ 15A-1419. When motion for appropriate relief denied. — (a) The following are grounds for the denial of a motion for appropriate relief:

(1) Upon a previous motion made pursuant to this Article, the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so. This subdivision does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such right. This subdivision does not apply when the previous motion was made within 10 days after entry of judgment.

(2) The ground or issue underlying the motion was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in the courts of this State or a federal court, unless since the time of such previous determination there has been a retroactively effective change in the law controlling such issue.

(3) Upon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so.

(b) Although the court may deny the motion under any of the circumstances specified in this section, in the interest of justice and for good cause shown it may in its discretion grant the motion if it is otherwise meritorious. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

As indicated in the commentary to G.S. 15A-1415, one of the interests in the balance in determining what motions may be made long after the trial is the interest in finality of criminal judgments. The balancing by the Commission included liberality in permitting matters to be raised at times subsequent to the trial, restricted by provisions that once a matter has been litigated or there has been opportunity to litigate a matter, there will not be a right to seek relief by additional motions at a later date. Thus this section provides, in short, that if a matter has been determined on the merits upon an appeal, or upon a post-trial motion or proceeding, there is no right to litigate the matter again in an additional motion for appropriate relief. Similarly, if there has been an opportunity to have the matter considered on a previous motion for appropriate relief or appeal the court may deny the motion for appropriate relief.

There are two exceptions to the rule with regard to the opportunity to present a matter on a previous motion for appropriate relief. The first is the rather obvious one of deprivation of the right to counsel. The other exception relates to a motion made within 10 days after the entry of judgment. The latter exception permits counsel who has moved in open court for a new trial or other relief to come back within 10 days and make additional motions for appropriate relief in the trial court, without being faced with a bar on the basis of not having raised the available grounds when he stood in open court and made his first motion.

Subsection (b) contains the customary provision for the court, in its discretion, to grant relief even though the right to relief is barred under the provisions of subsection (a).

Sections similar in import to these are found in New York Criminal Procedure Law in §§ 440.10 and 440.20.

§ 15A-1420. Motion for appropriate relief; procedure. — (a) Form, Service, Filing. —

(1) A motion for appropriate relief must:

a. Be made in writing unless it is made:

1. In open court;
2. Before the judge who presided at trial;
3. Before the end of the session if made in superior court; and
4. Within 10 days after entry of judgment;

b. State the grounds for the motion; and

c. Set forth the relief sought.

(2) A written motion for appropriate relief must be served in the manner provided in G.S. 15A-951(b). When the written motion is made more than 10 days after entry of judgment, service of the motion and a notice of hearing must be made not less than five working days prior to the date of the hearing. When a motion for appropriate relief is permitted to be made orally the court must determine whether the matter may be heard immediately or at a later time. If the opposing party, or his counsel if he is represented, is not present, the court must provide for the giving of adequate notice of the motion and the date of hearing to the opposing party, or his counsel if he is represented by counsel.

(3) A written motion for appropriate relief must be filed in the manner provided in G.S. 15A-951(c).

(b) Supporting Affidavits. —

(1) A motion for appropriate relief made after the entry of judgment must be supported by affidavit or other documentary evidence if based upon the existence or occurrence of facts which are not ascertainable from the records and any transcript of the case or which are not within the knowledge of the judge who hears the motion.

(2) The opposing party may file affidavits or other documentary evidence.

(c) Hearings, Showing of Prejudice; Findings. —

(1) Any party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit. The court must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact.

(2) An evidentiary hearing is not required when the motion is made in the trial court pursuant to G.S. 15A-1414, but the court may hold an evidentiary hearing if it is appropriate to resolve questions of fact.

(3) The court must determine the motion without an evidentiary hearing when the motion and supporting and opposing information present only questions of law.

(4) If the court cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence, and must make findings of fact. The defendant has a right to be present at the evidentiary hearing and to be represented by counsel. A waiver of the right to be present must be in writing.

(5) If an evidentiary hearing is held, the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion.

(6) A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief. Relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443.

(7) The court must rule upon the motion and enter its order accordingly. When the motion is based upon an asserted violation of the rights of the defendant under the Constitution or laws or treaties of the United

States, the court must make and enter conclusions of law and a statement of the reasons for its determination to the extent required, when taken with other records and transcripts in the case, to indicate whether the defendant has had a full and fair hearing on the merits of the grounds so asserted.

(d) Action on Court's Own Motion. — At any time that a defendant would be entitled to relief by motion for appropriate relief, the court may grant such relief upon its own motion. The court must cause appropriate notice to be given to the parties. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This Article provides for motions for appropriate relief which may be made on two essentially different occasions. There are the immediate motions made while the case is still fresh and the trial judge is still available, and the later motion which may require a substantially greater use of supporting documents or other evidence. This procedural section provides for the formalities of making the oral motion and the written motion, notice, and hearing. It should be noted that the subsections provide for two types of hearings. One is the hearing based upon affidavits, transcripts, or the like, plus matters within the judge's knowledge, to comply with the parties' entitlement to a hearing on questions of law and fact. The other is an evidentiary hearing. G.S. 15A-1420(c)(3) provides that if the only question is a question of law then the matter is to be disposed of without an evidentiary hearing. On the other hand, subdivision (4) makes it clear that if it is necessary to take evidence the court must hold an evidentiary hearing at which the defendant has the right to be present and to be represented by counsel, and the judge must make findings of fact. Obviously, it is unlikely that such an evidentiary hearing would be necessary on the immediate post-trial motion, made within 10 days as provided by G.S. 15A-1414, and that is reflected in subdivision (c)(2).

Pursuant to subsections (c)(5) and (6) the moving party has the burden of proof, by a preponderance of evidence, with regard to facts essential to support the motion. The defendant must show the existence of the ground and prejudice must appear. The definition of prejudice is cross-referenced to G.S. 15A-1443, in the Appeal Article, where the State rule on prejudice and the federal constitutional error rule are set out.

The provisions of subsection (c)(7) require that when the motion is based upon an asserted violation of the rights of the defendant under the Constitution or laws or treaties of the United States, the court must make conclusions of law and a statement of reason for its determination. These requirements are imposed in order that properly made determinations in the State court will not fail in the federal courts because of the lack of a record indicating that there has been a full and fair hearing on the merits on these grounds. See Townsend v. Sain, 372 U.S. 293 and Title 28, U.S. Code, § 2254. Compare also New York Criminal Procedure Law, § 440.30.

§ 15A-1421. Indigent defendants. — The provisions of Chapter 7A of the General Statutes with regard to the appointment of counsel for indigent defendants are applicable to proceedings under this Article. The court also may make appropriate orders relieving indigent defendants of all or a portion of the costs of the proceedings. (1977, c. 711, s. 1.)

§ 15A-1422. Review upon appeal. — (a) The making of a motion for appropriate relief is not a prerequisite for asserting an error upon appeal.

(b) The grant or denial of relief sought pursuant to G.S. 15A-1414 is subject to appellate review only in an appeal regularly taken.

(c) The court's ruling on a motion for appropriate relief pursuant to G.S. 15A-1415 is subject to review:

(1) If the time for appeal from the conviction has not expired, by appeal.

(2) If an appeal is pending when the ruling is entered, in that appeal.

(3) If the time for appeal has expired and no appeal is pending, by writ of certiorari.

(d) There is no right to appeal from the denial of a motion for appropriate relief when the movant is entitled to a trial de novo upon appeal.

(e) When an error asserted upon appeal has also been the subject of a motion for appropriate relief, denial of the motion has no effect on the right to assert error upon appeal. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Subsection (a). The motions which may be made pursuant to G.S. 15A-1414 incorporate the trial judge's "supervisory" right to order a new trial or other relief on the basis of unfairness to the defendant in the trial, and his authority to correct legal errors, both present in "new trials" under the prior law. (G.S. 15-174 and Rules of Civil Procedure, G.S. 1A-1, Rule 59.) Under this section, if an error has been committed during the trial, appellate review is related directly to the error and is not dependent upon the reassertion of the error after trial by means of a post-verdict motion.

This section also reflects the somewhat different situation which exists with regard to motions made pursuant to § 15A-1415. That section provides for matters which may be asserted, even for the first time, beyond the 10-day period after entry of judgment, as well as before the expiration of that time. Thus, if those matters are raised in sufficient time to be reviewed in connection with an appeal, the statute permits the alleged error in denial of relief to be asserted in the appeal. If the ruling on the motion is made after the time for appeal has expired and there is no appeal pending, review is discretionary, by means of petition for a writ of certiorari.

Subsection (d) provides the obvious rule that although post-trial motions may be made in the district court, there is no need for appellate review of those motions if the movant is entitled to a trial de novo upon appeal.

The provisions of Chapter 7A have in G.S. 7A-27, 7A-28 and 7A-31(a) limited review of post-conviction proceedings to review in the Court of Appeals, by certiorari. With the change in procedure here, and the limitations created to prevent repetitive motions, the limitation of the review to the Court of Appeals has been eliminated by concurrent amendments to the sections cited.

§§ 15A-1423 to 15A-1430: Reserved for future codification purposes.

ARTICLE 90.

Appeals from Magistrates and District Court Judges.

§ 15A-1431. Appeals by defendants from magistrate and district court judge; trial de novo. — (a) A defendant convicted before a magistrate may appeal for trial de novo before a district court judge without a jury.

(b) A defendant convicted in the district court before the judge may appeal to the superior court for trial de novo with a jury as provided by law.

(c) Within 10 days of entry of judgment, notice of appeal may be given orally in open court or in writing to the clerk. Within 10 days of entry of judgment, the defendant may withdraw his appeal and comply with the judgment. Upon expiration of the 10-day period, if an appeal has been entered and not withdrawn, the clerk must transfer the case to the appropriate court.

(d) A defendant convicted by a magistrate or district court judge is not barred from appeal because of compliance with the judgment, but notice of appeal after compliance must be given by the defendant in person to the magistrate or judge who heard the case or, if he is not available, notice must be given:

(1) Before a magistrate in the county, in the case of appeals from the magistrate; or

(2) During an open session of district court in the judicial district, in the case of appeals from district court.

The magistrate or district court judge must review the case and fix conditions of pretrial release as appropriate. If a defendant has paid a fine or costs and then appeals, the amount paid must be remitted to the defendant, but the judge, clerk or magistrate to whom notice of appeal is given may order the remission delayed pending the determination of the appeal.

(e) Any order of pretrial release remains in effect pending appeal by the defendant unless the judge modifies the order.

(f) Appeal pursuant to this section stays the execution of portions of the judgment relating to fine and costs. Appeal stays portions of the judgment relating to confinement when the defendant has complied with conditions of pretrial release.

(g) The defendant may withdraw his appeal at any time prior to calendaring of the case for trial de novo. The case is then automatically remanded to the court from which the appeal was taken, for execution of the judgment. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section codifies the appeal from the magistrate to the district court judge for trial de novo and appeal from the district court judge to the superior court for trial de novo, and also deals with a problem which has recurred with some frequency. That problem has been presented by the defendant, not represented by counsel, who pays his fine and then wishes to appeal. When he secures counsel, he finds that he has lost his right to appeal by complying with the sentence. That is not true under this revision. It should be noted that although provision is made for remitting of a fine or costs, that may be delayed pending the determination of the appeal.

It also is made clear that the cut-off point for the right to withdraw an appeal is the time of calendaring of the case for trial de novo. If an appeal is taken to the superior court, the costs of that division will attach at the end of 10 days in accordance with G.S. 7A-304(b). Since remand to the original trial court is automatic when the appeal is withdrawn prior to calendaring of the appeal case for trial de novo, no conditions may be imposed on such a remand.

Editor's Note. — Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly, as revised by the Commission prior to the reprinting of this volume.

§ 15A-1432. Appeals by State from district court judge. — (a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the district court judge to the superior court:

(1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.

(2) Upon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence but only on questions of law.

(b) When the State appeals pursuant to subsection (a) the appeal is by written motion specifying the basis of the appeal made within 10 days after the entry of the judgment in the district court. The motion must be filed with the clerk and a copy served upon the defendant.

(c) The motion may be heard by any judge of superior court having authority for the trial of criminal cases in the district. The State and the defendant are entitled to file briefs and are entitled to adequate time for their preparation, consonant with the expeditious handling of the appeal.

(d) If the superior court finds that a judgment, ruling, or order dismissing criminal charges in the district court was in error, it must reinstate the charges

and remand the matter to district court for further proceedings. The defendant may appeal this order to the appellate division as in the case of other orders of the superior court.

(e) If the superior court finds that the order of the district court was correct, it must enter an order affirming the judgment of the district court. The State may appeal the order of the superior court to the appellate division upon certificate by the district attorney to the judge who affirmed the judgment that the appeal is not taken for the purpose of delay. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Although G.S. 15-179 had provided the right of the State to appeal to the superior court, procedure had never been provided. This section creates a simplified motion practice for the State's appeal in such circumstances. The right of the State to appeal is defined in the same manner as in G.S. 15A-1445. See the commentary to that section.

§§ 15A-1433 to 15A-1440: Reserved for future codification purposes.

ARTICLE 91.

Appeal to Appellate Division.

OFFICIAL COMMENTARY

Present provisions of Chapter 15 of the General Statutes, in Article 18, relating to criminal appeals, are very limited. In addition to those limited provisions other sources for rules governing criminal appeals include the Rules of the Appellate Division, and provisions of Chapter 7A of the General Statutes with regard to jurisdiction of the courts.

The attempt here is to bring together the items appropriately left to the criminal statutes relating to criminal appeals. There is one modification of Chapter 7A. This act does not infringe upon those areas which are appropriately within the rule-making power of the appellate division.

Editor's Note. — The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly, as revised by the Commission prior to the reprinting of this volume.

§ 15A-1441. Correction of errors by appellate division. — Errors of law may be corrected upon appellate review as provided in this Article. (1977, c. 711, s. 1.)

Editor's Note. — Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

The annotations set out below are from causes decided under former § 15-180.

The right to appeal is wholly statutory. State v. Blades, 209 N.C. 56, 182 S.E. 714 (1935).

Appeal as Substitute for Common-Law Writs. — At common law there was no appeal from the decision of any of the courts, high or low, and these decisions could only be reviewed

by writ of error or writ of false judgment. In North Carolina appeals are used as a substitute for those writs. State v. Bailey, 65 N.C. 426 (1871); State v. Webb, 155 N.C. 426, 70 S.E. 1064 (1911).

This right of appeal is a substantial right. State v. Rhinehart, 267 N.C. 470, 148 S.E.2d 651 (1966); State v. May, 8 N.C. App. 423, 174 S.E.2d 633 (1970); State v. Lowry, 10 N.C. App. 717, 179 S.E.2d 888 (1971).

Exercise of Right Should Not Prejudice Defendant. — While the trial judge has the discretionary power to change the sentence during the term, where it appears of record that after prayer for judgment was continued, with defendant's consent, upon specified terms, the court, upon learning of defendant's intention to appeal, struck that judgment out and imposed a jail sentence, the cause will be remanded for resentence, since defendant's exercise of his right to appeal under this section should not prejudice him in any manner. State v. Patton, 221 N.C. 117, 19 S.E.2d 142 (1942); State v. Rhinehart, 267 N.C. 470, 148 S.E.2d 651 (1966).

The trial judge may not impose a penalty on the exercise of the right to appeal. State v. Lowry, 10 N.C. App. 717, 179 S.E.2d 888 (1971).

If an appeal is allowed, it is not to be supposed that any penalty is attached thereto or imposed as a result thereof. State v. May, 8 N.C. App. 423, 174 S.E.2d 633 (1970).

And Sentence May Not Be Suspended on Conditions Conflicting with Such Right. — The execution of a sentence in a criminal action may not be suspended on conditions that conflict with the defendant's right of appeal. State v. Rhinehart, 267 N.C. 470, 148 S.E.2d 651 (1966); State v. May, 8 N.C. App. 423, 174 S.E.2d 633 (1970).

Where defendant could not meet the conditions upon which execution of the judgment was suspended if he exercised his right to appeal, under this section, the judgment on this count is erroneous, and the cause remanded for proper judgment thereon. State v. Calcutt, 219 N.C. 545, 15 S.E.2d 9 (1941).

It is an unwarranted interference with defendant's right of appeal where the trial court, upon learning of defendant's intention to appeal, strikes defendant's suspended sentences and imposes active sentences. State v. May, 8 N.C. App. 423, 174 S.E.2d 633 (1970).

Increase in Sentence. — A trial judge may increase the sentence given a defendant only where the record does not sustain the suggestion that the defendant was being penalized for announcing his intention to appeal. State v. Lowry, 10 N.C. App. 717, 179 S.E.2d 888 (1971).

It is incumbent upon the trial judge to correct a sentence which is less than the statutory minimum in such a manner as to preclude any inference that the greater sentence was given as a penalty for exercising the right of appeal. Such an inference has a chilling effect on the exercise of the right to appeal and cannot be tolerated. State v. Lowry, 10 N.C. App. 717, 179 S.E.2d 888 (1971).

Defendant Entitled to Lesser Sentence. — Where a defendant was convicted and sentenced to 45 days in jail, and the minimum statutory sentence was six months, and the sentence was increased to six months only after the defendant had notified the court of his intention to appeal, the trial judge was held to have allowed the inference that the greater sentence was imposed as a penalty for exercising the right of appeal, and the defendant was entitled to the lesser sentence. State v. Lowry, 10 N.C. App. 717, 179 S.E.2d 888 (1971).

The rules governing appeals are mandatory, not directory. State v. Lewis, 9 N.C. App. 323, 176 S.E.2d 1 (1970).

Authority of Court from Which Appeal Taken. — After an appeal is taken, the court from which it is taken has no authority with reference to the appellate procedure except that specifically conferred upon it by the statute. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2283, 29 L. Ed. 2d 859 (1971).

Appeal Lies Only from Final Judgment. — The right to appeal is wholly statutory, and a defendant may appeal only from a conviction or from some judgment that is final in its nature. Thus an appeal from the denial of defendant's plea in abatement will be dismissed as being an appeal from an interlocutory judgment. State v. Blades, 209 N.C. 56, 182 S.E. 714 (1935).

A defendant is entitled to appeal only from conviction in the superior court or some final judgment thereof, and an appeal from an order of the superior court remanding the case to the recorder's court will be dismissed. State v. Rooks, 207 N.C. 275, 176 S.E. 752 (1934).

The statute does not provide for an appeal in criminal cases except from a final judgment. Hence, upon the indictment of members of the armed forces of the United States by State authorities, an appeal from an adverse ruling on objection to jurisdiction is premature. State v. Inman, 224 N.C. 531, 31 S.E.2d 641 (1944), cert. denied, 323 U.S. 805, 65 S. Ct. 563, 89 L. Ed. 2d 642 (1945).

§ 15A-1442. Grounds for correction of error by appellate division. — The following constitute grounds for correction of errors by the appellate division.

(1) Lack of Jurisdiction. —

a. The trial court lacked jurisdiction over the offense.

b. The trial court did not have jurisdiction over the person of the defendant.

(2) Error in the Criminal Pleading. — Failure to charge a crime, in that:
   a. The criminal pleading charged acts which at the time they were committed did not constitute a violation of criminal law; or
   b. The pleading fails to state essential elements of an alleged violation as required by G.S. 15A-924(a)(5).

(3) Insufficiency of the Evidence. — The evidence was insufficient as a matter of law.

(4) Errors in Procedure. —
   a. There has been a denial of pretrial motions or relief to which the defendant is entitled, so as to affect the defendant's preparation or presentation of his defense, to his prejudice.
   b. There has been a denial of a trial motion or relief to which the defendant is entitled, to his prejudice.
   c. There has been error in the admission or exclusion of evidence, to the prejudice of the defendant.
   d. There has been error in the judge's instructions to the jury, to the prejudice of the defendant.
   e. There has been a denial of a post-trial motion or relief to which the defendant is entitled, to his prejudice. This provision is subject to the provisions of G.S. 15A-1422.

(5) Constitutionally Invalid Procedure or Statute; Prosecution for Constitutionally Protected Conduct. —
   a. The conviction was obtained by a violation of the Constitution of the United States or of the Constitution of North Carolina.
   b. The defendant was convicted under a statute that is in violation of the Constitution of the United States or the Constitution of North Carolina.
   c. The conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina.

(6) Other Errors of Law. — Any other error of law was committed by the trial court to the prejudice of the defendant. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

As indicated in the general commentary, this section undertakes to catalogue various errors which may be asserted upon appeal. The listing of these categories of errors which may be asserted on appeal does not of course imply that the mere assertion of such an error implies entitlement to relief. It should be borne in mind that the appealing party must also meet the requirement of preserving his right to view when some particular step is required (see G.S. 15A-1446) and must of course show prejudice in accordance with G.S. 15A-1443. This section should be read in conjunction with the sections relating to the correction of errors by post-trial motions, particularly G.S. 15A-1414 and G.S. 15A-1415. This act undertakes to provide a substantial correlation between the possibility of correction of error at the trial level and at the appellate level.

§ 15A-1443. Existence and showing of prejudice. — (a) A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

(b) A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

(c) A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section provides in subsection (a) a codification of existing definitions of prejudice in North Carolina. See State v. Turner, 268 N.C. 225, 150 S.E.2d 406. Subsection (b) reflects the standard of prejudice with regard to violation of the defendant's rights under the Constitution of the United States, as set out in the case of Chapman v. California, 386 U.S. 18.

Subsection (c) is a statutory codification of the "invited error rule." Compare 28 U.S.C. 2111.

§ 15A-1444. When defendant may appeal; certiorari. — (a) A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered.

(b) Procedures for appeal from the magistrate to the district court are as provided in Article 90, Appeals from Magistrates and from District Court Judges.

(c) Procedures for appeal from the district court to the superior court are as provided in Article 90, Appeals from Magistrates and from District Court Judges.

(d) Procedures for appeal to the appellate division are as provided in this Article, the rules of the appellate division, and Chapter 7A of the General Statutes. The appeal must be perfected and conducted in accordance with the requirements of those provisions.

(e) Except as provided in G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari. If an indigent defendant petitions the appellate division for a writ of certiorari, the presiding superior court judge may in his discretion order the preparation of the record and transcript of the proceedings at the expense of the State.

(f) The ruling of the court upon a motion for appropriate relief is subject to review upon appeal or by writ of certiorari as provided in G.S. 15A-1422.

(g) Review by writ of certiorari is available when provided for by this Chapter, by other rules of law, or by rule of the appellate division. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Subsection (a) states the familiar rule of appellate practice that appeal, as a matter of right, is available when final judgment has been entered. (Entry of judgment is defined in G.S. 15A-101, by virtue of a concurrent amendment.)

A number of cross references are included in subsections (b), (c), (d) and (f) for the purpose of pointing out as well as locating other appellate rules, trial de novo in misdemeanor cases, and the rules with regard to appeal from motions for appropriate relief.

Subsection (e) carries forward the provisions of G.S. 15-180.2, a 1973 statute, which provide(d) only discretionary review when a defendant has plead guilty or entered a plea of no contest. The exception relates to review of determinations on motions to suppress vital evidence.

As subsection (g) indicates, review by writ of certiorari is available. That discretionary review is necessarily controlled by the rules of the appellate division.

G.S. 15-179 had provided that the State may

appeal in seven enumerated instances. These areas had imposed an effective limitation to appeal on matters of law. The statute here proposed is less complicated in statement and follows the federal revision (Title 18, U.S. Code, §3731) after the case of United States v. Sisson, 399 U.S. 267. Appeals by the State have been few in number and it is not contemplated that this provision will substantially change that situation.

§ 15A-1445. Appeal by the State. — (a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the superior court to the appellate division:

(1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.

(2) Upon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence but only on questions of law.

(b) The State may appeal an order by the superior court granting a motion to suppress as provided in G.S. 15A-979. (1977, c. 711, s. 1.)

Editor's Note. — The annotations set out below are from cases decided under former § 15-179.

Right Is Statutory. — As a general rule the prosecution cannot appeal or bring error proceedings from a judgment in favor of the defendant in a criminal case, in the absence of a statute clearly conferring that right. State v. Horton, 7 N.C. App. 497, 172 S.E.2d 887 (1970); State v. Harrell, 279 N.C. 464, 183 S.E.2d 638 (1971).

And May Not Be Enlarged by Court. — The right of the State to appeal is statutory, which right may not be enlarged by the superior court, and when the superior court remands a cause with provision that the State may appeal from any judgment thereafter rendered by the lower court, the provision giving the State the right to appeal is void. State v. Cox, 216 N.C. 424, 5 S.E.2d 125 (1939). See State v. Ferguson, 243 N.C. 766, 92 S.E.2d 197 (1956).

Strict Construction. — Statutes authorizing an appeal by the prosecution will be strictly construed. State v. Horton, 7 N.C. App. 497, 172 S.E.2d 887 (1970); State v. Harrell, 279 N.C. 464, 183 S.E.2d 638 (1971).

Proper Court for Appeal. — If the State's right to appeal arises in the district court, the appeal is to the superior court; if it arises in the superior court, the appeal is to the appellate division. State v. Greenwood, 12 N.C. App. 584, 184 S.E.2d 386 (1971).

General Verdict of Not Guilty. — In a criminal prosecution where there is a plea and general verdict of not guilty, the State has no right of appeal; such verdict ends the case, State v. Savery, 126 N.C. 1083, 36 S.E. 22 (1900) and cases cited; but under this section the State may appeal from a judgment for defendant on a special verdict. State v. Lane, 78 N.C. 547 (1878); State v. Monger, 107 N.C. 771, 12 S.E. 250 (1890); State v. Winston, 194 N.C. 243, 139 S.E. 240 (1927).

The State has no right to appeal from a verdict of not guilty. State v. Gilbert, 30 N.C. App. 130, 226 S.E.2d 229 (1976).

Order Sustaining Plea of Former Acquittal. — The right of the State to appeal to the Supreme Court from adverse rulings of the superior court or to the superior court from adverse rulings of an inferior court is governed by this section. And the State has no right, under this section, to appeal from an order of the superior court sustaining a defendant's plea of former acquittal. State v. Wilson, 234 N.C. 552, 67 S.E.2d 748 (1951); State v. Ferguson, 243 N.C. 766, 92 S.E.2d 197 (1956).

The State has no right to appeal from a judgment allowing a plea of former jeopardy or acquittal. State v. Reid, 263 N.C. 825, 140 S.E.2d 547 (1965); State v. Peguise, 2 N.C. App. 526, 163 S.E.2d 294 (1968).

§ 15A-1446. Requisites for preserving the right to appellate review. — (a) Except as provided in subsection (d), error may not be asserted upon appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection or motion. No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection clearly presented the alleged error to the trial court. Formal exceptions are not required, but when evidence is excluded a record must be made in the manner provided in G.S. 1A-1, Rule 43(c), in order to assert upon appeal error in the exclusion of that evidence.

(b) Failure to make an appropriate and timely motion or objection constitutes a waiver of the right to assert the alleged error upon appeal, but the appellate

court may review such errors in the interest of justice if it determines it appropriate to do so.

(c) The making of post-trial motions is not a prerequisite to the assertion of error on appeal.

(d) Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.

(1) Lack of jurisdiction of the trial court over the offense of which the defendant was convicted.
(2) Lack of jurisdiction of the trial court over the person of the defendant.
(3) The criminal pleading charged acts which, at the time they were committed, did not constitute a violation of criminal law.
(4) The pleading fails to state essential elements of an alleged violation, as required by G.S. 15A-924(a)(5).
(5) The evidence was insufficient as a matter of law.
(6) The defendant was convicted under a statute that is in violation of the Constitution of the United States or the Constitution of North Carolina.
(7) The conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina.
(8) The conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina.
(9) Subsequent admission of evidence from a witness when there has been an improperly overruled objection to the admission of evidence on the ground that the witness is for a specified reason incompetent or not qualified or disqualified.
(10) Subsequent admission of evidence involving a specified line of questioning when there has been an improperly overruled objection to the admission of evidence involving that line of questioning.
(11) Questions propounded to a witness by the court or a juror.
(12) Rulings and orders of the court, not directed to the admissibility of evidence during trial, when there has been no opportunity to make an objection or motion.
(13) Error of law in the charge to the jury.
(14) The court has expressed to the jury an opinion as to whether a fact is fully or sufficiently proved.
(15) The defendant was not present at any proceeding at which his presence was required.
(16) Error occurred in the entry of the plea.
(17) The form of the verdict was erroneous.
(18) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.
(19) A significant change in law, either substantive or procedural, applies to the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

A crucial item in any system of appellate procedure is the rule stating the requirements for "preserving the right to appeal." The steps to be taken in the trial level have evolved over the years from the original purpose, which was in effect a statement of "charges" against the judge for making an error, into what is now recognized as a need simply to bring the matter to the attention of the trial judge sufficiently to permit him to correct the error. Thus, the Rules of Civil Procedure in G.S. 1A-1, Rule 46, and the appellate rules (N.C. Appellate Rules, Rule

10(b)) make clear that formal "exceptions" are unnecessary and that no particular extra steps need be taken if an appropriate and timely objection has been made clear to the trial judge, at some time sufficiently close to the occurrence of the error to permit its correction. In addition to that notion, there is also the idea that there are certain errors that the defendant may appeal from whether or not he has given some signal that he thinks the judge has committed an error. On occasion this idea has appeared in the statement that certain errors need not be brought to the attention of the judge (as, for example, with regard to his charge). Sometimes that idea has been indicated by the straightforward statement that items were reviewable on appeal without the making of a motion, as was true of the 1967 statute which provided that the sufficiency of the evidence of the State was reviewable upon an appeal without the making of a motion for nonsuit (G.S. 15-173.1). Another form which this idea has taken is permitting a motion to be made in the appellate courts. Thus permitting in the appellate court a motion in arrest of judgment, based, for example, upon a defect in the pleading, is simply another way of stating that during the appeal the sufficiency of the pleadings may be raised even though no question has been raised in that regard in the trial court. This act undertakes to unify those devices and simply states that certain listed items may be raised on appeal whether or not objection, exception, or motion has been made in the trial court. Other errors must be appropriately brought to the attention of the trial court as provided in subsection (a).

Subsection (a) of this section is similar in basic import to G.S. 1A-1, Rule 46, of the Rules of Civil Procedure. It provides essentially that any timely objection or motion is sufficient and no particular formality is required to preserve the right to assert an alleged error upon appeal if that has been done.

Subsection (b) states the corollary that failure to make such timely motion or objection constitutes a waiver of the right to assert the alleged error upon appeal (but of course the court is granted the authority to review such errors in the interest of justice).

Subsection (c) is a duplicate of G.S. 15A-1422(e) and restates the idea that post-trial motions are not steps for the preservation of the right to appellate review, but rather are means of correcting errors at the trial level.

Subsection (d) contains a listing of errors which may be asserted upon appeal even if no objection, motion or exception was made in the trial court at the time the error is asserted to have been committed.

§ 15A-1447. Relief available upon appeal. — (a) If the appellate court finds that there has been reversible error which denied the defendant a fair trial conducted in accordance with law, it must grant the defendant a new trial.

(b) If the appellate court finds that the facts charged in a pleading were not at the time charged a crime, the judgment must be reversed and the charge must be dismissed.

(c) If the appellate court finds that the evidence with regard to a charge is insufficient as a matter of law, the judgment must be reversed and the charge must be dismissed unless there is evidence to support a lesser included offense. In that case the court may remand for trial on the lesser offense.

(d) If the appellate court affirms only some of the charges, or if it finds error relating only to the sentence, it may direct the return of the case to the trial court for the imposition of an appropriate sentence.

(e) If the appellate court affirms one or more of the charges, but not all of them, and makes a finding that the sentence is sustained by the charge or charges which are affirmed and is appropriate, the court may affirm the sentence.

(f) If the appellate court finds that there is an error with regard to the sentence which may be corrected without returning the case to the trial division for that purpose, it may direct the entry of the appropriate sentence.

(g) If the appellate court finds that there has been reversible error and the rule against double jeopardy prohibits further prosecution, it must dismiss the charges with prejudice. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section provides a self explanatory listing of the various types of relief which are available upon appeal, including new trial, dismissal and further action with regard to the sentence. The utility of such a listing would appear to be obvious when read in light of the Rules of Appellate Procedure which provide in Rule 28(b)(4) that the appellant's brief should contain "a short conclusion stating the precise relief sought."

§ 15A-1448. Procedures for appeal. — (a) Time for Entry of Appeal, Jurisdiction over the Case. —

(1) A case remains open for the taking of an appeal to the appellate division for a period of 10 days after the entry of judgment.

(2) When a motion for appropriate relief is made during the 10-day period, the case remains open for the taking of an appeal until the expiration of 10 days after the court has ruled on the motion.

(3) The jurisdiction of the trial court with regard to the case is divested, except as to actions authorized by G.S. 15A-1453, when notice of appeal has been given and

a. The period described in (1) and (2) has expired; or

b. No motion for appropriate relief is pending and the parties file written consent that the case be transferred immediately to the appellate division; or

c. Thirty days after the making of a motion for appropriate relief there has been no ruling and the appealing party files with the clerk a written request that the case be transferred immediately to the appellate division.

(4) For the purpose of computing time limitations for settling of the record on appeal, docketing the appeal, or other steps in the appellate process, the appeal is considered as "taken" on the date the jurisdiction of the trial court is divested under subdivision (3), or the date a transcript is delivered to the clerk of court, whichever is later.

(5) The right to appeal is not waived by withdrawal of an appeal if the appeal is reentered within the time specified in (1) and (2).

(6) The right to appeal is not waived by compliance with all or a portion of the judgment imposed. If the defendant appeals, the court may enter appropriate orders remitting any fines or costs which have been paid. The court may delay the remission pending the determination of the appeal.

(b) How and When Appeal of Right Taken. —

(1) Oral notice of appeal may be given in open court:

a. At the time final judgment is entered; or

b. When the court rules upon a post-verdict motion for appropriate relief, if appeal is then available.

(2) Written notice of appeal may be filed with the clerk after final judgment and before the time for taking an appeal has expired.

(c) Certiorari. — Petitions for writs of certiorari are governed by rules of the appellate division. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Most procedure for the appeal itself will be as provided in the rules of appellate procedure and not in statutory law. However, one appropriate area for statutory regulation is the question of timing of the taking of an appeal, for that relates to activity which must be conducted in the trial division.

Problems have arisen in the processing of appeals when post-trial motions are pending. The system here provides the usual (for North Carolina) 10-day period for taking an appeal, and provides that if a post-trial motion is made within 10 days after the trial there will be a period of

not less than 10 days after the ruling on the motion in which to take an appeal. This is in accord with the North Carolina Rules of Appellate Procedure with regard to civil cases under Rule 3, but such an extension has not been incorporated in those rules with regard to criminal cases in Appellate Rule 4.

This section adds a further modification to the prior system. If giving notice of appeal of the case "divests the trial court of jurisdiction" (see State v. Grundler and State v. Jelly, 251 N.C. 177, 111 S.E.2d 1) giving notice of appeal must wait until the determination of any post-trial motion. This section permits the defendant to give his notice of appeal, and yet retains the case in the trial court for the full 10-day period. This will insure a period during which matters may, if possible, be corrected at the trial level, without problem as to the timely notice of appeal. In addition to the full 10-day period, the right of the trial court to act in a case is extended for the period of time that a motion for appropriate relief is pending in the trial court. (G.S. 15A-1448(a)(2).)

Subsection (a)(4) is a legislative committee addition to the original proposal by the Commission. It establishes the date an appeal is "taken" as a matter of jurisdictional adjustment, i.e., jurisdiction to compute time does not vest in the appellate division until the conditions of subsection (a)(3) are met. In an effort to avoid the procedural impasse resulting from hopelessly backlogged court reporters' work loads in certain districts, the legislative committee made the time limitations for settling records on appeal, etc., begin to run from the *later* of the date jurisdiction is divested of the trial court *or* the date the transcript is delivered to the clerk of superior court.

This timing provision in subsection (a)(4) may be at variance with the current language of the Rules of Appellate Procedure. Cf. Rule 12 (a).

If no motion for relief is pending and the parties wish to expedite the processing of the appeal, they may pursuant to G.S. 15A-1448(a)(3)b file written consent that the case be transferred immediately to the appellate division without waiting for the 10 days to run. Similarly, if a motion for appropriate relief has been made, 30 days have passed, and no ruling has been made on the motion, the appealing party may file a written request that the case be transferred immediately to the appellate division. Of course the trial court would have no power to act once the case was transferred.

The appellant has free choice during the 10-day period. Thus, if appeal is entered and withdrawn, it may be entered again if time remains. To the same end, the statute provides that compliance with all or a portion of the judgment does not waive the right to appeal. There is provision for remitting fines which have been paid, but, in order to simplify collection and remittance procedures, the repayment may be delayed until the appeal is determined. The free right to enter appeal, withdraw it and reenter it, or to comply with a portion of the judgment and then enter the appeal are substantially more important in criminal cases than in civil cases. The litigants are frequently less sophisticated and the consequences of an unknowing waiver may be substantially more severe than loss of monetary damages or property rights.

Subsection (b) provides for oral notice of appeal in open court, and written notice of appeal to be filed with the clerk. No effort is made here to specify additional steps and the formalities of the filed notice. The contents of the notice of appeal, service of copies on other parties, and other procedural details with regard to the notice of appeal are left to the rules of the appellate division, which should be consulted.

§ 15A-1449. Security for costs not required. — In criminal cases no security for costs is required upon appeal to the appellate division. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The requirement for security for costs in criminal appeals is eliminated by this section.

§ 15A-1450. Withdrawal of appeal. — An appeal may be withdrawn by filing with the clerk of superior court a written notice of the withdrawal, signed by the defendant and, if he has counsel, his attorney. The clerk must forward a copy of the notice to the clerk of the appellate division in which the case is pending. The appellate division may enter an appropriate order with regard to the costs of the appeal. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section provides a simplified means of withdrawal of an appeal. The notice is given to the Clerk of Superior Court. It is then the responsibility of the Clerk of Superior Court to notify the appellate division if the case has gone forward. No limitations are placed upon the right to withdraw the appeal other than that the notice, which must be written, must be signed by defendant and his counsel if he is represented, and of course, he may be ordered to pay costs. If the appeal is withdrawn, it is no longer pending and the stay pursuant to G.S. 15A-1451 is terminated.

§ 15A-1451. Stay of sentence; bail; no stay when State appeals. — (a) When a defendant has given notice of appeal:

(1) Payment of costs is stayed.

(2) Payment of a fine is stayed.

(3) Confinement is stayed only when the defendant has been released pursuant to Article 26, Bail.

(4) Probation or special probation is stayed.

(b) The effect of dismissal of charges is not stayed by an appeal by the State, and the defendant is free from such charges unless they are subsequently reinstated as a result of the determination upon appeal. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section carries forward in more detail the comments of prior G.S. 15-184 with regard to stay of costs and sentence when an appeal has been taken. Subsection (b) makes clear that if the State appeals from the dismissal of charges, the effect of the dismissal is not stayed during the pendency of the appeal. The defendant is free of the charge unless the State prevails upon the appeal and has the charges reinstated pursuant to the directive of the appellate division.

§ 15A-1452. Execution of sentence upon determination of appeal; compliance with directive of appellate court. — (a) If an appeal is withdrawn, the clerk of superior court must enter an order reflecting that fact and directing compliance with the judgment.

(b) If the appellate division affirms the judgment in whole or in part, the clerk of superior court must file the directive of the appellate division and order compliance with its terms.

(c) If the appellate division orders a new trial or directs other relief or proceedings, the clerk must file the directive of the appellate court and bring the directive to the attention of the district attorney or the court for compliance with the directive. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section recodifies and makes a more complete statement of the concepts of prior G.S. 15-186.

§ 15A-1453. Ancillary actions during appeal. — (a) While an appeal is pending in the appellate division, the court in which the defendant was convicted has continuing authority to act with regard to the defendant's release pursuant to Article 26, Bail.

(b) The appropriate court of the appellate division may direct that additional steps be taken in the trial court while the appeal is pending, including but not limited to:

(1) Appointment of counsel.
(2) Hearings with regard to matters relating to the appeal.
(3) Taking evidence or conducting other proceedings relating to motions for appropriate relief made in the appellate division, as provided in G.S. 15A-1418. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section provides for actions which necessarily must be taken at the trial level while an appeal is pending. Subsection (a) provides that the trial court may act with regard to bail without directive from the appellate division. As to other matters, the appellate division may direct additional steps in the trial court. Of particular note is subdivision (b)(3) which expressly authorizes the direction of hearings or other proceedings relating to motions for appropriate relief which now may be made in the appellate division in accordance with G.S. 15A-1418. See the commentary to that section.

ARTICLES 92 TO 99.

§§ 15A-1454 to 15A-1999: Reserved for future codification purposes.

SUBCHAPTER XV. CAPITAL PUNISHMENT.

ARTICLE 100.

Capital Punishment.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence. — (a) Separate Proceedings on Issue of Penalty. —

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or

mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. — Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death. — When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. —

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is

excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances. — Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(f) Mitigating Circumstances. — Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c. 406, s. 2.)

Editor's Note. — Session Laws 1977, c. 406, s. 9, makes this Article effective June 1, 1977.

Session Laws 1977, c. 406, s. 6, provides: "In the event that it is determined by the Supreme Court of North Carolina or by the Supreme Court of the United States that a sentence of death may not be constitutionally imposed for a capital offense for which the death penalty is provided by this act, the punishment for that offense shall be imprisonment in the State's prison for life."

Session Laws 1977, c. 406, s. 7, contains a severability clause.

Session Laws 1977, c. 406, s. 8, provides: "The provisions of this act shall apply to murders committed on or after the effective date of this act."

§ 15A-2001. Capital offenses; plea of guilty. — Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may sentence such person to life imprisonment or to death pursuant to the procedures of G.S. 15A-2000. Before sentencing the defendant, the presiding judge shall impanel a jury for the limited purpose of hearing evidence and determining a sentence recommendation as to the appropriate sentence pursuant to G.S. 15A-2000. The jury's sentence recommendation in cases where the defendant pleads guilty shall be determined under the same procedure of G.S. 15A-2000 applicable to defendants who have been tried and found guilty by a jury. (1977, c. 406, s. 2.)

§ 15A-2002. Capital offenses; jury verdict and sentence. — If the recommendation of the jury is that the defendant be sentenced to death, the judge shall impose a sentence of death in accordance with the provisions of Chapter 15, Article 19 of the General Statutes. If the recommendation of the jury is that the defendant be imprisoned for life in the State's prison, the judge shall impose a sentence of imprisonment for life in the State's prison. (1977, c. 406, s. 2.)

§ 15A-2003. Disability of trial judge. — In the event that the trial judge shall become disabled or unable to conduct the sentencing proceeding provided in this Article, the Chief Justice shall designate a judge to conduct such proceeding. (1977, c. 406, s. 2.)

Chapter 16.

Gaming Contracts and Futures.

Article 1.

Gaming Contracts.

Sec.
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Contracts for "Futures."

16-3. Certain contracts as to "futures" void.
16-4. Entering into or aiding contract for "futures" misdemeanor.
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ARTICLE 1.

Gaming Contracts.

§ 16-1. Gaming and betting contracts void. — All wagers, bets or stakes made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event whatever, shall be unlawful; and all contracts, judgments, conveyances and assurances for and on account of any money or property, or thing in action, so wagered, bet or staked, or to repay, or to secure any money, or property, or thing in action, lent or advanced for the purpose of such wagering, betting, or staking as aforesaid, shall be void. (1810, c. 796, P. R.; R. C., c. 51, ss. 1, 2; Code, ss. 2841, 2842; Rev., s. 1687; C. S., s. 2142.)

Cross Reference. — As to criminal laws regarding gambling, see § 14-289 et seq.

In General. — At common law all gambling contracts were void. And generally in this country, all wagering contracts are held to be illegal and void as against public policy. Irwin v. Williar, 110 U.S. 499, 4 S. Ct. 160, 28 L. Ed. 225 (1884).

Liberal Construction. — This section is construed liberally. Turner v. Peacock, 13 N.C. 303 (1830).

Gambling contracts are void, because they are so declared by this section. Morehead Banking Co. v. Tate, 122 N.C. 313, 30 S.E. 341 (1898).

Judgments in Invitum Not Included. — This section does not include judgments taken in invitum, but only such as are confessed or taken by consent. Teague v. Perry, 64 N.C. 39 (1870).

No Recovery Where Game Fair. — It is settled that money, or a horse, or a judgment, won at cards and actually paid and delivered, cannot be recovered back, the game being fairly played. Hodges v. Pitman, 4 N.C. 276 (1816); Hudspeth v. Wilson, 13 N.C. 372 (1830); Warden v. Plummer, 49 N.C. 524 (1857); Teague v. Perry, 64 N.C. 39 (1870).

Unfair Gaming Always Illegal. — Unfair gaming was not only illegal by force of the statute against gaming, but was unlawful at common law, so that the money, or thing won, if it had been paid, might be recovered back in an action at law. Webb v. Fulchire, 25 N.C. 485 (1843); Warden v. Plummer, 49 N.C. 524 (1857).

Same; Recovery. — Where a man is cheated out of his money, though it is in playing at a game forbidden by law, he may recover back what he has paid from the person who practiced the fraud upon him. Webb v. Fulchire, 25 N.C. 485 (1843).

No Recovery on Bond Unfairly Won. — Where A., at a game of cards unfairly played, won a justice's judgment from B., and took from the defendants in the judgment a bond payable to himself for the amount, on which he brought suit, to which the statute against gaming was pleaded, it was held that he could not recover. Warden v. Plummer, 49 N.C. 524 (1857).

Subsequent Note Valid. — A note given subsequently, in purchase of a magistrate's judgment which had been won at cards by the payee from the maker, is not void under this section against gaming. Teague v. Perry, 64 N.C. 39 (1870).

Rights of Innocent Holder of Gambling Note. — This section, applicable to a note originally given for a gambling debt, renders this and all notes and contracts in like cases void. This being true, no action thereon can be sustained. The position as stated is undoubtedly the law in this jurisdiction, and is in accord with well-considered authorities elsewhere. This

principle, however, is allowed to prevail only where the action is on the note to enforce its obligations, and does not affect or extend to suits by an innocent endorsee for value, and holder in due course, against the endorser on his contract of endorsement. Wachovia Bank & Trust Co. v. Crafton, 181 N.C. 404, 107 S.E. 316 (1921).

A note given for a gambling debt is void and no action thereon can be maintained. Bullard v. Johnson, 264 N.C. 371, 141 S.E.2d 472 (1965).

Intent of Parties. — Where the transaction is legitimate on its face, one party cannot avoid it by claiming that it was a gambling contract where the proof shows that the other party did not so understand it, but believed it to be a valid agreement. Bibb v. Allen, 149 U.S. 481, 13 S. Ct. 950, 37 L. Ed. 817 (1893).

Money Lent for Gaming. — Money lent to play with at gaming, or to play at the time of loss, is not recoverable. Mooring v. Stanton, 1 N.C. 70 (1795).

When Stakeholder Liable. — Where money is deposited with a stakeholder, to be delivered to the winner, and the stakeholder pays over the money, after notice from the loser not to do so, the loser may recover the money from the stakeholder. Wood v. Wood, 7 N.C. 172 (1819); Forrest v. Hart, 7 N.C. 458 (1819).

Note Given in Foreign State Unenforceable. — A note given in consideration of a bet won on a horse race cannot be enforced in this State although given in a state where wagering contracts are not invalid. Gooch v. Faucett, 122 N.C. 270, 29 S.E. 362 (1898). See Burrus v. Witcover, 158 N.C. 384, 74 S.E. 11 (1912).

Cards a Game of Chance. — It is a matter of common knowledge that a game of cards is a game of chance. State v. Taylor, 111 N.C. 680, 16 S.E. 168 (1892).

Betting on Horse Race. — It was the intention of this section to make betting on horse races a criminal offense, since such wagering contracts had already been outlawed and the denouncement of the wager as unlawful came in by amendment at a later time. State v. Brown, 221 N.C. 301, 20 S.E.2d 286 (1942); State v. Felton, 239 N.C. 575, 80 S.E.2d 625 (1954).

Betting on dog races under a pari-mutuel system, having no other purpose than that of providing the facilities by means of tickets, machines, etc., for placing bets, calculating odds, determining winnings, if any, constitutes gambling within the meaning of the statutes presently codified as §§ 16-1, 16-2 and 14-292. State ex rel. Taylor v. Carolina Racing Ass'n, 241 N.C. 80, 84 S.E.2d 390 (1954).

The game of tenpins is not a "game of chance." State v. Gupton, 30 N.C. 271 (1848); State v. King, 113 N.C. 631, 18 S.E. 169 (1893).

"Shuffleboard". — The keeping of a gaming table called "a shuffleboard" is not indictable, as the game is not one of chance, but of skill. State v. Bishop, 30 N.C. 266 (1848).

"Shooting for beef" and other similar trials of skill, for which the participants pay for the "chance" or privilege of shooting, is not a game of chance, there being no "chance" in the sense of the acts against gambling. State v. DeBoy, 117 N.C. 702, 23 S.E. 167 (1895).

Cited in Moore v. Schwartz, 195 N.C. 549, 142 S.E. 772 (1928).

§ 16-2. Players and betters competent witnesses. — No person shall be excused or incapacitated from confessing or testifying touching any money or property, or thing in action, so wagered, bet or staked, or lent for such purpose, by reason of his having won, played, bet or staked upon any game, lot or chance, casualty, or unknown or contingent event aforesaid; but the confession or testimony of such person shall not be used against him, in any criminal prosecution, on account of such betting, wagering or staking. (R. C., c. 51, s. 3; Code, s. 2843; Rev., s. 1688; C. S., s. 2143.)

Cross References. — As to rule of evidence generally that defendant is not compellable to testify, see § 8-54. As to exception with reference to testimony as to gambling, etc., see also § 8-55.

Stated in State v. Brown, 221 N.C. 301, 20 S.E.2d 286 (1942).

Cited in State v. Felton, 239 N.C. 575, 80 S.E.2d 625 (1954); State ex rel. Taylor v. Carolina Racing Ass'n, 241 N.C. 80, 84 S.E.2d 390 (1954).

ARTICLE 2.

Contracts for "Futures."

§ 16-3. Certain contracts as to "futures" void. — Every contract, whether in writing or not, whereby any person shall agree to sell and deliver any cotton, Indian corn, wheat, rye, oats, tobacco, meal, lard, bacon, salt pork, salt fish, beef, cattle, sugar, coffee, stocks, bonds, and choses in action, at a place and at a time

specified and agreed upon therein, to any other person, whether the person to whom such article is so agreed to be sold and delivered shall be a party to such contract or not, when, in fact, and notwithstanding the terms expressed of such contract, it is not intended by the parties thereto that the articles or things so agreed to be sold and delivered shall be actually delivered, or the value thereof paid, but it is intended and understood by them that money or other thing of value shall be paid to the one party by the other, or to a third party, the party to whom such payment of money or other thing of value shall be made to depend, and the amount of such money or other thing of value so to be paid to depend upon whether the market price or value of the article so agreed to be sold and delivered is greater or less at the time and place so specified than the price stipulated to be paid and received for the articles so to be sold and delivered, and every contract commonly called "futures" as to the several articles and things hereinbefore specified, or any of them, by whatever other name called, and every contract as to the said several articles and things, or any of them, whereby the parties thereto contemplate and intend no real transaction as to the article or thing agreed to be delivered, but only the payment of a sum of money or other thing of value, such payment and the amount thereof and the person to whom the same is to be paid to depend on whether or not the market price or value is greater or less than the price so agreed to be paid for the said article or thing at the time and place specified in such contract, shall be utterly null and void; and no action shall be maintained in any court to enforce any such contract, whether the same was made in or out of the State, or partly in and partly out of this State, and whether made by the parties thereto by themselves or by or through their agents, immediately or mediately; nor shall any party to any such contract, or any agent of any such party, directly or remotely connected with any such contract in any way whatever, have or maintain any action or cause of action on account of any money or other thing of value paid or advanced or hypothecated by him or them in connection with or on account of such contract and agency; nor shall the courts of this State have any jurisdiction to entertain any suit or action brought upon a judgment based upon any such contract. This section shall not be construed so as to apply to any person, firm or corporation, or his or their agents, engaged in the business of manufacturing or wholesale merchandising in the purchase and/or sale of the necessary commodities required in the ordinary course of their business; nor shall this section be construed so as to apply to any contract with respect to the purchase and/or sale for future delivery of any of the articles or things mentioned and referred to in this section, where such purchase and/or sale is made on any exchange on which any such article or things are regularly bought and sold, or contracts therefor regularly entered into, and the rules and regulations of such exchange are such that either party to such contract may require delivery thereof: Provided, such contract is made in accordance with such rules and regulations. (1889, c. 221, s. 1; 1905, c. 538, s. 7; Rev., s. 1689; 1909, c. 853, s. 1; C. S., s. 2144; 1931, c. 236, s. 1.)

History of Section. — On examination of the original statute, it appears that the act, defining and declaring contracts in "futures" unlawful, was passed in 1889, Chapter 221. In 1905, Chapter 538, the legislature enacted a law to suppress what is known, in popular phrase, as "bucket shops," and, having provided for this in §§ 1 and 2, the statute contains several additional sections relating to the statute of 1889 and all of them having reference to the mode or quantum of proof which should be required in enforcement of that act. The law of 1905 then, in its closing section, provided: "This act shall not be construed so as to apply to any person, firm, or corporation, etc." This is the first time these words appear in legislation of the State on this subject, and, so far as they had reference to the law of 1889, it is clear the legislature, in the original statutes, only intended that they should affect questions of proof. See Rodgers, McCabe & Co. v. Bell, 156 N.C. 378, 72 S.E. 817 (1911).

From these considerations, it seems clear that the last sentence of this section was inserted "unnecessarily and out of abundance of caution"

— and it does not confer any exclusive right or privilege upon manufacturers or wholesale merchants; nor does it authorize them to engage in any business prohibited by the section. It simply provides that the courts shall not construe the section to have the effect of preventing them from buying and selling for future delivery the necessary commodities required in their ordinary business. See State v. McGinnis, 138 N.C. 724, 51 S.E. 50 (1905); State v. Clayton, 138 N.C. 732, 50 S.E. 866 (1905); Rodgers, McCabe & Co. v. Bell, 156 N.C. 378, 72 S.E. 817 (1911).

The 1931 act amended the "Bucket Shop Act" of 1889, now this section, so as to exempt contracts with respect to purchase or sale where they are made in accordance with the regulations of any exchange, and where the rules of the exchange permit either party to require delivery. It was intended to remove the ban of illegality from transactions on legitimate exchanges, as distinguished from "an establishment nominally for the transaction of a stock exchange business, or business of a similar character, but really for the registration of lots or wagers, usually for small amounts, on the rise or fall of stock, grain, etc., there being no transfer or delivery of the stocks or things dealt with." Gatewood v. North Carolina, 203 U.S. 531, 27 S. Ct. 167, 51 L. Ed. 305 (1906). See 9 N.C.L. Rev. 358.

Section Constitutional. — This section is in furtherance of the declared public policy of North Carolina, and is constitutional and valid. Garseed v. Sternberger, 135 N.C. 501, 47 S.E. 603 (1904); State v. McGinnis, 138 N.C. 724, 51 S.E. 50 (1905); State v. Clayton, 138 N.C. 732, 60 S.E. 866 (1905); Rankin v. Mitchem, 141 N.C. 277, 53 S.E. 854 (1906); Randolph v. Heath, 171 N.C. 383, 88 S.E. 731 (1916).

The legislature can, in the exercise of the police power, prescribe when and under what circumstances and as to what offenses a certain act shall be prima facie evidence. Therefore, a provision that the purchase of commodities upon margin under certain circumstances shall raise a prima facie case that such purchases were void, and other circumstances shall not constitute such prima facie evidence, is not a discrimination forbidden by the Fourteenth Amendment. State v. McGinnis, 138 N.C. 724, 51 S.E. 50 (1905), decided under § 2145 of the Consolidated Statutes, which section was repealed by Public Laws 1931, c. 236.

Not Contrary to Federal Constitution. — When, in an action pending in the courts of this State to recover on a judgment in a sister state, the legislature amended this section by adding thereto: "nor shall the courts of this State have any jurisdiction to entertain any suit or action brought upon a judgment based upon any such contract," there can be no valid objection to such legislation on the ground that it impairs the obligation of contracts, and it would seem that no such objection can be made under Art. IV, §§ 1 and 2 of the federal Constitution, "the full faith and credit clause," if it is admitted or clearly appears that the judgment sued on was rendered on a transaction expressly forbidden by the statute on gaming, and that the question was not raised, investigated, or determined in the courts of the state in which the judgment was originally rendered. Mottu v. Davis, 151 N.C. 237, 65 S.E. 969 (1909).

The North Carolina statutes prohibiting gambling in futures and denying jurisdiction of the courts to suits on judgments based upon such contracts have been upheld as constituting an exception to the application of the full faith and credit clause of the Constitution, on the ground that the State had not provided a court with jurisdiction to entertain suit on such a judgment though properly rendered in another state. Lockman v. Lockman, 220 N.C. 95, 16 S.E.2d 670 (1941).

In an action on a judgment of the state of New York, defendant moved for leave to amend his answer to allege that the judgment was based on a gaming contract, and that therefore the North Carolina court was without jurisdiction of the action. The trial court, in its discretion, denied the motion to amend, and, there being no valid defense set up in the answer as constituted, entered judgment on the pleadings. It was held that the denial of the motion to amend was affirmed, but the cause was remanded in order that the court find facts determinative of whether the question of the validity of the contract was concluded by the New York judgment, and if not, whether the contract constituting the basis of the judgment was one condemned by this section, since the court cannot render final judgment until it has determined the jurisdictional question. Cody v. Hovey, 219 N.C. 369, 14 S.E.2d 30 (1941).

Within Police Power. — This section, forbidding the business of running a "bucket shop," is clearly within the police power of the State. State v. McGinnis, 138 N.C. 724, 51 S.E. 50 (1905).

Defines Illegal Contract. — This section clearly defines what is an illegal contract where there is no real sale, but merely an agreement for an adjustment upon the basis of differences in the prices of the commodity at the time fixed. Orvis Bros. & Co. v. Holt-Morgan Mills, 173 N.C. 231, 91 S.E. 948 (1917).

Example of "Margin". — A payment made on account by a customer to a stockbroker, under an agreement between the customer and the stockbroker in which the stockbroker agreed either to sell or to buy from the customer a certain number of shares of stock, but under which, in fact, no delivery or transfer of shares was contemplated, is known in stockbroker's parlance as a "margin." West v. Satterfield, 190

N.C. 89, 129 S.E. 177 (1925); McClain v. Fleshman, 106 F. 880 (3rd Cir. 1901), decided under § 2145 of the Consolidated Statutes, which section was repealed by Public Laws 1931, c. 236.

Bucket Shop. — A "bucket shop" has been defined as "an establishment nominally for the transaction of a stock exchange business, or business of a similar character, but really for the registration of lots or wagers, usually for small amounts, on the rise or fall of stock, grain, etc., there being no transfer or delivery of the stocks or things dealt with." Gatewood v. North Carolina, 203 U.S. 531, 27 S. Ct. 167, 51 L. Ed. 305 (1906). For other definitions, see State v. McGinnis, 138 N.C. 724, 51 S.E. 50 (1905).

Contract Made in Foreign State. — An action upon a wagering or "future contract" in cotton cannot be maintained in this State, though entered into in another state where it is lawful Burrus v. Witcover, 158 N.C. 384, 74 S.E. 11 (1912).

Action upon judgment obtained in foreign state. See Cody v. Hovey, 217 N.C. 407, 8 S.E.2d 479 (1940). For note on this case, see 18 N.C.L. Rev. 224.

Contracts for Future Delivery. — It is well settled that contracts for the future delivery of merchandise or tangible property are not void, whether such property is in existence in the hands of the seller, or to be subsequently acquired. Bibb v. Allen, 149 U.S. 481, 13 S. Ct. 950, 37 L. Ed. 817 (1893).

And the fact that it is the practice of persons making sales for future delivery to settle the same by setting off one sale against another, will not render it invalid. Board of Trade v. Christie Grain & Stock Co., 198 U.S. 236, 25 S. Ct. 637, 49 L. Ed. 1031 (1905).

Lawful Agreement. — The 1931 amendment to this section made entirely lawful an "arrangement and agreement" between the plaintiffs and the defendant whereby the plaintiffs were to negotiate certain contracts for the sale of cotton on the New York Cotton Exchange for the defendant's account. Marx v. Maddrey, 94 F. Supp. 784 (E.D.N.C. 1951).

Test of Validity under Section. — The test of the validity of a contract for "future" which this section requires is the "intention not to actually deliver" the articles bought or sold for future delivery. No matter how explicit the words in any contract which may require a delivery, if in fact there is no intention to deliver, but the real understanding is that on the stipulated date the losing party shall pay to the other the difference between the market price and the contract price, this is a gambling contract. State v. Clayton, 138 N.C. 732, 50 S.E. 866 (1905); Rodgers, McCabe & Co. v. Bell, 156 N.C. 378, 72 S.E. 817 (1911).

When there is no real transaction, no real contract for purchase or sale, but only a wager upon the rise or fall of the price of stock, or an article of merchandise in the exchange or market, one party agreeing to pay, if there is a rise, and the other party agreeing to pay if there is a fall in price, the agreement is a pure wager. No business is done — nothing is bought or sold or contracted for, there is only a bet. Orvis Bros. & Co. v. Holt-Morgan Mills, 173 N.C. 231, 91 S.E. 948 (1917).

This section does not render void a contract for the purchase and sale of stocks on margin when actual delivery of the stocks is made to the purchaser or to his agent, and the stocks are paid for in whole or in part. Cody v. Hovey, 216 N.C. 391, 5 S.E.2d 165 (1939).

Intention of Parties. — The true test of validity of a contract for future delivery is whether it can be settled only in money and in no other way, or whether the party selling can tender and compel acceptance of the particular commodity sold or the party buying can compel the delivery of the commodity purchased. The essential inquiry in every case is as to the necessary effect of the contract and the real intention of the parties. Williams v. Carr, 80 N.C. 295 (1879); State v. McGinnis, 138 N.C. 724, 51 S.E. 50 (1905); State v. Clayton, 138 N.C. 732, 50 S.E. 866 (1905); West v. Satterfield, 190 N.C. 89, 129 S.E. 177 (1925).

The contract, by its terms, not disclosing any gambling element, the matter is to be settled by ascertaining the true underlying purpose of the parties. Was it in the intention of both parties that the cotton should not be delivered, and did they conceal in the deceptive terms of a fair and lawful contract, a gambling agreement, by which they contemplated no real transaction as to the article contracted to be delivered? Rankin v. Mitchem, 141 N.C. 277, 53 S.E. 854 (1906); Burns v. Tomlinson, 147 N.C. 645, 61 S.E. 614 (1908); G.G. Edgerton & Son v. J.T. Edgerton & Bros., 153 N.C. 167, 69 S.E. 53 (1910); L. Harvey & Son v. Pettaway, 156 N.C. 375, 72 S.E. 364 (1911); Rodgers, McCabe & Co. v. Bell, 156 N.C. 378, 72 S.E. 817 (1911); Hold v. Wellons, 163 N.C. 124, 79 S.E. 450 (1913).

The intent of the parties that the merchandise contracted for should not be actually delivered is the cardinal element of a "futures" contract made illegal by this section and the courts will disregard the form and ascertain whether the intent of the parties was to speculate in the rise and fall of the price of the commodity. Fenner v. Tucker, 213 N.C. 419, 196 S.E. 357 (1938).

Both Parties Must Have Intent. — It was never held that when an innocent party had made a contract valid in its terms, his rights acquired thereunder should be denied him by reason of an undisclosed purpose or intent of the other. To avoid the contract the vitiating purpose or understanding must be shared in by both. Rodgers, McCabe & Co. v. Bell, 156 N.C. 378, 72 S.E. 817 (1911).

Contracts to Which This Section Applies. — Where the defendant has induced the plaintiff to purchase certain shares of stock, through himself, from his own broker, upon margin, the broker to carry the stock upon its hypothecation with him as collateral, and thereafter the defendant has his broker, unknown to the plaintiff, to sell the stock and place the proceeds to his own account, and uses the same and other moneys upon margin advanced from time to time by the plaintiff upon his representation that the price of this stock had decreased, it was held that the plaintiff may recover of the defendant in his action the moneys the defendant had thus converted to his own use; and this section, relating to gambling, etc., is not available to the defendant as a defense. Gladstone v. Swain, 187 N.C. 712, 122 S.E. 755 (1924).

A note given for margins upon an illegal contract for cotton futures, without intention of delivery of the cotton, cannot be collected by suit in the courts of North Carolina and the promisor's repeated promise to pay it cannot impart any validity to it. Garseed v. Sternberger, 135 N.C. 501, 47 S.E. 603 (1904); Burns v. Tomlinson, 147 N.C. 645, 61 S.E. 614 (1908); Burrus v. Witcover, 158 N.C. 384, 74 S.E. 11, 39 L.R.A. (n.s.) 1005 (1912); Cobb Bros. & Co. v. Guthrie, 160 N.C. 313, 76 S.E. 81 (1912); Orvis Bros. & Co. v. Holt-Morgan Mills, 173 N.C. 231, 91 S.E. 948 (1917).

Where there is evidence that contracts set up by certain defendants in an action by the receiver of a brokerage business were founded upon speculation and based upon "margins," and that no actual delivery of the stock was intended by the parties, the evidence is sufficient to support a finding that the contracts were void under this section and the finding is as conclusive as the verdict of a jury, and the judgment that such contracts were absolutely void will be sustained. Martin v. Bush, 199 N.C. 93, 154 S.E. 43 (1930).

A contract for "cotton futures" in which no actual delivery is intended or contemplated is void and no action may be maintained thereon. Bodie v. Horn, 211 N.C. 397, 190 S.E. 236 (1937).

Parties Included. — The owner of a draft which he knows to have been given in the unlawful purchase of cotton futures, or in maintaining or purchasing margins in contracts of that character, is a party to the prohibited contract, the consideration is illegal and he cannot recover from the payee in his action on the draft. Burrus v. Witcover, 158 N.C. 384, 74 S.E. 11 (1912).

Subsequent Promise Void. — A subsequent promise made by one of the contracting parties to the other to repay him for loss arising from a contract for "futures" is void. Burns v. Tomlinson, 147 N.C. 645, 61 S.E. 614 (1908).

Unauthorized Act of Agent. — A bona fide wholesale dealer who sues upon a contract for the future delivery of cotton, which is resisted on the ground that the contract was a wagering one and void under the provisions of this section, is bound by the acts and statements of his agent in negotiating and closing the trade, to the effect that actual delivery was not contemplated or required; and the plaintiff may not recover on the contract merely because he was a bona fide wholesale dealer in cotton and only authorized his agent to make a contract for actual delivery, if the agent at the time entered into a contract with the vendor which was condemned by the statute as being a wagering one. Alex. Sprunt & Sons v. May, 156 N.C. 388, 72 S.E. 821 (1911).

Agent's Right to Recover. — An agent for a principal to a contract made in violation of this section, as to "futures," cannot recover for any loss he may have sustained on account thereof, as such act of agency would be in violation of § 16-4, making it a misdemeanor. Burns v. Tomlinson, 147 N.C. 645, 61 S.E. 614 (1908).

If agents have no knowledge that it was the intention of their principals to enter into a wagering or gambling contract, they are entitled to recover, not only their commissions, but any sums of money which they have advanced to carry out purposes for their principals. Embrey v. Jemison, 131 U.S. 336, 9 S. Ct. 776, 33 L. Ed. 172 (1889).

Parol Evidence. — The section, rendering void and unenforceable a contract for the sale of futures upon margin covered by the purchaser, that does not contemplate the delivery of the thing bargained for, but only a payment to be made for the loss incurred or a profit to be received in accordance with the fall or rise of the market, looks to the substance of the contract and not to its form, and parol evidence is competent to show the intention of the parties entering therein. West v. Satterfield, 190 N.C. 89, 129 S.E. 177 (1925).

Burden of Proof. — Where in an action by an assignee and trustee under § 23-1, et seq., it is alleged that one of the defendants was a partner in the business of the assignor and liable for the debts of the firm, and the other defendants admit this allegation and set up and seek to recover of the plaintiff and the alleged partner on contract with the assignor, the alleged partner is a defendant in the action on the contracts and her answer setting up the defense that the contracts were void under this section, as gambling contracts, places the burden on the other defendants to prove that the contracts were lawful. Martin v. Bush, 199 N.C. 93, 154 S.E. 43 (1930).

When the defendant pleads in a verified answer that a contract, the subject of suit, for buying and selling cotton was void for being one for "futures," the burden of proof is upon the plaintiff to show that it was a lawful one, i.e., that actual delivery was intended by the parties, and not merely that either had the privilege of

calling therefor. Burns v. Tomlinson, 147 N.C. 645, 61 S.E. 614 (1908), decided under § 2146 of the Consolidated Statutes, which section was repealed by Public Laws 1931, c. 236.

Burden Not upon Administrator. — Where an administrator paid certain notes and it was later alleged by the legatees that the notes were given for a gambling contract which should not have been paid, it was held that former § 2146 did not apply so as to put the burden of proving that the notes were given for a valid contract upon the administrator. Overman v. Lanier, 157 N.C. 544, 73 S.E. 192 (1911), decided under § 2146 of the Consolidated Statutes, which section was repealed by Public Laws 1931, c. 236.

Evidence Sufficient. — The purchaser makes out a prima facie case upon evidence that the contract was founded upon a gambling or wagering consideration in violation of this section. West v. Satterfield, 190 N.C. 89, 129 S.E. 177 (1925), decided under § 2145 of the Consolidated Statutes, which section was repealed by Public Laws 1931, c. 236.

Where the plaintiff himself testified that he did not buy certain cotton in the ordinary course of his business as a cotton manufacturer for use in his mill, this was prima facie a "future contract." Burns v. Tomlinson, 147 N.C. 634, 61 S.E. 615 (1908), decided under § 2145 of the Consolidated Statutes, which section was repealed by Public Laws 1931, c. 236.

When Question for Jury. — Where the contract is not a gambling one on its face the underlying purpose and intent of the parties should be left to the jury. Harvey v. Pettaway, 156 N.C. 375, 72 S.E. 364 (1911).

Where there was evidence offered by the plaintiffs tending to show that they were wholesale dealers in cotton as a commodity, and that they purchased certain cotton as a commodity and sold it to manufacturers and exporters, and dealt in actual spot cotton and were in no wise dealers in futures, they were entitled to have this issue submitted to a jury. Eure v. Sabiston, 195 F. 721 (4th Cir. 1912).

Upon conflicting evidence as to whether or not the contract is a gambling contract, it becomes a question for the jury under proper instructions from the court. West v. Satterfield, 190 N.C. 89, 129 S.E. 177 (1925), decided under § 2146 of the Consolidated Statutes, which section was repealed by Public Laws 1931, c. 236.

Judgment by Default Void. — A judgment rendered by default of an answer upon notes regular and valid upon their face, but growing out of transactions in cotton futures made void by this section which also declares that actions thereon may not be maintained in the courts of this State, will be set aside as utterly void, irrespective of whether it was obtained through excusable neglect, etc. Randolph v. Heath, 171 N.C. 383, 88 S.E. 731 (1916).

Stated in Royster v. Hancock, 235 N.C. 110, 69 S.E.2d 29 (1952).

Cited in Meyer v. Fenner, 196 N.C. 476, 146 S.E. 82 (1929).

§ 16-4. Entering into or aiding contract for "futures" misdemeanor. — If any person shall become a party to any contract declared void in this Article; or if any person shall be the agent, directly or indirectly, of any party in making or furthering or effectuating the same; or if any agent or officer of a corporation shall in any manner knowingly aid in making or furthering any such contract to which the corporation is a party, he shall be guilty of a misdemeanor, and on conviction shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), and may be imprisoned in the discretion of the court.

If any person shall, while in this State, consent to become a party to any such contract made in another state, and if any person shall, as agent of any person or corporation, become a party to any such contract made in another state, or in this State do any act or in any way aid in the making or furthering of any such contract so made in another state, he shall be guilty of a misdemeanor, and on conviction shall be fined not less than fifty ($50.00) nor more than two hundred dollars ($200.00), and may be imprisoned in the discretion of the court. (1889, c. 221, ss. 3, 4; Rev., ss. 3823, 3824; C. S., s. 2147.)

This Section Is Constitutional. — Garseed v. Sternberger, 135 N.C. 501, 47 S.E. 603 (1904); State v. McGinnis, 138 N.C. 724, 51 S.E. 50 (1905); State v. Clayton, 138 N.C. 732, 50 S.E. 866 (1905); Rankin v. Mitchem, 141 N.C. 277, 53 S.E. 854 (1906); Randolph v. Heath, 171 N.C. 383, 88 S.E. 731 (1916).

§ 16-5. Opening office for sales of "futures" misdemeanor. — If any person, corporation or other association of persons, either as principal or agent, shall

establish or open an office or place of business in this State for the purpose of carrying on or engaging in making such contracts as are forbidden in this Article, he shall be guilty of a misdemeanor, and shall on conviction be fined and imprisoned in the discretion of the court. (1905, c. 538, ss. 1, 2; Rev., s. 3825; C. S., s. 2148.)

§ 16-6. Evidence in prosecutions under this Article. — No person shall be excused on any prosecution under the provisions of this Article from testifying touching anything done by himself or others contrary to the provisions thereof, but no discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done or participated in by him. In all such prosecutions proof that the defendant was a party to a contract, as agent or principal, to sell and deliver any article, thing or property specified or named in this Article, or that he was the agent, directly or indirectly, of any party in making, furthering or effectuating the same, or that he was the agent or officer of any corporation or association or person in making, furthering or effectuating the same, and that the article, thing or property agreed to be sold and delivered was not actually delivered, and that settlement was made or agreed to be made upon the difference in value of said article, thing or property, shall constitute against such defendant prima facie evidence of guilt. Proof that any person, corporation or other association of persons, either as principal or agent, has established an office or place where are posted or published from information received the fluctuating prices of grain, cotton, provisions, stocks, bonds and other commodities, or of any one or more of the same, shall constitute prima facie evidence of being guilty of violating the provisions of this Article. (1905, c. 538, ss. 3, 4, 5; Rev., s. 3826; C. S., s. 2149.)

Chapter 17.

Habeas Corpus.

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ARTICLE 1.

Constitutional Provisions.

§ 17-1. Remedy without delay for restraint of liberty. — Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed. (Const., art. 1, s. 18; Rev., s. 1819; C. S., s. 2203.)

Cross References. — As to costs in habeas corpus, see § 6-21, subdivision (3).

Definition. — The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. In pursuance to its command, the body of the

petitioner is brought before the court, that it may inquire into the legality of his detention. United States v. Ju Toy, 198 U.S. 253, 25 S. Ct. 644, 49 L. Ed. 1040 (1905).

Nature. — The writ of habeas corpus is a high prerogative writ, known to the common law, similar in nature to the writs of quo warranto, mandamus, certiorari and prohibition, and the proceedings thereunder are regarded as appellate in character, but it cannot be made to perform the office of a writ of error on appeal. Ex parte Virginia, 100 U.S. 339, 25 L. Ed. 676 (1879).

The proceeding is, in its nature, civil rather than criminal, legal rather than equitable, appellate rather than original, collateral rather than direct, and summary rather than cumbersome. Perrine v. Slack, 164 U.S. 452, 17 S. Ct. 79, 41 L. Ed. 510 (1896).

Object. — The object of the proceeding by a writ of habeas corpus is to inquire into the legality of the detention of the petitioner. United States v. McBratney, 104 U.S. 621, 26 L. Ed. 869 (1881).

Habeas corpus is high prerogative writ. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Waiver. — A defendant may waive the benefit of this article by express consent, failure to assert it in apt time or by conduct inconsistent with a purpose to insist upon it. State v. Parks, 290 N.C. 748, 228 S.E.2d 248 (1976).

§ 17-2. Habeas corpus not to be suspended. — The privileges of the writ of habeas corpus shall not be suspended. (Const., art. 1, s. 21; Rev., s. 1820; C. S., s. 2204.)

Cross Reference. — As to constitutional provision, see N.C. Const., Art. I, § 21.

Cannot Be Abrogated. — This section is an express provision, and there is no rule of construction or principle of constitutional law by which an express provision can be abrogated and made of no force by an implication from any other provision of the instrument. The clauses should be construed so as to give effect to each, and prevent conflict. This is done by giving to N.C. Const., Art. XII, § 1, the effect of allowing military possession of a county to be taken, and the arrest of all suspected persons to be made by military authority, but requiring, by force of N.C. Const., Art. I, § 21, the persons arrested to be surrendered for trial to the civil authorities, on habeas corpus, should they not be delivered over without the writ. Ex parte Moore, 64 N.C. appx., 802 (1870).

ARTICLE 2.

Application.

§ 17-3. Who may prosecute writ. — Every person imprisoned or restrained of his liberty within this State, for any criminal or supposed criminal matter, or on any pretense whatsoever, except in cases specified in § 17-4, may prosecute a writ of habeas corpus, according to the provisions of this Chapter, to inquire into the cause of such imprisonment or restraint, and, if illegal, to be delivered therefrom. (1868-9, c. 116, s. 1; Code, s. 1623; Rev., s. 1821; C. S., s. 2205.)

Court Is Not Permitted to Act as One of Errors and Appeals. — In habeas corpus proceedings, the court is not permitted to act as one of errors and appeals, but the right to afford relief, on such hearings, arises only when the petitioner is held unlawfully or on a sentence manifestly entered by the court without power to impose it. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Habeas corpus is not available as a substitute for appeal. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

The judgment must be void as distinguished from erroneous. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962); Brown v. North Carolina, 341 F.2d 87 (4th Cir. 1965).

As Where Court Had No Jurisdiction or Judgment Was Not Authorized by Law. — In habeas corpus proceedings, the court has jurisdiction to discharge petitioner only when the record discloses that the court which imprisoned him did not have jurisdiction of the offense or of the person of defendant, or that the judgment was not authorized by law. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Habeas corpus relief may be obtained only on determination that the court was imprisoned the petitioner did not have jurisdiction of the offense or of the prisoner, or that judgment was not authorized by law. Brown v. North Carolina, 341 F.2d 87 (4th Cir. 1965).

The sole question for determination at habeas corpus hearing for alleged unlawful imprisonment is whether petitioner is then being

unlawfully restrained of his liberty. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

The only questions open to inquiry are whether on the record the court which imposed the sentence had jurisdiction of the matter or had exceeded its powers. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

There must be actual confinement, or the present means of enforcing it, in order to justify the issuance of the writ of habeas corpus and granting a release therefrom. Wales v. Whitney, 114 U.S. 564, 5 S. Ct. 1050, 29 L. Ed. 277 (1885).

Where one is actually confined for a longer term of imprisonment than is legal, a writ of habeas corpus will issue to the end that a proper sentence may be imposed. State v. Green, 85 N.C. 600 (1881).

Voluntary Custody. — If the prisoner is in custody by his own voluntary act, the writ will not issue for his release. McElvaine v. Brush, 142 U.S. 155, 12 S. Ct. 156, 35 L. Ed. 971 (1891).

One Imprisoned for Contempt. — Where a defendant punished for direct contempt contends that a legal right has been denied him, and it is made to appear that the court was without jurisdiction of the cause or power to impose the sentence, his remedy is by habeas corpus proceedings, taken to the Supreme Court, if necessary, by writ of certiorari. State v. Little, 175 N.C. 743, 94 S.E. 680 (1917).

Relief of Soldier in Army. — A soldier actually and rightfully in the army can have no relief by the writ of habeas corpus against any abuse of military authority, and if he be wrongfully held as a soldier he is not entitled to a habeas corpus while he is undergoing punishment or awaiting trial for a military offense. Cox v. Gee, 60 N.C. 516 (1864).

Proceedings to obtain control of a minor child between persons with whom the child had been placed for adoption and welfare officers seeking to place the child with his family are not proceedings under this section, to set the infant free but are proceedings to fix and determine the right of custody. In re Thompson, 228 N.C. 74, 44 S.E.2d 475 (1947).

Prisoner under Illegal Sentence. — Where a defendant, charged with the crime of burglary with intent to commit murder, consented to a mistrial and pleaded "guilty of larceny," and was sentenced to imprisonment in the penitentiary, a writ of habeas corpus will issue, in order that he may be taken from the penitentiary and held to answer the charge in the court below. State v. Queen, 91 N.C. 659 (1884).

Denial of Due Process of Law. — A person convicted without due process of law may be discharged on habeas corpus. In re Frederich, 149 U.S. 70, 13 S. Ct. 793, 37 L. Ed. 653 (1893).

Cited in State v. Hamrick, 2 N.C. App. 227, 162 S.E.2d 567 (1968).

§ 17-4. When application denied. — Application to prosecute the writ shall be denied in the following cases:

(1) Where the persons are committed or detained by virtue of process issued by a court of the United States, or a judge thereof, in cases where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of suits in such courts.

(2) Where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree.

(3) Where any person has willfully neglected, for the space of two whole sessions after his imprisonment, to apply for the writ to the superior court of the county in which he may be imprisoned, such person shall not have a habeas corpus in vacation time for his enlargement.

(4) Where no probable ground for relief is shown in the application. (1868-9, c. 116, s. 2; Code, s. 1624; Rev., s. 1822; C. S., s. 2206; 1971, c. 528, s. 1.)

In construing the term, "final judgment or decree of a competent tribunal," it has come to be well understood that the exception refers only to judgments warranted by the law applicable to the case in hand, and where it appears from an inspection of the record proper and the judgment itself that the court had no jurisdiction of the cause and was manifestly without power to enter the judgment or impose the sentence in question, in such case there would be no final sentence of a competent tribunal, and the exception established by the statute does not obtain. State v. Queen, 91 N.C. 659 (1884); In re Holley, 154 N.C. 163, 69 S.E. 872 (1910).

Meaning of "Competent Jurisdiction". — The term, "competent jurisdiction," used by this section in making an exception to the power of this court to review a judgment in habeas corpus

proceedings, means that where a committed criminal is detained under a sentence not authorized by law, he is entitled to be heard, and where, though authorized in kind, it extends beyond what the law expressly permits, he may be relieved from further punishment after serving the lawful portion of the sentence; and a different construction would render the statute unconstitutional. In re Holley, 154 N.C. 163, 69 S.E. 872 (1910).

Presumption of Validity. — Proceedings before a court of competent jurisdiction will be presumed to be regular and valid, unless upon their face they plainly appear to be void; and when they do not so appear, they are not subject to review in habeas corpus proceedings. State v. Burnette, 173 N.C. 734, 91 S.E. 364 (1917).

Cannot Be Used as Writ of Error. — The writ of habeas corpus cannot be used in the nature of a writ of error. State v. Dunn, 159 N.C. 470, 74 S.E. 1014 (1912).

Habeas corpus is in the nature of a writ of error to the extent of examining into the legality of a person's detention, but it is not available as a means of reviewing and correcting mere errors as distinguished from defects of jurisdiction. State v. Edwards, 192 N.C. 321, 135 S.E. 37 (1926); In re Chase, 193 N.C. 450, 137 S.E. 305 (1927), cert. denied, 278 U.S. 600, 49 S. Ct. 9, 73 L. Ed. 529 (1928).

The writ of habeas corpus may not be used as a substitute for appeal. In re Smith, 218 N.C. 462, 11 S.E.2d 317 (1940).

Process by United States Judge. — The petitioner in habeas corpus proceedings adjudged in contempt of court shall, under the provisions of this section, be remanded when upon the hearing it is made to appear that he is held in custody by virtue of a process issued by a court or judge of the United States where such judge or court has exclusive jurisdiction. State v. Hooker, 183 N.C. 763, 111 S.E. 351 (1922).

An indictment returned by a grand jury is sufficient ground to detain a defendant for trial. State v. Murphy, 10 N.C. App. 11, 177 S.E.2d 917 (1970).

And the defendant is not entitled to his release in a habeas corpus proceeding. State v. Murphy, 10 N.C. App. 11, 177 S.E.2d 917 (1970).

Habeas corpus is inappropriate to test the validity of a trial which resulted in conviction and final judgment against petitioner, both by reason of established procedure and also by this section. In re Taylor, 229 N.C. 297, 49 S.E.2d 749 (1948).

Where one is imprisoned under the final process of a court of competent jurisdiction the writ of habeas corpus may not successfully be sued out since this section expressly forbids it. Ledford v. Emerson, 143 N.C. 527, 55 S.E. 969 (1906); In re Holley, 154 N.C. 163, 69 S.E. 872 (1910); Howie v. Spittle, 156 N.C. 180, 72 S.E. 207 (1911).

In a proceeding wherein there was no question of the superior court having jurisdiction of the offense and of the person of the defendant, and the power to render the judgment imposed, the defendant was not entitled to relief by habeas corpus on the ground that the record failed to show that a verdict was rendered in the case or that he had entered any plea, since any omissions in the minutes of the court with respect to procedure followed during the course of trial could be amended by the court. State v. Cannon, 244 N.C. 399, 94 S.E.2d 339 (1956).

Reason for Rule. — Without reference to the positive prohibition of this section, it is otherwise clear that the power cannot extend to cases where the person is confined on final process. For if so, this unseemly and discordant result would follow, that one superior court judge might try and sentence a person to death or the penitentiary, and another might issue the writ of habeas corpus and discharge the prisoner. Results so disgraceful and destructive to the orderly and harmonious administration of justice were never contemplated by the framers of our judicial system; on the contrary, they were carefully guarded against, both by the Constitution and legislation. In re Schenck, 74 N.C. 607 (1876).

Where Sentence Erroneous. — The application must be refused, even where it appears that the applicant is imprisoned in the State's prison, and the sentence of the court is erroneous, and the applicant, in default of appeal, must be left to his remedy by writ of certiorari when he is detained by virtue of a final judgment of a court of competent jurisdiction. In re Schenck, 74 N.C. 607 (1876).

Administrative Discretion. — The difficult problems of when a person should be released and under what circumstances turn on analysis of internal correctional policy, and rightfully lie within the sole administrative jurisdiction of State governmental departments, and are not, barring a clear instance of constitutional infirmity, subjects appropriate for judicial scrutiny. In re Imprisonment of Stevens, 28 N.C. App. 471, 221 S.E.2d 839 (1976).

In practical terms, the questions of grade of conduct, privileges, disciplinary action and commendations are strictly administrative and not judicial matters. In re Imprisonment of Stevens, 28 N.C. App. 471, 221 S.E.2d 839 (1976).

Prior Writ of Habeas Corpus. — See In re Adams, 218 N.C. 379, 11 S.E.2d 163 (1940).

Examples. — Where the petitioner in habeas corpus proceedings directed to a superior court judge has previously been convicted in that court of an offense of which it had jurisdiction, and accordingly sentenced to imprisonment under a final order, the judgment imports verity, and evidence to collaterally impeach it is incompetent, and the application to prosecute the writ will be denied. In re Croom, 175 N.C. 455, 95 S.E. 903 (1918).

An indictment and judgment against the prisoner for an illegal sale of spirituous liquors alleged to have been based upon illegal evidence authorized by an unconstitutional statute, may not be passed upon in habeas corpus proceedings, for such would be to permit one superior court judge to examine into the proceedings before another judge, upon parol evidence, and review his action. State v. Dunn, 159 N.C. 470, 74 S.E. 1014 (1912).

Applied in In re Renfrow, 247 N.C. 55, 100 S.E.2d 315 (1957).

Quoted in In re Harris, 241 N.C. 179, 84 S.E.2d 808 (1954).

Cited in Dantzic v. State, 279 N.C. 212, 182 S.E.2d 563 (1971).

§ 17-5. By whom application is made. — Application for the writ may be made either by the party for whose relief it is intended or by any person in his behalf. (1868-9, c. 116, s. 3; Code, s. 1625; Rev., s. 1823; C. S., s. 2207.)

Application May Be Withdrawn. — One who has petitioned for a writ of habeas corpus may withdraw his application whenever he chooses. State v. Wiley, 64 N.C. appx., 821 (1870).

Quoted in In re Thomas, 290 N.C. 410, 226 S.E.2d 371 (1976).

§ 17-6. To judge of appellate division or superior court in writing. — Application for the writ shall be made in writing, signed by the applicant —

(1) To any one of the justices or judges of the appellate division.

(2) To any one of the superior court judges, either during a session or in vacation. (1868-9, c. 116, s. 4; Code, s. 1626; Rev., s. 1824; C. S., s. 2208; 1969, c. 44, s. 41; 1971, c. 528, s. 2.)

Cross Reference. — As to jurisdiction of special or emergency judges of the superior court, see §§ 7A-45, 7A-48.

In General. — The Constitution required the legislature to furnish an adequate remedy, and when it was declared that all such persons should have the right to "prosecute a writ of habeas corpus," it followed ex vi termini, that they were entitled to demand this remedy before any judge of any court of general jurisdiction in this country. The power of all judges to grant it was conceded before the Magna Charta, and was only reaffirmed, like many other cardinal principles, in that instrument and those that followed reaffirming it. Harkins v. Cathey, 119 N.C. 649, 26 S.E. 136 (1896).

Concurrent Jurisdiction in State and Federal Courts. — On habeas corpus, the state courts have concurrent jurisdiction with the federal courts of all cases of imprisonment within their territorial jurisdiction, except in the case where the petitioner is in custody under the authority, or claim of authority, of the United States. Robb v. Connolly, 111 U.S. 624, 4 S. Ct. 544, 28 L. Ed. 542 (1884).

The federal and state courts have concurrent jurisdiction to inquire into the legality of detention under a governor's warrant in interstate extradition cases. United States v. Jung Ah Lung, 124 U.S. 621, 8 S. Ct. 663, 31 L. Ed. 591 (1888).

Source from Which Authority of State Judges Emanates. — It is to be observed that the authority of the state judges in cases of habeas corpus emanates from the several states, and not from the United States. In order to destroy their jurisdiction, therefore, it is necessary to show, not that the United States has given them jurisdiction, but that Congress possesses and has exercised the power of taking away that jurisdiction which the states have vested in their own judges. In re Bryan, 60 N.C. 1 (1863).

Jurisdiction of Courts. — The courts of this State, as well as the individual judges, have jurisdiction to issue writs of habeas corpus, returnable to them in term time, and as a court. In re Bryan, 60 N.C. 1 (1863).

Judges Mentioned Have Equal Powers. — A single judge of the Supreme Court has the same and no other jurisdiction to issue the writ than a judge of the superior court, and the same limitation of power to issue the writ in certain cases extends equally to the two classes of judges. In re Schenck, 74 N.C. 607 (1876).

Extent of Jurisdiction. — The habeas corpus jurisdiction of every court, and of every judge, extends to every possible case of privation of liberty to the national Constitution, treaties and laws. In re Burrus, 136 U.S. 586, 10 S. Ct. 850, 34 L. Ed. 500 (1890).

Obtaining Jurisdiction. — Presenting a petition to a judge for a writ of habeas corpus gives him jurisdiction of the subject. State v. Edney, 60 N.C. 463 (1864).

Section 1-76 et seq., concerning venue, all refer to "actions" and have no application to habeas corpus proceedings. McEachern v. McEachern, 210 N.C. 98, 185 S.E. 684 (1936).

Before Whom Writ Made Returnable. — The

judge issuing the writ may make it returnable before himself, or, for convenience, before any other judge. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

The particular judge before whom the writ is returnable need not be either the resident or presiding judge of any particular term of court. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Discretionary Power of Judge as to Place Writ Is Returnable Not Reviewed in Absence of Abuse. — Since any judge of the superior court or justice of the Supreme Court has the power to issue a writ of habeas corpus at any time or any place, he has the discretionary power to make the writ returnable at such place as he may determine, which discretion will not be reviewed in the absence of a showing of abuse or failure to afford full opportunity to be heard, and therefore an exception to the refusal of a motion for change of venue of habeas corpus proceedings cannot be sustained. McEachern v. McEachern, 210 N.C. 98, 185 S.E. 684 (1936).

Applied in In re Custody of Cox, 24 N.C. App. 99, 210 S.E.2d 223 (1974).

§ 17-7. Contents of application. — The application must state, in substance, as follows:

(1) That the party, in whose behalf the writ is applied for, is imprisoned or restrained of his liberty, the place where, and the officer or person by whom he is imprisoned or restrained, naming both parties, if their names are known, or describing them if they are not known.

(2) The cause or pretense of such imprisonment or restraint, according to the knowledge or belief of the applicant.

(3) If the imprisonment is by virtue of any warrant or other process, a copy thereof shall be annexed, or it shall be made to appear that a copy thereof has been demanded and refused, or that for some sufficient reason a demand for such copy could not be made.

(4) If the imprisonment or restraint is alleged to be illegal, the application must state in what the alleged illegality consists; and that the legality of the imprisonment or restraint has not been already adjudged, upon a prior writ of habeas corpus, to the knowledge or belief of the applicant.

(5) The facts set forth in the application must be verified by the oath of the applicant, or by that of some other credible witness, which oath may be administered by any person authorized by law to take affidavits. (1868-9, c. 116, s. 5; Code, s. 1627; Rev., s. 1825; C. S., s. 2209.)

Waiver of Errors. — The parties may waive all errors and dispense with all forms in the proceedings on the petition. State v. Edney, 60 N.C. 463 (1864).

Necessary Allegation. — A petition for habeas corpus must allege that the imprisonment has not been already adjudged upon a prior writ of habeas corpus. In re Brittain, 93 N.C. 587 (1885).

Where Other Remedies Exist. — The writ of habeas corpus will be refused where the prisoner can be otherwise discharged. In re Belt, 159 U.S. 95, 15 S. Ct. 987, 40 L. Ed. 88 (1895).

Prior Writ of Habeas Corpus. — See In re Adams, 218 N.C. 379, 11 S.E.2d 163 (1940).

Noncompliance. — Where a defendant had not been tried when his writ of habeas corpus was filed, and he did not assert in the petition that the legality of his restraint had not been already adjudged upon a prior writ of habeas corpus, he did not comply with the provisions of this section, relating to the contents of a petition for the writ of habeas corpus. State v. Murphy, 10 N.C. App. 11, 177 S.E.2d 917 (1970).

Stated in State v. Green, 2 N.C. App. 391, 163 S.E.2d 14 (1968).

§ 17-8. Issuance of writ without application. — When the appellate division or superior court division, or any judge of either division, has evidence from any judicial proceeding before such court or judge that any person within this State is illegally imprisoned or restrained of his liberty, it is the duty of said court or judge to issue a writ of habeas corpus for his relief, although no application be made for such writ. (1868-9, c. 116, s. 10; Code, s. 1632; Rev., s. 1826; C. S., s. 2210; 1969, c. 44, s. 42.)

When Illegal Imprisonment Appears. — If a case comes before the Supreme Court by appeal, or by certiorari, and upon the trial it appears that the prisoner was suffering an illegal confinement in the penitentiary, it would be the duty of that court, by virtue of its supervisory power, and of this section, enacted to carry into effect this constitutional power of the Supreme Court, to issue the writ of habeas corpus, even of its own motion, and discharge the prisoner. In re Schenck, 74 N.C. 607 (1876).

ARTICLE 3.

Writ.

§ 17-9. Writ granted without delay. — Any court or judge empowered to grant the writ, to whom such applications may be presented, shall grant the writ without delay, unless it appear from the application itself or from the documents annexed that the person applying or for whose benefit it is intended is, by this Chapter, prohibited from prosecuting the writ. (1868-9, c. 116, s. 6; Code, s. 1628; Rev., s. 1827; C. S., s. 2211.)

Cross Reference. — As to when application shall be denied, see § 17-4.

Duty of Court to Issue. — There can be no doubt of the duty and power of the court to issue the writ of habeas corpus when applied for in accordance with statutory provisions. In re Boyett, 136 N.C. 415, 48 S.E. 789 (1904).

§ 17-10. Penalty for refusal to grant. — If any judge authorized by this Chapter to grant writs of habeas corpus refuses to grant such writ when legally applied for, every such judge shall forfeit to the party aggrieved two thousand five hundred dollars ($2,500). (1868-9, c. 116, s. 9; Code, s. 1631; Rev., s. 1828; C. S., s. 2212.)

The writ of habeas corpus always issues when legally applied for, because this section subjects a judge who refuses to entertain the petition to a penalty of $2,500. In re Croom, 175 N.C. 455, 95 S.E. 903 (1918).

Cited in McEachern v. McEachern, 210 N.C. 98, 185 S.E. 684 (1936).

§ 17-11. Sufficiency of writ; defects of form immaterial. — No writ of habeas corpus shall be disobeyed on account of any defect of form. It shall be sufficient —

(1) If the person having the custody of the party imprisoned or restrained be designated either by his name of office, if he have any, or by his own name, or, if both such names be unknown or uncertain, he may be described by an assumed appellation, and anyone who may be served with the writ shall be deemed the person to whom it is directed, although it may be directed to him by a wrong name, or description, or to another person.

(2) If the person who is directed to be produced be designated by name, or if his name be uncertain or unknown, he may be described by an assumed appellation or in any other way, so as to designate the person intended. (1868-9, c. 116, ss. 7, 8; Code, ss. 1629, 1630; Rev., s. 1829; C. S., s. 2213.)

§ 17-12. Service of writ. — The writ of habeas corpus may be served by any qualified elector of this State thereto authorized by the court or judge allowing the same. It may be served by delivering the writ, or a copy thereof, to the person to whom it is directed; or, if such person cannot be found, by leaving it, or a copy, at the jail, or other place in which the party for whose relief it is intended is confined, with some under officer or other person of proper age; or, if none such can be found, or if the person attempting to serve the writ be refused

admittance, by affixing a copy thereof in some conspicuous place on the outside, either of the dwelling house of the party to whom the writ is directed or of the place where the party is confined for whose relief it is sued out. (1868-9, c. 116, s. 32; Code, s. 1657; Rev., s. 1833; C. S., s. 2214.)

To Whom Issued. — The writ should be issued to the person who has the immediate custody of the petitioner with the power to produce the body of such party before the court or judge. Wales v. Whitney, 114 U.S. 564, 5 S. Ct. 1050, 29 L. Ed. 277 (1885).

ARTICLE 4.

Return.

§ 17-13. When writ returnable. — Writs of habeas corpus may be made returnable at a certain time, or forthwith, as the case may require. If the writ be returnable at a certain time, such return shall be made and the party shall be produced at the time and place specified therein. (1868-9, c. 116, s. 31; Code, s. 1656; Rev., s. 1830; C. S., s. 2215.)

§ 17-14. Contents of return; verification. — The person or officer on whom the writ is served must make a return thereto in writing, and, except where such person is a sworn public officer and makes his return in his official capacity, it must be verified by his oath. The return must state plainly and unequivocally —

(1) Whether he has or has not the party in his custody or under his power or restraint.

(2) If he has the party in his custody or power, or under his restraint, the authority and the cause of such imprisonment or restraint, setting forth the same at large.

(3) If the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof shall be annexed to the return; and the original shall be produced and exhibited on the return of the writ to the court or judge before whom the same is returnable.

(4) If the person or officer upon whom such writ is served has had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause and by what authority such transfer took place. (1868-9, c. 116, s. 11; Code, s. 1633; Rev., s. 1831; C. S., s. 2216.)

§ 17-15. Production of body if required. — If the writ requires it, the officer or person on whom the same has been served shall also produce the body of the party in his custody or power, according to the command of the writ, except in the case of the sickness of such party, as hereinafter provided. (1868-9, c. 116, s. 14; Code, s. 1636; Rev., s. 1832; C. S., s. 2217.)

ARTICLE 5.

Enforcement of Writ.

§ 17-16. Attachment for failure to obey. — If the person or officer on whom any writ of habeas corpus has been duly served refuses or neglects to obey the same, by producing the body of the party named or described therein, and by making a full and explicit return thereto, within the time required, and no sufficient excuse is shown for such refusal or neglect, it is the duty of the court or judge before whom the writ has been made returnable, upon due proof of the service thereof, forthwith to issue an attachment against such person or officer, directed to the sheriff of any county within this State, and commanding

him forthwith to apprehend such person or officer and bring him immediately before such court or judge. On being so brought such person or officer shall be committed to close custody in the jail of the county where such court or judge may be, without being allowed the liberties thereof, until such person or officer make return to such writ and comply with any order that may be made by such court or judge in relation to the party for whose relief the writ has been issued. (1868-9, c. 116, s. 15; Code, s. 1637; Rev., s. 1834; C. S., s. 2218.)

In General. — The attachment warranted by this section does not rest on the idea of punishing for a contempt of the judge, or court, but of compelling a return to the writ and a production of a body. It is a substitute for the provision in the old Habeas Corpus Act, which punished the officer or person refusing or neglecting to make due return, "upon conviction by indictment," with a fine of $500 for the first offense, and of $1,000, and incapacity to hold office, for the second. Ex parte Moore, 64 N.C. appx., 802 (1870). See also Ex parte Kerr, 64 N.C. appx., 816 (1870).

No Power to Arrest Governor. — Under the Habeas Corpus Act, a judge has no power to order the arrest of the Governor of the State. Ex parte Moore, 64 N.C. appx., 802 (1870).

Excuse for Refusal to Make Return. — Where a military officer detaining persons arrested in counties declared by the Governor to be in a state of insurrection, answered to a writ of habeas corpus, that he held them under the orders of the Governor, who had also ordered him not to obey the writ, it was held that such return was a sufficient excuse, under this section, and, therefore, that such officer was not liable to be attached. Ex parte Moore, 64 N.C. appx., 802 (1870).

§ 17-17. Liability of judge refusing attachment. — If any judge willfully refuses to grant the writ of attachment, as provided for in § 17-16, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars ($2,500). (1870-1, c. 221, s. 2; Code, s. 1638; Rev., s. 1835; C. S., 2219.)

§ 17-18. Attachment against sheriff to be directed to coroner; procedure. — If a sheriff has neglected to return the writ agreeably to the command thereof, the attachment against him may be directed to the coroner or to any other person to be designated therein, who shall have power to execute the same, and such sheriff, upon being brought up, may be committed to the jail of any county other than his own. (1868-9, c. 116, s. 16; Code, s. 1639; Rev., s. 1836; C. S., s. 2220.)

Cross Reference. — As to requirement of coroner to act for sheriff in certain cases, see § 152-8.

§ 17-19. Precept to bring up party detained. — The court or judge by whom any such attachment may be issued may also at the same time, or afterwards, direct a precept to any sheriff, coroner, or other person to be designated therein, commanding him to bring forthwith before such court or judge the party, wherever to be found, for whose benefit the writ of habeas corpus has been granted. (1868-9, c. 116, s. 17; Code, s. 1640; Rev., s. 1837; C. S., s. 2221.)

§ 17-20. Liability of judge refusing precept. — If any judge refuses to grant the precept provided for in § 17-19, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars ($2,500). (1870-1, c. 221, s. 3; Code, s. 1641; Rev., s. 1838; C. S., s. 2222.)

§ 17-21. Liability of judge conniving at insufficient return. — If any judge grants the attachment, or the precept, and gives the officer or other person charged with the execution of the same verbal or written instructions not to execute the same, or to make any evasive or insufficient return, or any return other than that provided by law; or shall connive at the failing to make any return or any evasive or insufficient return, or any return other than that

provided by law, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars ($2,500). (1870-1, c. 221, s. 4; Code, s. 1642; Rev., s. 1839; C. S., s. 2223.)

§ 17-22. Power of county to aid service. — In the execution of any such attachment, precept or writ, the sheriff, coroner, or other person to whom it may be directed, may call to his aid the power of the county, as in other cases. (1868-9, c. 116, s. 18; Code, s. 1643; Rev., s. 1840; C. S., s. 2224.)

Editor's Note. — The posse comitatus is discussed in Worth v. Commissioners of Craven County, 118 N.C. 112, 24 S.E. 778 (1896).

Means "Men of the County". — The power of the county, or "posse comitatus," means the men of the county in which the writ is to be executed. Ex parte Moore, 64 N.C. appx., 802 (1870).

§ 17-23. Obedience to order of discharge compelled. — Obedience to a judgment or order for the discharge of a prisoner or person restrained of his liberty, pursuant to the provisions of this Chapter, may be enforced by the court or judge by attachment in the same manner and with the same effect as for a neglect to make return to a writ of habeas corpus; and the person found guilty of such disobedience shall forfeit to the party aggrieved two thousand five hundred dollars ($2,500), besides any special damages which such party may have sustained. (1868-9, c. 116, s. 24; Code, s. 1649; Rev., s. 1841; C. S., 2225.)

§ 17-24. No civil liability for obedience. — No officer or other person shall be liable to any civil action for obeying a judgment or order of discharge upon writ of habeas corpus. (1868-9, c. 116, s. 25; Code, s. 1650; Rev., s. 1842; C. S., s. 2226.)

§ 17-25. Recommittal after discharge; penalty. — If any person shall knowingly again imprison or detain one who has been set at large upon any writ of habeas corpus, for the same cause, other than by the legal process or order of the court wherein he is bound by recognizance to appear, or of any other court having jurisdiction in the case, he shall be guilty of a misdemeanor. (1868-9, c. 116, s. 26; Code, s. 1651; Rev., s. 3581; C. S., s. 2227.)

Cross Reference. — See also § 17-38 and the note thereto.

When Rearrest Valid. — A party, set at large by writ of habeas corpus, upon the ground that the judgment of imprisonment was void for want of jurisdiction in the court, may be again arrested for the same cause upon legal process of a court having jurisdiction. State ex rel. Barbee v. Weatherspoon, 88 N.C. 19 (1883).

§ 17-26. Disobedience to writ or refusing copy of process; penalty. — If any person to whom a writ of habeas corpus is directed shall neglect or refuse to make due return thereto, or to bring the body of the party detained according to the command of the writ without delay, or shall not, within six hours after demand made therefor, deliver a copy of the commitment or cause of detainer, such person shall, upon conviction on indictment, be fined one thousand dollars ($1,000), or imprisoned not exceeding 12 months, and if such person be an officer, shall moreover be removed from office. (1868-9, c. 116, s. 27; Code, s. 1652; Rev., s. 3597; C. S., s. 2228.)

§ 17-27. Penalty for false return. — If any person shall make a false return to a writ of habeas corpus, he shall be guilty of a misdemeanor. (1868-9, c. 116, s. 28; Code, s. 1653; Rev., s. 3582; C. S., s. 2229.)

§ 17-28. Penalty for concealing party entitled to writ. — If anyone having in his custody, or under his power, any party who, by law, would be entitled to a writ of habeas corpus, or for whose relief such writ shall have been issued,

shall, with intent to elude the service of such writ, or to avoid the effect thereof, transfer the party to the custody, or put him under the power or control, of another, or shall conceal or change the place of his confinement, or shall knowingly aid or abet another in so doing, he shall be guilty of a misdemeanor. (1868-9, c. 116, ss. 29, 30; Code, ss. 1654, 1655; Rev., s. 3583; C. S., s. 2230.)

Article 6.

Proceedings and Judgment.

§ 17-29. Notice to interested parties. — When it appears from the return to the writ that the party named therein is in custody on any process, or by reason of any claim of right, under which any other person has an interest in continuing his imprisonment or restraint, no order shall be made for his discharge until it appears that the person so interested, or his attorney, if he have one, has had reasonable notice of the time and place at which such writ is returnable. (1868-9, c. 116, s. 12; 1870-1, c. 221, s. 1; Code, s. 1634; Rev., s. 1843; C. S., s. 2231.)

§ 17-30. Notice to district attorney. — When it appears from the return that such party is detained upon any criminal accusation, the court or judge may, if he thinks proper, make no order for the discharge of such party until sufficient notice of the time and place at which the writ has been returned, or is made returnable, is given to the district attorney of the district in which the person prosecuting the writ is detained. (1868-9, c. 116, s. 13; Code, s. 1635; Rev., s. 1844; C. S., s. 2232; 1973, c. 47, s. 2.)

Hearing May Be Continued. — If it appears from the return on a writ of habeas corpus that the petitioner is detained on a criminal charge, the court may continue the hearing for a reasonable time to give the solicitor (now district attorney) an opportunity to examine into the case. State v. Jones, 113 N.C. 669, 18 S.E. 249 (1893).

§ 17-31. Subpoenas to witnesses. — Any party to a proceeding on a writ of habeas corpus may procure the attendance of witnesses at the hearing, by subpoena, to be issued by the clerk of any superior court, under the same rules, regulations and penalties prescribed by law in other cases. (1868-9, c. 116, s. 34; Code, s. 1659; Rev., s. 1845; C. S., s. 2233.)

Cross Reference. — As to issuance of subpoenas, see §§ 7A-103, 8-59.

§ 17-32. Proceedings on return; facts examined; summary hearing of issues. — The court or judge before whom the party is brought on a writ of habeas corpus shall, immediately after the return thereof, examine into the facts contained in such return, and into the cause of the confinement or restraint of such party, whether the same has been upon commitment for any criminal or supposed criminal matter or not; and if issue be taken upon the material facts in the return, or other facts are alleged to show that the imprisonment or detention is illegal, or that the party imprisoned is entitled to his discharge, the court or judge shall proceed, in a summary way, to hear the allegations and proofs on both sides, and to do what to justice appertains in delivering, bailing or remanding such party. (1868-9, c. 116, s. 19; Code, s. 1644; Rev., s. 1846; C. S., s. 2234.)

Proceedings Must Be Summary. — Proceedings under the writ of habeas corpus, which have for their principal object a release of a party from illegal restraint, must necessarily be summary and prompt to be useful, and if an action could be arrested by an appeal, they

would lose many of their most beneficial results. State v. Miller, 97 N.C. 451, 1 S.E. 776 (1887).

Hearing Not Perfunctory. — The words of the section preclude the idea that such hearing shall be perfunctory and merely formal. In re Bailey, 203 N.C. 362, 166 S.E. 165 (1932).

Hearing Confined to Record. — The hearing is confined to the record and judgment, and relief may be afforded only when on the record itself the judgment is one clearly and manifestly beyond the power of the court, a statement of the doctrine supported in numerous and authoritative decisions here and elsewhere. In re Schenck, 74 N.C. 607 (1876); Ex parte McCown, 139 N.C. 95, 51 S.E. 957 (1905); In re Croom, 175 N.C. 455, 95 S.E. 903 (1918); In re Coy, 127 U.S. 731, 8 S. Ct. 1263, 32 L. Ed. 274 (1888); In re Swan, 150 U.S. 637, 14 S. Ct. 225, 37 L. Ed. 1207 (1893).

Questions Open to Inquiry. — Where the petitioner in habeas corpus proceedings is held under a final sentence of a court, a commitment of contempt or other, the only questions open to inquiry at the hearing are whether on the record the court had jurisdiction of the matter and whether on the facts disclosed in the record and under the law applicable to the case in hand, the court has exceeded its powers in imposing the sentence whereof the petitioner complains. State v. Hooker, 183 N.C. 763, 111 S.E. 351 (1922).

Evidence Not Reviewable. — As was held in State v. Dunn, 159 N.C. 470, 74 S.E. 1014 (1912), the Supreme Court cannot review the evidence or other matters in a criminal case in habeas corpus proceedings, but only the jurisdiction of the court and the validity of the judgment which is attacked. State v. Burnette, 173 N.C. 734, 91 S.E. 364 (1917).

Discretion of Judge. — The quantum of evidence and the number of witnesses to be examined must necessarily be left also to the sound discretion of the judge who hears the writ, and his action in that regard cannot be reviewed. State v. Herndon, 107 N.C. 934, 12 S.E. 268 (1890). See also In re Bailey, 203 N.C. 362, 166 S.E. 165 (1932).

Presumption of Innocence and Burden of Proof. — The presumption of innocence applies only on a trial, and does not avail to furnish a presumption that the detention of a party on regular process, when the committing officer has jurisdiction, is illegal; therefore, where, upon the return of a sheriff to a writ of habeas corpus, it appeared that the petitioners were in custody on a mittimus, regular in every way, from a justice of the peace, for failure to give bond for their appearances at the next term of the superior court to answer a criminal charge of which the court had jurisdiction, the detention, nothing else appearing, was clearly legal, and the burden was upon the petitioner to show wherein it was illegal, and not upon the State to show that they were lawfully in custody. State v. Jones, 113 N.C. 669, 18 S.E. 249 (1893).

No Appeal Lies. — Appeal to the Supreme Court will not lie from the refusal of a superior court judge to discharge the defendant from custody in proceedings in habeas corpus, the remedy being by a petition for a writ of certiorari which is addressed to the sound discretion of the Supreme Court. State v. Burnette, 173 N.C. 734, 91 S.E. 364 (1917); In re Croom, 175 N.C. 455, 95 S.E. 903 (1918).

Question of Insanity Determined. — When the petitioner in habeas corpus has been adjudged insane and her detention is ordered by a court of lunacy of another state, the judge of the superior court in this State by whom the proceedings of habeas corpus are heard should determine the validity of the order of the adjudication of insanity when the same is properly presented to him, and this is the determinative question involved, and upon failure to have done so the case will be remanded. In re Chase, 193 N.C. 450, 137 S.E. 305 (1927), cert. denied, 278 U.S. 600, 49 S. Ct. 9, 73 L. Ed. 529 (1928).

Constitutional Provision. — In habeas corpus proceedings wherein upon the hearing are involved questions of law or legal inference, and judgment is a denial of a legal right, it may be reviewed by the Supreme Court by virtue of the N.C. Const., Art. IV, § 12, under the power given to the court to "issue any remedial writs necessary to give it general supervision and control over the proceedings of inferior courts." In re Holley, 154 N.C. 163, 69 S.E. 872 (1910).

Petitioner Serving Sentence under Void Judgment Is Entitled to Immediate Release. — Where upon habeas corpus it appears that petitioner is serving a sentence under a void judgment, petitioner is entitled to his immediate release. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Release of Person Committed to State Mental Institution. — A person committed to a State mental institution under Chapter 122 may not invoke the provisions of § 35-4 for a determination of the restoration of sanity by a jury trial as a condition precedent to his release, the proper remedy being by habeas corpus under this section. In re Harris, 241 N.C. 179, 84 S.E.2d 808 (1954).

Writ of Certiorari Proper Remedy. — Where it appears that, upon the return of the writ, the judge declined to hear evidence or investigate the charge, the writ of certiorari should issue. Walton v. Gatlin, 60 N.C. 310 (1864); Ex parte Biggs, 64 N.C. 202 (1870); State v. Jefferson, 66 N.C. 309 (1872); State v. Herndon, 107 N.C. 934, 12 S.E. 268 (1890).

The remedy given under the constitutional power conferred upon the Supreme Court to review a judgment in habeas corpus proceedings in matters not involving the care and custody of children, N.C. Const., Art. IV, § 12, shall only be

exercised by certiorari. In re Holley, 154 N.C. 163, 69 S.E. 872 (1910).

When Writ of Certiorari Denied. — A petition for certiorari in the Supreme Court will be denied in habeas corpus proceedings when it appears therefrom that the prisoner is not entitled to his discharge. In re Croom, 175 N.C. 455, 95 S.E. 903 (1918).

If the judge, upon the investigation of the evidence on a petition for habeas corpus, adjudges that there is or is not probable cause, and admits or refuses to admit to bail, no appeal or certiorari lies, either in favor of the State or the petitioner. Walton v. Gatlin, 60 N.C. 310 (1864); State v. Miller, 97 N.C. 451, 1 S.E. 776 (1887); State v. Herndon, 107 N.C. 934, 12 S.E. 268 (1890).

In habeas corpus proceedings, where it appears from the application for certiorari in the Supreme Court, or the documents annexed thereto, that the petition is determined under a final judgment of a competent tribunal, the writ will be denied in the Supreme Court. In re Holley, 154 N.C. 163, 69 S.E. 872 (1910).

Proceeding Where Judgment Reversed. — If, upon certiorari, the court reverses and sets aside the judgment of the court below, and the proceedings are remanded, no procedendo issues to any particular judge, but the petitioner can exercise his statutory right to apply, de novo, to any judge authorized to grant the writ of habeas corpus. State v. Herndon, 107 N.C. 934, 12 S.E. 268 (1890).

Judicial Review of Questions of Law. — In deciding questions which arise under writs of habeas corpus the judiciary may review and control the action of the Governor in regard to points of law; but cannot interfere with such action in regard to any matter within the discretion of the Governor. In re Hughes, 61 N.C. 57 (1867).

§ 17-33. When party discharged. — If no legal cause is shown for such imprisonment or restraint, or for the continuance thereof, the court or judge shall discharge the party from the custody or restraint under which he is held. But if it appears on the return to the writ that the party is in custody by virtue of civil process from any court legally constituted, or issued by any officer in the course of judicial proceedings before him, authorized by law, such party can be discharged only in one of the following cases:

(1) Where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person.

(2) Where, though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged.

(3) Where the process is defective in some matter of substance required by law, rendering such process void.

(4) Where the process, though in proper form, has been issued in a case not allowed by law.

(5) Where the person, having the custody of the party under such process, is not the person empowered by law to detain him.

(6) Where the process is not authorized by any judgment, order or decree of any court, nor by any provision of law. (1868-9, c. 116, s. 20; Code, s. 1645; Rev., s. 1847; C. S., s. 2235.)

Cross Reference. — See also note to § 17-32.

Administrative Discretion. — Where defendant, a youthful offender, was unsatisfied with an essentially administrative determination whereby his correctional status was affected adversely, diminishing his prospect for an early release, standing by itself, raises no habeas corpus question. In re Imprisonment of Stevens, 28 N.C. App. 471, 221 S.E.2d 839 (1976).

In practical terms, the questions of grade of conduct, privileges, disciplinary action and commendations are strictly administrative and not judicial matters. In re Imprisonment of Stevens, 28 N.C. App. 471, 221 S.E.2d 839 (1976).

The difficult problems of when a person should be released and under what circumstances turn on analysis of internal correctional policy, and rightfully lie within the sole administrative jurisdiction of State governmental departments, and are not, barring a clear instance of constitutional infirmity, subjects appropriate for judicial scrutiny. In re Imprisonment of Stevens, 28 N.C. App. 471, 221 S.E.2d 839 (1976).

Imprisonment for Contempt. — It was held in Ex parte Summers, 27 N.C. 149 (1844), that in a case of imprisonment for contempt, where the court states the facts upon which it proceeds, a reviewing tribunal may, on a habeas corpus, discharge the party if it appears plainly that the facts do not amount to a contempt. State v. Queen, 91 N.C. 659 (1884).

Sentence Partly Void. — Where a prisoner is detained by virtue of a sentence in part valid and part otherwise, he may not be liberated on habeas corpus until he shall have served the valid portion of his sentence, and he shall be remanded when it appears that the time during which he may legally be detained has not expired. State v. Hooker, 183 N.C. 763, 111 S.E. 351 (1922).

State Cannot Appeal. — The State cannot appeal from an order in habeas corpus proceedings discharging from imprisonment one convicted of crime. Proceedings in habeas corpus, the object of which is to release a person from illegal restraint, must necessarily be summary to be useful, and if action could be arrested by an appeal upon the part of the State, the great writ of liberty would be deprived of its most beneficial results. State v. Miller, 97 N.C. 451, 1 S.E. 776 (1887); In re Williams, 149 N.C. 436, 63 S.E. 108 (1908).

The recovery from a mental disease after commitment to an institution would seem to be an event "which has taken place afterwards," within the meaning of subdivision (2) of this section, entitling an inmate to discharge under § 17-32. In re Harris, 241 N.C. 179, 84 S.E.2d 808 (1954).

§ 17-34. When party remanded. — It is the duty of the court or judge forthwith to remand the party, if it appears that he is detained in custody, either —

(1) By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction.

(2) By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree.

(3) For any contempt specially and plainly charged in the commitment by some court, officer or body having authority to commit for the contempt so charged.

(4) That the time during which such party may be legally detained has not expired. (1868-9, c. 116, s. 21; Code, s. 1646; Rev., s. 1848; C. S., s. 2236.)

Cross Reference. — See also § 17-4, when application for writ shall be denied.

Judgment Imports Verity. — A judgment in habeas corpus imports verity, and it cannot be collaterally impeached. In re Croom, 175 N.C. 455, 95 S.E. 903 (1918).

§ 17-35. When the party bailed or remanded. — If it appears that the party has been legally committed for any criminal offense, or if it appears by the testimony offered with the return of the writ, or upon the hearing thereof, that the party is guilty of such an offense, although the commitment is irregular, the court or judge shall proceed to let such party to bail, if the case is bailable and good bail is offered; if not, the court or judge shall forthwith remand such party to the custody or place him under the restraint from which he was taken, if the person or officer, under whose custody or restraint he was, is legally entitled thereto; if not so entitled, the court or judge shall commit such party to the custody of the officer or person legally entitled thereto. (1868-9, c. 116, s. 22; Code, s. 1647; Rev., s. 1849; C. S., s. 2237.)

Judge May Admit to Bail. — Any person charged (but not convicted) of any crime whatever may be admitted to bail if the judge, upon hearing the testimony upon a writ of habeas corpus, adjudges that, upon the facts developed, the petitioner is entitled to be released on bail. State v. Herndon, 107 N.C. 934, 12 S.E. 268 (1890). And although a sentence is not valid the defendant may not be unconditionally released, as the court may hold him to bail. State v. Burnette, 173 N.C. 734, 91 S.E. 364 (1917).

A prisoner may be admitted to bail in a habeas corpus proceeding if the trial judge determines that the prisoner is so entitled. State v. Parks, 290 N.C. 748, 228 S.E.2d 248 (1976).

No Discharge after Indictment. — Of course, after indictment found, the judge cannot absolutely discharge the prisoner in any case, however clear a case of innocence may be made out, but must require his appearance at the next term of court. State v. Herndon, 107 N.C. 934, 12 S.E. 268 (1890).

§ 17-36. Party held in execution not to be discharged. — When a writ of habeas corpus cum causa issues and the sheriff or other officer to whom it is directed returns upon the same that the prisoner is condemned, by judgment given against him, and held in custody by virtue of an execution issued against him, the prisoner shall not be let to bail but shall be presently remanded, where he shall remain until discharged in due course of law. (2 Hen. V, c. 2; R. C., c. 31, s. 111; Code, s. 937; Rev., s. 1850; C. S., s. 2238.)

§ 17-37. When party ill, cause determined in his absence. — When, from the illness or infirmity of the person directed to be produced by a writ of habeas corpus, such person cannot, without danger, be brought before the court or judge where the writ is made returnable, the party in whose custody he is may state the fact in his return to the writ; and if the court or judge is satisfied of the truth of the allegation, and the return is otherwise sufficient, the court or judge shall proceed to decide on such return and to dispose of the matter in the same manner as if the body had been produced. (1868-9, c. 116, s. 23; Code, s. 1648; Rev., s. 1851; C. S., s. 2239.)

§ 17-38. No second committal after discharge; penalty. — No person who has been set at large upon any writ of habeas corpus shall be again imprisoned or detained for the same cause by any person whatsoever other than by the legal order or process of the court wherein he shall be bound by recognizance to appear or of any other court having jurisdiction in the case, under the penalty of two thousand five hundred dollars ($2,500) to the party aggrieved thereby. (1868-9, c. 116, s. 26; Code, s. 1651; Rev., s. 1852; C. S., s. 2240.)

Cross Reference. — As to recommittal after discharge, see § 17-25.

Surrender by Sureties. — Where the defendant was not originally liable to arrest and had been discharged upon habeas corpus, he cannot be held upon a surrender by his sureties. Ledford v. Emerson, 143 N.C. 527, 55 S.E. 969 (1906).

When Rearrest Permissible. — According to the express terms of this section, a party once discharged may be again arrested and imprisoned for the same cause, provided it be done by the legal order or process of a court of competent jurisdiction. State v. Weatherspoon, 88 N.C. 19 (1883).

ARTICLE 7.

Habeas Corpus for Custody of Children in Certain Cases.

§§ 17-39 to 17-40: Repealed by Session Laws 1967, c. 1153, s. 1.

Cross Reference. — As to action or proceeding for custody of minor child, see §§ 50-13.1 to 50-13.8.

ARTICLE 8.

Habeas Corpus Ad Testificandum.

§ 17-41. Authority to issue the writ. — Every court of record has power, upon the application of any party to any suit or proceeding, civil or criminal, pending in such court, to issue a writ of habeas corpus, for the purpose of bringing before the said court any prisoner who may be detained in any jail or prison within the State, for any cause, except a prisoner under sentence for a capital felony, to be examined as a witness in such suit or proceeding in behalf of the party making the application.

Such writ of habeas corpus may be issued by any magistrate or clerk of the superior court, upon application as provided in this section, to bring any person confined in the jail or prison of the same county where such magistrate or clerk may reside, to be examined as a witness before such magistrate or clerk.

In cases where the testimony of any prisoner is needed in a proceeding before a magistrate, or a clerk, and such person is confined in a county in which such magistrate or clerk does not reside, application for habeas corpus to testify may be made to any justice or judge of the General Court of Justice. (1868-9, c. 116, ss. 37, 38; Code, ss. 1663, 1664; Rev., ss. 1855, 1856; C. S., s. 2243; 1969, c. 44, s. 43; 1971, c. 528, s. 3.)

An Inherent Power. — The right to bring a person, whose presence is necessary, before a court for the exercise of its powers is inherent in every court of general jurisdiction, and its exercise is essential to the preservation of its power and dignity. State v. Hoskins, 77 N.C. 530 (1877); Harkins v. Cathey, 119 N.C. 649, 26 S.E. 136 (1896).

No Application to State. — This section applies only to parties strictly so called, and not to the State. Ex parte Harris, 73 N.C. 65 (1875), citing State v. Adair, 68 N.C. 68 (1873).

Murderer Is Competent Witness. — One who has been convicted of murder, and is under sentence of death, is a competent witness; and the solicitor (now district attorney) for the State is entitled to a habeas corpus to bring such condemned prisoner into court for the purpose of testifying before the grand jury. Ex parte Harris, 73 N.C. 65 (1875).

Same; Objection Untenable. — When the State has procured the attendance of a witness under sentence of death, the objection by the defendant that he could not be procured by writ of habeas corpus ad testificandum under this section is untenable, this not applying to the State; nor will objection avail that the time set for the execution had passed, and the witness, being dead in the eyes of the law, could not testify, the witness having been present and having testified. State v. Jones, 176 N.C. 702, 97 S.E. 32 (1918).

§ 17-42. Contents of application. — The application for the writ shall be made by the party to the suit or proceeding in which the writ is required, or by his agent or attorney. It must be verified by the applicant; and shall state—

(1) The title and nature of the suit or proceeding in regard to which the testimony of such prisoner is desired.

(2) That the testimony of such prisoner is material and necessary to such party on the trial or hearing of such suit or proceeding, as he is advised by counsel and verily believes. (1868-9, c. 116, s. 39; Code, s. 1665; Rev., s. 1857; C. S., s. 2244.)

§ 17-43. Service of writ. — The writ of habeas corpus to testify shall be served by the same person, and in like manner in all respects, and enforced by the court or officer issuing the same as prescribed in this Chapter for the service and enforcement of the writ of habeas corpus cum causa. (1868-9, c. 116, s. 40; Code, s. 1666; Rev., s. 1858; C. S., s. 2245.)

Cross Reference. — As to service of writ in habeas corpus proceedings, see § 17-12.

§ 17-44. Applicant to pay expenses and give bond to return. — The service of the writ shall not be complete, however, unless the applicant for the same tenders to the person in whose custody the prisoner may be, if such person is a sheriff, coroner, or marshal, the fees and expenses allowed by law for bringing such prisoner, nor unless he also gives bond, with sufficient security, to such sheriff, coroner, or marshal, as the case may be, conditioned that such applicant will pay the charges of carrying back such prisoner. (1868-9, c. 116, s. 41; Code, s. 1667; Rev., s. 1859; C. S., s. 2246; 1971, c. 528, s. 4.)

§ 17-45. Duty of officer to whom writ delivered or on whom served. — It is the duty of the officer to whom the writ is delivered or upon whom it is served, whether such writ is directed to him or not, upon payment or tender of the charges allowed by law, and the delivery or tender of the bond herein prescribed, to obey and return such writ according to the exigency thereof upon pain, on

refusal or neglect, to forfeit to the party on whose application the same has been issued the sum of five hundred dollars ($500.00). (1868-9, c. 116, s. 42; Code, s. 1668; Rev., s. 1860; C. S., s. 2247.)

§ 17-46. Prisoner to be remanded. — After having testified, the prisoner shall be remanded to the prison from which he was taken. (1868-9, c. 116, s. 43; Code, s. 1669; Rev., s. 1861; C. S., s. 2248.)

Chapter 17A.

Law-Enforcement Officers.

Sec.
17A-1. Findings and policy.
17A-2. Definitions.
17A-3. North Carolina Criminal Justice Training and Standards Council established; members; terms; vacancies.
17A-4. Compensation.
17A-5. Chairman; vice-chairman; other officers; meetings; reports.
17A-6. Powers of Council; appointment of director.
17A-7. Required standards.
17A-8. Grants under the supervision of Council and the State.
17A-9. Donations and appropriations.

§ 17A-1. Findings and policy. — The General Assembly finds that the administration of criminal justice is of statewide concern, and that proper administration is important to the health, safety and welfare of the people of the State and is of such nature as to require education and training of a professional nature. It is in the public interest that such education and training be made available to persons who seek to become criminal justice officers, persons who are serving as such officers in a temporary or probationary capacity, and persons already in regular service. (1971, c. 963, s. 1.)

This Chapter Is Applicable to Police Officers Appointed by Director of Department of Administration under § 143-340. — See opinion of Attorney General to Mr. John Faircloth, Director, N.C. Criminal Justice Training and Standards Council, 43 N.C.A.G. 99 (1973).

Officers Subject to Requirements of Criminal Justice Training and Standards Council. — Special peace officers appointed for conservation and development pursuant to § 113-28.1 and forest rangers appointed pursuant to Article 4, Chapter 113, General Statutes, and similar law-enforcement officers employed by the State or agencies thereof, who have the power of arrest, are subject to the requirements of the North Carolina Criminal Justice Training and Standards Council. Opinion of Attorney General to Mr. John Faircloth, Director, N.C. Criminal Justice Training and Standards Council, 43 N.C.A.G. 179 (1973).

§ 17A-2. Definitions. — Unless the context clearly otherwise requires, the following definition applies in this Chapter: "Criminal justice system" means the State and local law-enforcement agencies, the State and local police traffic service agencies, the State correctional agencies, the jails and other correctional agencies maintained by local governments, except constitutional officers. (1971, c. 963, s. 2.)

§ 17A-3. North Carolina Criminal Justice Training and Standards Council established; members; terms; vacancies. — (a) There is hereby established the North Carolina Criminal Justice Training and Standards Council, hereinafter called "the Council" in the Executive Office of the Governor (or the Department of Justice). The Council shall be composed of 21 members as follows:

(1) Sheriffs. — Five sheriffs or other individuals serving in sheriffs' departments, one of whom shall be selected by the North State Law Enforcement Officers Association and four selected by the North Carolina Sheriffs' Association.

(2) Police Officers. — Five police chiefs or other individuals serving in police departments, one of whom shall be selected by the North State Law Enforcement Officers Association and four selected by the North Carolina Association of Police Executives.

(3) Departments. — A representative of the Department of Justice to be selected by the Attorney General; a representative of the Department of Crime Control and Public Safety to be selected by the Secretary of the Department; a representative for the correctional system to be

selected by the Governor; a representative for the court system to be selected by the Chief Justice.

(4) At-Large Groups and Ex Officio Members. — Three members at large to be selected by the Governor. The Director of the Institute of Government and the Director of Law-Enforcement Training in the Department of Community Colleges, the Director of Criminal Justice Programs at East Carolina University and the Director of Criminal Justice Programs of North Carolina University at Charlotte, who shall be permanent members of the Council.

(b) The members shall be appointed for staggered terms and the initial appointments shall be made prior to September 1, 1971, and the appointees shall hold office until July 1 of the year in which their respective terms expire and until their successors are appointed and qualified as provided hereafter:

For the terms of one year: one member from subdivision (1) of subsection (a), one member from subdivision (2) of subsection (a), one from subdivision (3) representing the Department of Crime Control and Public Safety, one from subdivision (3) representing the court system, and one from subdivision (4) appointed by the Governor.

For the terms of two years: two members from subdivision (1) of subsection (a), two members from subdivision (2) of subsection (a), one from subdivision (3) representing the Department of Justice, and one from subdivision (4) appointed by the Governor.

For the terms of three years: two members from subdivision (1) of subsection (a), two members from subdivision (2) of subsection (a), one member from subdivision (3) representing the correctional system, and one from subdivision (4) appointed by the Governor.

Thereafter, as the term of each member expires, his successor shall be appointed for a term of three years. Notwithstanding the appointments for a term of years, each member shall serve at the will of the appointing authority.

The Director of the Institute of Government, the Director of Law-Enforcement Training of the Department of Community Colleges, the Directors of Criminal Justice Programs at East Carolina University and the University of North Carolina at Charlotte shall be continuing members of the Council during their tenure as Director.

Members of the Council who are public officers shall serve ex officio and shall perform their duties on the Council in addition to the duties of their office.

(c) Vacancies in the Council occurring for any reason shall be filled, for the unexpired term, by the authority making the original appointment of the person causing the vacancy. (1971, c. 963, s. 3; 1977, c. 70, ss. 29, 30.)

Editor's Note. — The 1977 amendment substituted "Department of Crime Control and Public Safety to be selected by the Secretary of the Department" for "Department of Motor Vehicles to be selected by the Commissioner of Motor Vehicles" in subdivision (3) of subsection (a) and substituted "Department of Crime Control and Public Safety" for "Department of Motor Vehicles" in the second paragraph of subsection (b).

§ 17A-4. Compensation. — Members of the Council who are State officers or employees shall receive no compensation for serving on the Council, but shall be reimbursed for their expenses in accordance with G.S. 138-6. Members of the Council who are full-time salaried public officers or employees other than State officers or employees shall receive no compensation for serving on the Council, but shall be reimbursed for their expenses in accordance with G.S. 138-5(b). All other members of the Council shall receive compensation and reimbursement for expenses in accordance with G.S. 138-5. (1971, c. 963, s. 4.)

§ 17A-5. Chairman; vice-chairman; other officers; meetings; reports. — (a) The Governor shall designate one of the members of the Council as chairman

upon its creation, and shall appoint or reappoint the chairman each July 1 thereafter.

(b) The Council shall select a vice-chairman and such other officers and committee chairmen from among its members, as it deems desirable, at the first regular meeting of the Council after its creation and at the first regular meeting after July 1 of each year thereafter. Nothing in this subsection, however, shall prevent the creation or abolition of committees or offices of the Council, other than the office of vice-chairman, as the need may arise at any time during the year.

(c) The Council shall hold at least four regular meetings per year upon the call of the chairman. Special meetings shall be held upon the call of the chairman or the vice-chairman, or upon the written request of five members of the Council.

(d) The activities and recommendations of the Council with respect to standards for criminal justice training shall be treated as appropriate in regular and special reports made by the Council. The Council, however, shall present special reports and recommendations to the Governor or the General Assembly, or both, as the need may arise or as the Governor or General Assembly may request. (1971, c. 963, s. 5.)

§ 17A-6. Powers of Council; appointment of director. — (a) In addition to powers conferred upon the Council elsewhere in this Chapter, the Council shall have the power to:

(1) Promulgate rules and regulations for the administration of this Chapter including the authority to require the submission of reports and information by criminal justice agencies and departments within this State relevant to employment, education and training.

(2) Establish minimum educational and training standards for employment as a criminal justice officer: (i) in temporary or probationary status, and (ii) in permanent positions.

(3) Certify persons as being qualified under the provisions of this Chapter to be criminal justice officers.

(4) Consult and cooperate with counties, municipalities, agencies of this State, other governmental agencies, and with universities, colleges, junior colleges, and other institutions concerning the development of criminal justice training schools and programs or courses of instruction.

(5) To establish minimum standards and levels of education or equivalent experience for all criminal justice instructors, teachers or professors.

(6) Conduct and stimulate research by public and private agencies which shall be designed to improve education and training in the administration of criminal justice.

(7) Make recommendations concerning any matters within its purview pursuant to this Chapter.

(8) Repealed by Session Laws 1975, c. 372, s. 2.

(9) Appoint such advisory committees as it may deem necessary.

(10) Make such evaluations as may be necessary to determine if governmental units are complying with the provisions of this Chapter.

(11) Adopt and amend bylaws, consistent with law, for its internal management and control.

(12) Enter into contracts and do such things as may be necessary and incidental to the administration of its authority pursuant to this Chapter.

(b) The Attorney General shall appoint a director from a list of three names recommended to him by the Council. If, in the opinion of the Attorney General, none of the three persons recommended have the necessary qualifications for the position of director, the Council shall submit another list of three names, from which the Attorney General shall appoint a director. The director shall be

responsible to and shall serve at the pleasure of the Attorney General. (1971, c. 963, s. 6; 1975, c. 372, s. 2.)

Editor's Note. — The 1975 amendment substituted the provision codified as subsection (b) in the section as set out above for former subdivision (8), which authorized the Council to employ a director and other personnel. Because the new provision, enacted as a revised subdivision (8), does not follow either logically or grammatically the introductory language of the section, the codifiers have designated the original provisions of this section as subsection (a), treated former subdivision (8) as repealed, and designated the new subdivision added by the 1975 act as subsection (b).

§ 17A-7. Required standards. — (a) Criminal justice officers already serving under permanent appointment on July 1, 1971, shall not be required to meet any requirement of subsections (b) and (c) of this section as a condition of tenure or continued employment, nor shall failure of any such criminal justice officers to fulfill such requirements make him ineligible for any promotional examination for which he is otherwise eligible. The legislature finds, and it is hereby declared to be the policy of this Chapter, that such criminal justice officers have satisfied such requirements by their experience. It is the intent of this Chapter that all officers employed, after the Council has adopted the required standards, shall meet the requirements of this Chapter, provided that the Council shall not enforce its standards until after training facilities are available for personnel to comply with the standards.

(b) At the earliest practicable time, the Council shall provide, by regulation, that no person shall be appointed as a criminal justice officer, except on a temporary or probationary basis, unless such person has satisfactorily completed an initial preparatory program of training at a school approved by the Council. No criminal justice officer who lacks the education and training qualifications required by the Council may have his temporary or probationary employment extended beyond one year by renewal of appointment or otherwise.

(c) In addition to the requirements of subsection (b), of this section, the Council, by rules and regulations, shall fix other qualifications for the employment and retention of criminal justice officers, including minimum age, education, physical and mental standards, citizenship, good moral character, experience, and such other matters as relate to the competence and reliability of persons to assume and discharge the responsibilities of criminal justice officers, and the Council shall prescribe the means for presenting evidence of fulfillment of these requirements.

Where minimum general educational standards are not met, yet the individual shows potential and a willingness to achieve the standards by extra study, they may be waived by the Council for the amount of time it will take to achieve the standards required.

(d) The Council may issue a certificate evidencing satisfaction of the requirements of subsection[s] (b) and (c) of this section to any applicant who presents such evidence as may be required by its rules and regulations of satisfactory completion of a program or course of instruction in another jurisdiction equivalent in content and quality to that required by the Council for approved criminal justice education and training programs in this State. (1971, c. 963, s. 7.)

§ 17A-8. Grants under the supervision of Council and the State. — The Council may authorize the reimbursement to each political subdivision of the State not exceeding sixty percent (60%) of the salary and of the allowable tuition, living and travel expenses incurred by the officers in attendance at approved training programs, providing said political subdivisions do in fact adhere to the selection and training standards established by the Council. (1971, c. 963, s. 8.)

§ 17A-9. Donations and appropriations. — (a) The Council may accept for any of its purposes and functions under this Chapter any and all donations, both real and personal, and grants of money from any governmental unit or public agency, or from any institution, person, firm or corporation, and may receive, utilize and dispose of the same. Any arrangements pursuant to this section shall be detailed in the annual report of this Council. Such report shall include the identity of the donor, the nature of the transaction, and the conditions, if any. Any moneys received by the Council pursuant to this section shall be deposited in the State treasury to the account of the Council.

(b) The Council, by rules and regulations, shall provide for the administration of the grant program authorized by this section. In promulgating such rules, the Council shall promote the most efficient and economical program of criminal justice training, including the maximum utilization of existing facilities and programs for the purpose of avoiding duplication.

(c) The Council may provide grants as a reimbursement for actual expenses incurred by the State or political subdivision thereof for the provisions of training programs of officers from other jurisdictions within the State. (1971, c. 963, s. 9.)

Chapter 17B.

North Carolina Criminal Justice Education and Training System.

Sec.
17B-1. Definitions.
17B-2. System established.
17B-3. Center established.
17B-3.1. Application of State highway and motor vehicles laws at Center.
17B-4. North Carolina Criminal Justice Education and Training System Council — organization.
17B-5. North Carolina Criminal Justice Education and Training System Council — duties.
17B-6. Functions of Department of Justice.

§ 17B-1. Definitions. — As used in this Chapter, unless the context otherwise requires:

"Campus" means that Center property located in Salemburg, North Carolina.

"Center" means the North Carolina Criminal Justice Education and Training Center.

"Center property" means property that is owned or leased in whole or in part by the State of North Carolina and which is subject to the general management and control of the Department of Justice and is located in Salemburg, North Carolina.

"The Council" means the North Carolina Criminal Justice Education and Training System Council.

"Criminal justice agencies" means the State and local law-enforcement agencies, the State and local police traffic service agencies, the State correctional agencies, the jails and other correctional agencies maintained by local governments, and the courts of the State.

"Department" means the Department of Justice. (1973, c. 749; 1977, c. 831, s. 1.)

Editor's Note. — The 1977 amendment substituted "this Chapter" for "this Article" in the introductory language and added the definitions of "campus" and "center property."

§ 17B-2. System established. — The North Carolina Department of Justice shall establish a North Carolina Criminal Justice Education and Training System. The System shall consist of a cooperative arrangement between criminal justice agencies, both State and local, to provide education and training to the officers and employees of the criminal justice agencies of the State of North Carolina and its local governments. The System shall include the educational and training programs offered by the Criminal Justice Education and Training Center as well as those conducted by any other public agencies or institutions within the State which are engaged in criminal justice education and training and desire to be affiliated with the System for the purpose of achieving greater coordination of criminal justice education and training efforts in North Carolina. (1973, c. 749.)

§ 17B-3. Center established. — The North Carolina Department of Justice shall establish a North Carolina Criminal Justice Education and Training Center. The Center shall provide a comprehensive educational and training program for agents of the State Bureau of Investigation, for other employees of the Department of Justice and for the employees of any State criminal justice agency which desires to affiliate with the Center for purposes of education and training.

The Department of Justice, through the Center, also may provide educational and training programs for local criminal justice personnel upon request and is encouraged to develop programs which will enhance the skills of local criminal justice officials. In addition the Department of Justice is authorized to provide

comprehensive programs designed to qualify persons as instructors of criminal justice education and training at the local level. (1973, c. 749.)

§ 17B-3.1. Application of State highway and motor vehicles laws at Center. — (a) Except as otherwise provided in this section, all of the provisions of Chapter 20 of the General Statutes relating to the use of highways of the State and the operation of vehicles thereon are applicable to all streets, alleys, driveways, and parking lots on Center property. Nothing in this section modifies any rights of ownership or control of Center property, now or hereafter vested in the State of North Carolina ex rel., Department of Justice.

(b) The Council may by ordinance prohibit, regulate, divert, control, and limit pedestrian or vehicular traffic and the parking of vehicles and other modes of conveyance on the campus. In fixing speed limits, the Council is not subject to G.S. 20-141(f) or (g), but may fix any speed limit reasonable and safe under the circumstances as conclusively determined by the Council. The Council may not regulate traffic on streets open to the public as of right, except as specifically provided in this section.

(c) The Council may by ordinance provide for the registration of vehicles maintained or operated on the campus by any student, faculty member, or employee of the Center, and may fix fees for such registration. The ordinance may make it unlawful for any person to operate an unregistered vehicle on the campus when the vehicle is required by the ordinance to be registered.

(d) The Council may by ordinance set aside parking lots on the campus for use by students, faculty, and employees of the Center and members of the general public attending schools, conferences, or meetings at the Center, visiting or making use of any Center facilities, or attending to official business with the Center. The Council may issue permits to park in these lots and may charge a fee therefor. The Council may also by ordinance make it unlawful for any person to park a vehicle in any lot or other parking facility without procuring the requisite permit and displaying it on the vehicle.

(e) The Council may by ordinance provide for the issuance of stickers, decals, permits or other indicia representing the registration status of vehicles or the eligibility of vehicles to park on the campus and may by ordinance prohibit the forgery, counterfeiting, unauthorized transfer, or unauthorized use of such stickers, decals, permits or other indicia.

(f) Violation of an ordinance adopted under any protion of this section is a misdemeanor punishable by a fine of not more than fifty dollars ($50.00) or imprisonment for not more than 30 days, in the discretion of the court. An ordinance may provide that certain acts prohibited thereby shall not be enforced by criminal sanctions, and in such cases a person committing any such act shall not be guilty of a misdemeanor.

(g) An ordinance adopted under any portion of this section may provide that a violation will subject the offender to a civil penalty. Penalties may be graduated according to the seriousness of the offense or the number of prior offenses committed by the person charged. The Council may establish procedures for the collection of these penalties and may enforce the penalties by civil action in the nature of debt. The Council may also provide for appropriate administrative sanctions if an offender does not pay a validly due penalty or has committed repeated offenses. Appropriate administrative sanctions include, but are not limited to, revocation of parking permits, termination of vehicle registration, and termination or suspension of enrollment in or employment by the Center.

(h) An ordinance adopted under this section may provide that any vehicle illegally parked may be removed to a storage area, in which case the person so removing the vehicle shall be deemed a legal possessor within the meaning of G.S. 44A-2(d).

(i) Evidence that a vehicle was found parked or unattended in violation of a

council ordinance is prima facie evidence that the vehicle was parked by:

(1) The person holding a Center parking permit for the vehicle; or

(2) If no Center parking permit has been issued for the vehicle, the person in whose name the vehicle is registered with the Center pursuant to subsection (c); or

(3) If no Center parking permit has been issued for the vehicle and the vehicle is not registered with the Center, the person in whose name it is registered with the North Carolina Department of Motor Vehicles or the corresponding agency of another state or nation.

The rule of evidence established by this subsection applies only in civil, criminal, or administrative actions or proceedings concerning violations of ordinances of the Council. G.S. 20-162.1 does not apply to such actions or proceedings.

(j) The Council shall cause to be posted appropriate notice to the public of applicable traffic and parking restrictions.

(k) All ordinances adopted under this section shall be recorded in the minutes of the Council and copies thereof shall be filed in the offices of the North Carolina Attorney General and the Secretary of State. The Council shall provide for printing and distributing copies of its traffic and parking ordinances.

(l) All moneys received pursuant to this section shall be placed in a trust account and may be used for any of the following purposes:

(1) To defray the cost of administering and enforcing ordinances adopted under this section;

(2) To develop, maintain, and supervise parking areas and facilities;

(3) Other purposes related to parking, traffic, and transportation on the campus. (1977, c. 831, s. 2.)

§ 17B-4. North Carolina Criminal Justice Education and Training System Council — organization. — (a) Membership. — The North Carolina Criminal Justice Education and Training System Council shall be composed of 41 members as follows:

(1) Four representatives of sheriffs' departments, one of whom shall be selected by the North State Law Enforcement Officers' Association and three selected by the North Carolina Sheriffs' Association.

(2) Four representatives of police departments, one of whom shall be selected by the North State Law Enforcement Officers' Association and three selected by the North Carolina Association of Police Executives.

(3) Two county commissioners selected by the North Carolina Association of County Commissioners.

(4) Two mayors selected by the North Carolina League of Municipalities.

(5) One criminal justice educator selected by the North Carolina Association of Criminal Justice Education.

(6) One law-enforcement training officer selected by the North Carolina Law-Enforcement Training Officers' Association.

(7) Five civilian members at large to be selected by the Governor from the general private sector.

(8) One superior court judge, one district court judge and one district attorney of the General Court of Justice, each of these individuals to be selected by the members of their respective groups in general meeting assembled.

(9) The Attorney General, the Director of the Administrative Office of the Courts, the Secretary of Correction, the Director of Prisons, the Director of Jail and Detention Services, the Director of Adult Probation and Parole, the Director of Youth Development, the Director of the State Bureau of Investigation, the Secretary of Crime Control and Public Safety, the Commander of the State Highway Patrol, the Executive Director of the Wildlife Resources Commission, the Commissioner of Commercial and Sports Fisheries, the Chairman of the

State Board of Alcoholic Control, the Coordinator of the Governor's Highway Safety Program, the President of Community Colleges of the Department of Education, and the Director of the Institute of Government, all of whom shall serve ex officio.

(10) One member of the North Carolina Senate to be appointed by the Lieutenant Governor; one member of the North Carolina House of Representatives to be appointed by the Speaker of the House; and one member from the public at large to be selected by the Attorney General. The initial appointments shall be made prior to July 1, 1975 and the term of successors shall begin on July 1 of each year thereafter.

(b) Terms. — Each of these members, other than those designated as ex officio, shall be appointed for one-year terms with the initial appointments being made prior to September 1, 1973, and each appointee serving upon said Council until September 1, 1974, or until such date as their respective successors are appointed and qualified.

(c) Vacancies. — Vacancies on the Council occurring for any reason shall be filled, for the unexpired term, by the appropriate designated authority making the appointment of the person causing the vacancy.

(d) Votes. — Each and every member of the Council, including those designated as ex officio members, shall be voting members.

(e) Chairman. — The chairman of the Council shall be elected from within the Council membership by a majority of the members voting thereon. The Council may elect such other officers from its membership as it deems necessary.

(f) Ex Officio Proxy. — Any of the ex officio members may, in writing, designate another individual on his staff to represent and vote for him on the Council.

(g) Compensation. — No member of the Council shall receive any compensation for serving on the Council. Members of the Council who are State officers or employees shall be reimbursed for their expenses in accordance with G.S. 138-6. All other members of the Council shall be reimbursed for their necessary expenses in accordance with G.S. 138-5(b). (1973, c. 47, s. 2; c. 749; c. 1262, ss. 10, 28; 1975, c. 227; c. 658, ss. 1, 2; 1977, c. 70, s. 31.)

Editor's Note. — The first 1975 amendment, in subdivision (9) of subsection (a), inserted "Director of Prisons" preceding "the Director of Jail and Detention Services" and substituted "Director of Adult Probation and Parole, the Director of Youth Development" for "Secretary of Correction, the Secretary of Correction, the Secretary of Correction" and "Commissioner of Commercial and Sports Fisheries" for "Secretary of Natural and Economic Resources."

The second 1975 amendment substituted "41 members" for "38 members" in the introductory paragraph of subsection (a) and added subdivision (10) of subsection (a).

The 1977 amendment substituted "Secretary of Crime Control and Public Safety" for "Commissioner of Motor Vehicles" near the middle of subdivision (9) of subsection (a).

§ 17B-5. North Carolina Criminal Justice Education and Training System Council — duties. — The North Carolina Criminal Justice Education and Training System Council shall have the following duties:

(1) It shall formulate basic plans for and promote the development of a comprehensive system of education and training for the officers and employees of criminal justice agencies consistent with the regulations and standards of the North Carolina Criminal Justice Training and Standards Council and shall provide advice, counsel, and leadership in bringing together the various components of the System and in implementing and operating the System.

(2) It may adopt and amend bylaws, consistent with law, for its internal management and control.

(3) It may establish an executive committee and such other committees of

the Council and such advisory bodies as it deems appropriate and may determine their respective powers and duties.

(4) The Council may accept for any of its purposes and functions under this Article any and all donations, both real and personal, and grants of money from any governmental unit or public agency, or from any institution, person, firm or corporation. Any arrangements pursuant to this section shall be detailed in the annual report of the Council. Such reports shall include the identity of the donor, the nature of the transaction, and the conditions, if any. Any moneys received by the Council pursuant to this section shall be deposited in the State treasury to the account of the System. All moneys involved shall be subject to audit by the State Auditor. (1973, c. 749.)

§ 17B-6. Functions of Department of Justice. — The Department of Justice shall have the following powers and duties with respect to the Criminal Justice Education and Training System:

(1) It may, after consultation with representatives of local criminal justice agencies, plan, organize, staff and conduct instructional and training programs to be offered through the System to local criminal justice agencies upon their request.

(2) It shall provide any personnel deemed necessary for the development, implementation and maintenance of the System as a whole, provided appropriations are made for such positions by the General Assembly or funds are otherwise available.

(3) It shall maintain liaison among local, State and federal agencies with respect to criminal justice education and training.

(4) It shall have legal custody of all books, papers, documents, other records and property relating to the System as a whole.

(5) It shall employ the staff of the Center and direct the operation of it in cooperation with other affiliated agencies.

(6) It shall make an annual report to the North Carolina Criminal Justice Education and Training System Council.

(7) It may enter into contracts and do such things as may be necessary and incidental to the administration of its authority pursuant to this Article. (1973, c. 749.)

Chapter 18.

Regulation of Intoxicating Liquors.

§§ 18-1 to 18-152: Repealed by Session Laws 1971, c. 872, s. 3.

Cross Reference. — For provisions covering the subject matter of the repealed Chapter, see Chapter 18A and §§ 105-113.68 to 105-113.104.

Chapter 18A.

Regulation of Intoxicating Liquors.

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Cross Reference. — As to the intoxicating liquors tax, see §§ 105-113.68 through 105-113.104.

Editor's Note. — Historical citations to sections of former Chapter 18 have been added to corresponding sections in new Chapter 18A.

Many of the cases cited under the provisions of this Chapter were decided under similar provisions of former Chapter 18.

ARTICLE 1.

General Provisions.

§ 18A-1. Purpose of Chapter. — The purpose and intent of this Chapter is to establish a uniform system of control over the sale, purchase, transportation, manufacture, and possession of intoxicating liquors in North Carolina, and to provide administrative procedures to insure, as far as possible, the proper administration of this Chapter under a uniform system throughout the State. This Chapter shall be liberally construed to the end that the sale, purchase, transportation, manufacture, and possession of intoxicating liquors shall be prohibited except as authorized in this Chapter. (1937, c. 49, s. 1; 1971, c. 872, s. 1.)

Applied in Food Fair, Inc. v. City of Henderson, 17 N.C. App. 335, 194 S.E.2d 213 (1973).

Quoted in Smith v. County of Mecklenburg, 280 N.C. 497, 187 S.E.2d 67 (1972); State v. Williams, 283 N.C. 550, 196 S.E.2d 756 (1973).

Cited in United States Labor Party v. Knox, 430 F. Supp. 1359 (W.D.N.C. 1977).

§ 18A-2. Definitions. — When used in this Chapter:

(1) The term "alcoholic beverage" means alcoholic beverages of any and all kinds that contain more than fourteen percent (14%) of alcohol by volume.

(2) "Fortified wines" shall mean any wine made by fermentation from grapes, fruits, berries, rice or honey to which nothing but pure brandy has been added, which brandy is made from the same type of grape, fruit, berry, rice or honey that is contained in the base wine to which it is added, and having an alcoholic content of over fourteen percent (14%) and not more than twenty-one percent (21%) of absolute alcohol reckoned by volume; and is approved by the State Board of Alcoholic Control as to identity, quality, and purity as provided in this Chapter.

(3) The word "license" shall mean a written or printed certificate which allows a person to engage in some phase of the liquor industry, and which may be issued by the Secretary of Revenue, by a municipality, or by a county, pursuant to the provisions of this Chapter or Article 2C of Chapter 105.

(4) The word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt or fermented beverages, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one half of one percent (½ of 1%) or more of alcohol by volume, which are fit for use for beverage purposes.

(5) The term "malt beverages" shall mean beer, lager beer, malt liquor, ale, porter, and other brewed or fermented beverages containing one half of one percent (½ of 1%) of alcohol by volume but not more than five percent (5%) of alcohol by weight.

(6) The term "mixed beverage," as used in this Chapter is defined to be and to mean a drink composed in whole or in part of alcoholic beverages having an alcoholic content of more than fourteen percent (14%) of alcohol by volume and served to an individual in a miniature bottle or in a quantity less than the quantity contained in a closed package, purchased for consumption on premises licensed for mixed beverages by the State Board of Alcoholic Control.

(7) The term "native wines" shall mean wine made from grapes, fruit, or berries and having only such alcoholic content as natural fermentation may produce.

(8) The term "nontaxpaid liquor" shall mean any intoxicating liquor upon which the taxes imposed by the United States and by the State or other territorial jurisdiction in which such liquor was purchased have not both been paid.

(8a) The term "passenger area of a motor vehicle" shall mean that area designed for the seating of the driver and passengers as well as any area that can be within the reach of a seated driver or passenger, including the glove compartment. In the case of a station wagon, hatchback or similar vehicle, that area to the rear of the last back seat shall not constitute part of the passenger area.

(9) The word "permit" shall mean a written or printed authorization to engage in some phase of the liquor industry which may be issued by the State Board of Alcoholic Control under the provisions of this Chapter.

(10) The term "person" shall mean any individual, firm, partnership, association, corporation, other organizations or groups, or combination of persons acting as a unit.

(11) The term "sale" shall include any transfer, trade, exchange, or barter in any manner or by any means whatsoever, for a consideration.

(12) The term "spirituous liquors" shall be deemed to include any alcoholic beverages containing an alcoholic content of more than twenty-one percent (21%) by volume.

(13) The term "taxpaid liquor" shall mean any intoxicating liquor upon which the taxes imposed by the United States and by the State or other territorial jurisdiction in which such liquor was purchased have both been paid.

(14) The term "unfortified wines" shall mean wine that has an alcoholic content produced only by natural fermentation or by the addition of pure cane, beet, or dextrose sugar, and having an alcoholic content of

not less than five percent (5%) and not more than fourteen percent (14%) of absolute alcohol, the percent of alcohol to be reckoned by volume, and that has been approved as to identity, quality and purity by the State Board of Alcoholic Control as provided in this Chapter. (1923, c. 1, s. 1; C. S., s. 3411(a); 1937, c. 49, s. 24; c. 411; 1939, c. 158, s. 501; 1941, c. 339, ss. 1, 3, 4; 1945, c. 780; c. 903, ss. 1, 3, 10; 1971, c. 872, s. 1; 1973, c. 476, s. 193; c. 1014; 1975, c. 329; c. 411, s. 2.)

Editor's Note. — The first 1975 amendment added subdivision (8a).

The second 1975 amendment inserted the references to honey near the beginning of subdivision (2) and made other minor changes in wording in subdivision (2).

Beverages Not Enumerated. — It may be shown in evidence as a fact that other beverages than those defined by this section as intoxicating and prohibited are intoxicating in fact and come within the intent and meaning of the statute. State v. Fields, 201 N.C. 110, 159 S.E. 11 (1931).

The General Assembly clearly intended to preempt the regulation of malt beverages in order to prevent local governments from enacting regulatory ordinances. State v. Williams, 283 N.C. 550, 196 S.E.2d 756 (1973).

Allowing local governments to regulate malt beverages contrary to State law would result in an intolerable situation whereby citizens lawfully possessing beer in one county would be violating a criminal law in another. The legislature preempted the field in order to avoid such confusion. State v. Williams, 283 N.C. 550, 196 S.E.2d 756 (1973).

Beer is not an alcoholic beverage as defined by subdivision (1). State v. Williams, 283 N.C. 550, 196 S.E.2d 756 (1973).

But is a malt beverage as defined by subdivision (5). State v. Williams, 283 N.C. 550, 196 S.E.2d 756 (1973).

A permit grants a privilege. It does not convey either a constitutional right or a property right. Hursey v. Town of Gibsonville, 284 N.C. 522, 202 S.E.2d 161 (1974).

It is subject to cancellation by the issuing authority for cause. Hursey v. Town of Gibsonville, 284 N.C. 522, 202 S.E.2d 161 (1974).

Those wines formerly called "sweet wines" are now called "fortified wines." Clark v. North Carolina Bd. of Alcoholic Control, 14 N.C. App. 464, 188 S.E.2d 705 (1972).

What Constitutes Sale of Beer. — See opinion of Attorney General to Mr. Lee P. Phillips, Director of Enforcement, State Board of Alcoholic Control, 40 N.C.A.G. 3 (1970).

§ 18A-3. Manufacture, sale, etc., forbidden except as expressly authorized. — (a) No person shall manufacture, sell, barter, transport, import, export, deliver, furnish, purchase, or possess any intoxicating liquor except as authorized in this Chapter or in Chapter 105, Article 2C.

(b) No person who does not have an appropriate permit and license (as defined in this Chapter) shall have any intoxicating liquor mailed or shipped to him from outside this State. (1923, c. 1, s. 2; C. S., s. 3411(b); 1971, c. 872, s. 1; 1975, c. 654, s. 4.)

Editor's Note. — The 1975 amendment added "or in Chapter 105, Article 2C" at the end of subsection (a).

State's Regulations in Relation to Interstate Commerce Clause. — Both by the Constitution of the United States (Amendment XXI) and this Chapter, liquor has been placed in a category somewhat different from other articles of commerce, and the State's regulations thereof should not be held obnoxious to the interstate-commerce clause, unless clearly in conflict with granted federal powers and congressional action thereunder. State v. Hall, 224 N.C. 314, 30 S.E.2d 158 (1944).

Guilty Knowledge. — This section, relating to alcoholic liquors, must be interpreted in the light of the common-law principle that guilty knowledge is an essential element of crime, and therefore a person cannot be held guilty of illegally transporting intoxicating liquors if he has no knowledge of the nature of the goods transported. State v. Welch, 232 N.C. 77, 59 S.E.2d 199 (1950).

A principal acts through its agents and employees and is responsible for their conduct. American Legion v. North Carolina State Bd. of Alcoholic Control, 27 N.C. App. 266, 218 S.E.2d 513 (1975).

Possession may be either actual or constructive. State v. Meyers, 190 N.C. 239, 129 S.E. 600 (1925). See also State v. Norris, 206 N.C. 191, 173 S.E. 14 (1934); State v. Webb, 233 N.C. 382, 64 S.E.2d 268 (1951); State v. Harrelson, 245 N.C. 604, 96 S.E.2d 867 (1957); State v. Glenn, 251 N.C. 156, 110 S.E.2d 791 (1959).

A prima facie case of the unlawful sale of intoxicating liquors may be established by circumstances sufficient to show that the

defendant had in his constructive possession large quantities of whiskey not on his premises, in the possession of others who held it for him. State v. Pierce, 192 N.C. 766, 136 S.E. 121 (1926).

An accused has possession of intoxicating liquor within the meaning of this section when he has both the power and the intent to control its disposition or use. The requisite power to control may reside in the accused acting alone or in combination with others. State v. Fuqua, 234 N.C. 168, 66 S.E.2d 667 (1951).

If a man procures another to obtain liquor for him and puts it in a given place, and the other performs this agreement and places the liquor, then the possession is complete. A person may be in the possession of the article which he has not at the moment about his person. The constructive possession, as well as the actual possession, is in the contemplation of the statute. State v. Meyers, 190 N.C. 239, 129 S.E. 600 (1925); State v. Pierce, 192 N.C. 766, 136 S.E. 121 (1926).

Burden of Showing Right to Possess. — This section contemplates that no person shall transport or have in his possession for the purpose of sale any intoxicating liquor. There are exceptions and, ordinarily, the burden is on him who asserts that he comes within the exception to show by way of defense that he is one of that class authorized by law to have intoxicants in his possession. State v. Gordon, 224 N.C. 304, 30 S.E.2d 43 (1944).

Possession of Taxpaid Liquor at Unauthorized Place Unlawful. — Possession of taxpaid whiskey is illegal under this section if it is not at an authorized place. State v. Welborn, 249 N.C. 268, 106 S.E.2d 204 (1958).

The possession of nontaxpaid liquor in any quantity anywhere in the State is, without exception, unlawful. State v. Barnhardt, 230 N.C. 223, 52 S.E.2d 904 (1949).

Purpose of Possession Immaterial. — Upon the trial for transporting intoxicating liquors in violation of this Article, the purpose of the possession of the intoxicants, or that it was for the purpose of profit, is immaterial, and the fact that the person accused is carrying intoxicants from one place to another is sufficient. State v. Sigmon, 190 N.C. 684, 130 S.E. 854 (1925).

Whether the transportation of nontaxpaid whiskey is unlawful does not depend upon whether it is being transported for the purpose of sale. State v. Wells, 259 N.C. 173, 130 S.E.2d 299 (1963).

The word "transport" means to carry or convey from one place to another, and therefore a person transports intoxicating liquor if he carries it on his person or conveys it in a vehicle under his control or in any other manner, regardless of whether the liquor belongs to him or is in his custody. State v. Welch, 232 N.C. 77, 59 S.E.2d 199 (1950).

A person is guilty of unlawfully transporting intoxicating liquor in violation of this section if he knowingly transports intoxicating liquor for any purpose other than those specified in this Chapter. State v. Welch, 232 N.C. 77, 59 S.E.2d 199 (1950).

Transportation as Including Possession. — Where the evidence is sufficient to convict the defendant of transporting whiskey under this section, the transportation of spirituous liquor includes the possession. State v. Sigmon, 190 N.C. 684, 130 S.E. 854 (1925).

Where an indictment for violating the prohibition law contains a count as to the unlawful possession and also as to unlawfully transporting spirituous liquor, an acquittal upon the first is not inconsistent with a conviction on the second issue. They are two distinct offenses under the statute. State v. Sigmon, 190 N.C. 684, 130 S.E. 854 (1925).

Only a person in the actual or constructive possession of nontaxpaid whiskey, absent conspiracy or aiding and abetting, could be guilty of the unlawful transportation thereof. State v. Wells, 259 N.C. 173, 130 S.E.2d 299 (1963).

Sale of Liquor in Clubs or Restaurants Not Authorized. — There is no provision in this Chapter or in any other law in this State that authorizes the sale of liquor in private or public clubs or restaurants in this State. Hill v. State Bd. of Alcoholic Control, 17 N.C. App. 592, 195 S.E.2d 94 (1973).

Receiving Intoxicating Liquors. — There is no provision in this Article which in express terms prohibits one from receiving intoxicating liquors. Except as embraced and included by the acts which are prohibited in the statute, the mere receiving of intoxicating liquors is not forbidden. State v. Hammond, 188 N.C. 602, 125 S.E. 402 (1924).

It is bad pleading to make the mere receipt of liquor the subject of a separate and independent count; and the charge that the mere receipt of same, though only in the home of the recipient and kept there only for a lawful purpose, is forbidden is not warranted by any proper construction of the statute that has been suggested to this court. State v. Hammond, 188 N.C. 602, 125 S.E. 402 (1924).

Effect on Recovery under Compensation Act. — The mere fact that an applicant for compensation under the provisions of the Workmen's Compensation Act had in his possession whiskey contrary to this section does not alone prevent the recovery of compensation. Jackson v. Dairymen's Creamery, 202 N.C. 196, 162 S.E. 359 (1932).

Warrant or Indictment. — Under this section a warrant or indictment should charge the unlawful possession or sale of intoxicating liquors. State v. May, 248 N.C. 60, 102 S.E.2d 418 (1958).

Separate Offenses Charged in Same Warrant. — The offenses of delivering and of

keeping for sale are separate offenses and although charged in the same warrant, they will be treated as separate counts. State v. Jarrett, 189 N.C. 516, 127 S.E. 590 (1925).

Sufficiency of Evidence. — See State v. Meyers, 190 N.C. 239, 129 S.E. 600 (1925); State v. Sigmon, 190 N.C. 684, 130 S.E. 854 (1925); State v. Pierce, 192 N.C. 766, 136 S.E. 121 (1926); State v. Hege, 194 N.C. 526, 140 S.E. 80 (1927); State v. Norris, 206 N.C. 191, 173 S.E. 14 (1934); State v. Epps, 213 N.C. 709, 197 S.E. 580 (1938); State v. Wilson, 227 N.C. 43, 40 S.E.2d 449 (1946); State v. Holbrook, 228 N.C. 582, 46 S.E.2d 842 (1948); State v. Vanhoy, 230 N.C. 162, 52 S.E.2d 278 (1949); State v. Webb, 233 N.C. 382, 64 S.E.2d 268 (1951); State v. Harrelson, 245 N.C. 604, 96 S.E.2d 867 (1957); State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963).

Testimony by officers searching without a warrant that they found a quantity of nontaxpaid liquor in defendant's car was held competent. State v. Vanhoy, 230 N.C. 162, 52 S.E.2d 278 (1949).

General Verdict Sufficient for Conviction. — A general verdict of guilty, under evidence tending to show that the defendant unlawfully had in his possession, when not in his private dwelling, intoxicating liquor, under an indictment therefor, as well as for the unlawful receiving and transportation, is sufficient to sustain a conviction upon the count of possession prohibited. State v. McAllister, 187 N.C. 400, 121 S.E. 739 (1924).

Erroneous Charge as to Separate Count Harmless. — Where a general verdict of guilty has been rendered against the defendant, upon competent evidence tending to show that he unlawfully had spirituous liquor in his possession, an erroneous charge as to receiving and transporting it is harmless error. State v. McAllister, 187 N.C. 400, 121 S.E. 739 (1924).

Harmless Error. — When a defendant is charged in two counts in the bill of indictment with separate offenses of the same grade, and the jury returns a verdict of guilty as to both counts, error in the trial of one count is harmless and does not entitle defendant to a new trial when such error does not affect the verdict on the other count. State v. Epps, 213 N.C. 709, 197 S.E. 580 (1938).

Distinct Charges Supporting Separate Sentences. — A charge of unlawful possession of intoxicating liquors for the purpose of sale and a charge of unlawful sale of intoxicating liquors are distinct charges of separate offenses and support separate sentences by the court on a general plea of guilty. State v. Moschoure, 214 N.C. 321, 199 S.E. 92 (1938).

Sentence of Two Years Constitutional. — See State v. Beavers, 188 N.C. 595, 125 S.E. 258 (1924).

Separate Punishment for Different Counts. — Upon a general verdict of guilty to an indictment charging separately unlawful possession of intoxicating liquor and unlawful transportation of intoxicating liquor, the court is empowered to assign separate punishment for each count, notwithstanding that the possession was physically necessary to the act of transporting. State v. Chavis, 232 N.C. 83, 59 S.E.2d 348 (1950).

§ 18A-4. Exemptions. — (a) The provisions of this Chapter shall not apply to grain alcohol received by duly licensed physicians, druggists, dental surgeons, college, university, and State laboratories, and manufacturers of medicine, when intended to be used in compounding, mixing, or preserving medicines or medical preparations, or for surgical purposes, when obtained as hereinbefore provided.

(b) Nothing contained in this Chapter shall prohibit the importation into the State and the delivery and possession in the State for use in industry, manufacturers, and arts of any denatured alcohol or other denatured spirits that are compounded and made in accordance with the formulas prescribed by acts of Congress of the United States and regulations made under authority thereof by the Treasury Department of the United States and the Commissioner of Internal Revenue thereof and are not now subject to internal revenue tax levied by the government of the United States.

(c) This Chapter shall not apply to liquor required and used by bona fide hospitals or sanatoriums established and maintained for the treatment of patients addicted to the use of liquor, morphine, opium, cocaine, or other deleterious drugs when the liquor is administered to patients actually in such hospitals or sanatoriums for treatment, and when the liquor is administered as an essential part of the particular system or method of treatment and exclusively by or under the direction of a duly licensed and registered physician of good moral character and standing.

(d) This Chapter shall not prohibit the manufacture or sale of cider or vinegar.

(e) Nothing in this Chapter shall prevent the purchase or possession of

unfortified wine for sacramental purposes by any organized church or ordained minister of the gospel.

(f) The provisions of this Chapter shall not apply to ethyl alcohol intended for use and/or used for the following purposes:

(1) For scientific, chemical, mechanical, industrial, medicinal, and culinary purposes;

(2) For use by those authorized to procure the same tax free, as provided by the acts of Congress and regulations promulgated thereunder;

(3) In the manufacture of denatured alcohol produced and used as provided by the acts of Congress and regulations promulgated thereunder;

(4) In the manufacture of patented, patent, proprietary, medicinal, pharmaceutical, antiseptic, toilet, scientific, chemical, mechanical, and industrial preparations or products unfit for beverage purposes;

(5) In the manufacture of flavoring extracts and syrups unfit for beverage purposes.

(g) This Chapter shall not apply to wine (fortified or unfortified) and liquor used for the manufacture of pharmaceutical products, as authorized by the State Board of Alcoholic Control. (1923, c. 1, ss. 4, 19, 20; C. S., s. 3411(d), (s), (t); 1935, c. 114; 1971, c. 872, s. 1; c. 1233.)

§ 18A-5. Manufacturing liquor, utensils, or stamps. — (a) It is unlawful for any person to distill, manufacture, or in any manner make, or for any person to aid, assist, or abet any such person in distilling, manufacturing, or in any manner making any intoxicating liquor, except as expressly authorized in this Chapter.

(b) It shall be unlawful for any person knowingly to permit or allow any distillery or other apparatus for the making or distilling of spirituous liquors to be set up for operation or to be operated on lands in his possession or control.

(c) It shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula, direction, or recipe advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this Chapter, or which has been so used, and no property rights shall exist in any such liquor or property.

(d) The willful manufacture or causing to be manufactured or the willful possession of any counterfeit or unauthorized federal revenue stamp or local A.B.C. board stamp shall be unlawful. (1905, c. 498, s. 2; Rev., s. 3533; 1923, c. 1, ss. 4, 6, 26; C. S., ss. 3407, 3411(d), (f), (z); 1937, c. 49, s. 13; 1945, c. 635; 1951, c. 850; 1955, c. 560; 1957, c. 984; c. 1235, s. 1; 1969, c. 789; 1971, c. 872, s. 1.)

"Property Designed for the Manufacture of Liquor". — The word "designed" is defined as "done by design or purposely," that is, "opposed to accidental or inadvertent." Hence, as used in this section, the phrase "property designed for the manufacture of liquor" means property "fashioned according to a plan" for that purpose. State v. McLamb, 235 N.C. 251, 69 S.E.2d 537 (1952).

Possession, within the meaning of this section, may be either actual or constructive. State v. McLamb, 235 N.C. 251, 69 S.E.2d 537 (1952).

If the property designed for the manufacture of liquor was within the power of the defendant in such a sense that he could and did command its use, the possession was as complete within the meaning of this section as if his possession had been actual. State v. Webb, 233 N.C. 382, 64 S.E.2d 268 (1951); State v. McLamb, 235 N.C. 251, 69 S.E.2d 537 (1952).

Possession of Property Designed for Manufacture. — An indictment charging the defendant with a violation of this section in that he had in his possession property designed for the manufacture of intoxicating liquor is not identical with a charge of an attempt to commit a crime. State v. Jaynes, 198 N.C. 728, 153 S.E. 410 (1930).

Process of Manufacturing Need Not Be Complete. — See State v. Horner, 174 N.C. 788, 94 S.E. 291 (1917).

Accessories Equally Guilty. — A defendant guilty of aiding and abetting the unlawful

manufacture of liquor is equally guilty with those who actually operated the still. State v. Clark, 183 N.C. 733, 110 S.E. 641 (1922).

The defendant, convicted on his trial of aiding or abetting in the manufacture of whiskey on one count of the indictment, may not complain because he was tried on another count of the same bill for the unlawful manufacture of liquor and acquitted, there being sufficient evidence to sustain a conviction on each one. State v. Smith, 183 N.C. 725, 110 S.E. 654 (1922).

It was proper to reject evidence as to the quantity of cotton or corn defendant, tried for unlawful manufacture of liquor, etc., had raised on his farm that year. State v. Smith, 183 N.C. 725, 110 S.E. 654 (1922).

Warrant. — A warrant adequately charges a defendant with the offense under this section if it charges possession of property designed for the manufacture of liquor intended for use in violation of this Chapter. State v. Stokes, 10 N.C. App. 176, 177 S.E.2d 758 (1970).

A plea of not guilty under this section puts in issue every element of the offense charged. State v. McLamb, 235 N.C. 251, 69 S.E.2d 537 (1952).

Insufficiency of Charge Not Such as to Warrant Sustaining Motion in Arrest of Judgment. — See State v. McLamb, 235 N.C. 251, 69 S.E.2d 537 (1952).

Evidence of the defendant's guilt of possessing parts of a still designed and intended for the purpose of manufacturing intoxicating liquor was sufficient to be submitted to the jury and to sustain their verdict of guilty, and the fact that the parts had not been assembled into a distillery is immaterial under the language of the statute. State v. Jaynes, 198 N.C. 728, 153 S.E. 410 (1930).

When Question for Jury. — Where there is evidence of defendant's guilty knowledge in aiding in the distilling or manufacturing of intoxicating liquor by hauling it away, and also evidence consistent with his innocence in merely hauling away the remnants after the illegal purpose had been accomplished or frustrated, without intention of taking part or aiding in its manufacture, the question of his guilt or innocence is one for the jury, under proper instructions. State v. Horner, 174 N.C. 788, 94 S.E. 291 (1917).

§ 18A-6. Nontaxpaid liquor. — It shall be unlawful for any person to have in his possession or transport any nontaxpaid liquor, except as authorized by law. In the event of a violation of this section, the liquor and any equipment or materials designed or intended for use in the manufacture, sale, or possession of nontaxpaid liquor shall be seized and disposed of as provided in G.S. 18A-24. Any vehicle or other conveyance used in the transportation of nontaxpaid liquor shall be seized and disposed of as provided in G.S. 18A-21. (1923, c. 1, s. 6; C. S., s. 3411(f); 1937, c. 49, ss. 13, 15; 1945, c. 635; 1951, c. 850; 1955, c. 560; 1957, c. 984; c. 1235, s. 1; 1969, c. 789; 1971, c. 872, s. 1.)

Possession Unlawful without Exception. — The possession of nontaxpaid liquor in any quantity anywhere in the State is, without exception, unlawful. State v. Barnhardt, 230 N.C. 223, 52 S.E.2d 904 (1949); State v. Parker, 234 N.C. 236, 66 S.E.2d 907 (1951); State v. Avery, 236 N.C. 276, 72 S.E.2d 670 (1952); State v. Brown, 238 N.C. 260, 77 S.E.2d 627 (1953); State v. Guffey, 252 N.C. 60, 112 S.E.2d 734 (1960); State v. Leach, 272 N.C. 733, 158 S.E.2d 782 (1968).

Possession May Be Actual or Constructive. — Possession, within the meaning of this section, may be either actual or constructive. State v. Brown, 238 N.C. 260, 77 S.E.2d 627 (1953); State v. Guffey, 252 N.C. 60, 112 S.E.2d 734 (1960); State v. Leach, 272 N.C. 733, 158 S.E.2d 782 (1968).

There can be a constructive possession of nontaxpaid whiskey, as well as an actual possession. State v. Carver, 259 N.C. 229, 130 S.E.2d 285 (1963).

What Warrant or Indictment Should Charge. — Under this section a warrant or indictment should charge the unlawful possession of alcoholic beverages upon which the taxes imposed by the laws of the Congress of the United States or by the laws of this State had not been paid. State v. May, 248 N.C. 60, 102 S.E.2d 418 (1958).

Sufficiency of Warrant. — A warrant which, stripped of nonessential words, charges defendant with unlawful possession of a quantity of nontaxpaid whiskey, is sufficient to survive a motion to quash. State v. Camel, 230 N.C. 426, 53 S.E.2d 313 (1949).

An allegation in a warrant or bill of indictment to the effect that the federal and State taxes had not been paid upon the liquor seized or that it was illicit liquor is merely descriptive, and does not limit the prosecution to any particular section of the liquor law or deprive the State of the benefit of the general provisions of the law as it now exists. Instead, it facilitates proof of the unlawfulness of the possession and renders it unnecessary to prove possession of any particular quantity. State v. Avery, 236 N.C. 276, 72 S.E.2d 670 (1952).

When Search Warrant Not Required. — No search warrant is required where the officer sees or has absolute personal knowledge that there is intoxicating liquor in an automobile. State v. Leach, 272 N.C. 733, 158 S.E.2d 782 (1968).

The court cannot take judicial notice that "bootleg whiskey" is "nontaxpaid liquor." State v. Tillery, 243 N.C. 706, 92 S.E.2d 64 (1956).

What State Must Prove. — See State v. Pitt, 248 N.C. 57, 102 S.E.2d 410 (1958).

Sufficiency of Evidence. — In a prosecution under this section on a warrant charging possession of nontaxpaid liquor, evidence by the State that six gallons of liquor and a jar of "white liquor" were found on defendant's premises, without evidence that the containers did not bear a revenue stamp of the federal government or a stamp of any of the county A.B.C. boards, is insufficient to sustain conviction. The court will not take judicial notice that "white liquor" means nontaxpaid liquor. State v. Wolf, 230 N.C. 267, 52 S.E.2d 920 (1949).

Evidence of defendant's illegal possession of a considerable quantity of nontaxpaid whiskey was held sufficient to carry the case to the jury and his motion to nonsuit was properly denied. State v. Camel, 230 N.C. 426, 53 S.E.2d 313 (1949); State v. Harrison, 239 N.C. 659, 80 S.E.2d 481 (1954).

Evidence that whiskey belonging to defendant was found on defendant's premises and that the whiskey was not A.B.C. whiskey, together with stipulations that the containers bore no stamps, is sufficient to be submitted to the jury in a prosecution under this section. State v. Pitt, 248 N.C. 57, 102 S.E.2d 410 (1958).

Evidence Sufficient to Overrule Defendant's Motion to Nonsuit. — See State v. Avery, 236 N.C. 276, 72 S.E.2d 670 (1952); State v. Bryant, 245 N.C. 645, 97 S.E.2d 264 (1957); State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963).

Evidence showing nontaxpaid liquor found within the curtilage of the defendant's home is sufficient to take the case to the jury under this section, and the court will properly overrule defendant's motion for judgment as of nonsuit. State v. Gibbs, 238 N.C. 258, 77 S.E.2d 779 (1953).

Confiscation of Car. — Defendant admitted ownership of the car in which two bottles of nontaxpaid whiskey were being transported at the time of his arrest, and he was found guilty of unlawful transportation of intoxicating liquor. This was held sufficient to sustain the court's order confiscating his car and ordering it sold in conformity with statute. State v. Vanhoy, 230 N.C. 162, 52 S.E.2d 278 (1949).

§ 18A-7. Keeping liquor for sale; evidence. — (a) It is unlawful for any person, firm, association or corporation, by whatever name called, to have or keep in possession for the purpose of sale, except as authorized by law, any intoxicating liquors; and proof of any one of the following facts shall constitute prima facie evidence of a violation of this section:

(1) The possession of a license from the government of the United States to sell or manufacture spirituous liquors; or

(2) The possession of more than four liters of spirituous liquors at any one time, whether in one or more places; or

(3) The possession of more than 20 liters of wine (fortified or unfortified) at any time, whether in one or more places; or

(4) The possession of more than 80 liters of malt beverages at any one time, whether in one or more places, other than draft malt beverages in kegs; or

(5) The possession of any quantity whatsoever of nontaxpaid liquor.

(b) The possession of liquor by any person not legally permitted under this Chapter to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this Chapter. (1913, c. 44, s. 2; 1915, c. 97, s. 8; 1923, c. 1, s. 10; C. S., ss. 3379, 3411(j); 1949, c. 1251, s. 2; 1963, c. 932; 1967, c. 222, ss. 4, 6; 1971, c. 872, s. 1; 1977, c. 176, ss. 1-3.)

Editor's Note. — The 1977 amendment in subsection (a), substituted "four liters" for "one gallon" in subdivision (2), "twenty liters" for "five gallons" in subdivision (3), and "eighty liters" for "twenty gallons" in subdivision (4).

For a discussion of the wisdom of permitting proof of possession to raise a presumption of unlawful handling for gain, see 5 N.C.L. Rev. 302.

Constitutionality. — The section is constitutional and valid. State v. Randall, 170 N.C. 757, 87 S.E. 227 (1915); State v. Langley, 209 N.C. 178, 183 S.E. 526 (1936).

This section is not in contravention of the

federal Constitution. State v. Brown, 170 N.C. 714, 86 S.E. 1042 (1915).

Liberal Construction. — Subsection (b) is to be liberally construed to prevent the use of liquor as a beverage, and the possession of such liquor is made prima facie evidence of the violation of the law. State v. Hammond, 188 N.C. 602, 125 S.E. 402 (1924).

"Prima Facie Evidence". — The words "prima facie evidence" are defined in Webster's International Dictionary as meaning "evidence sufficient, in law, to raise a presumption of fact or establish the fact in question, unless rebutted." It must presume that the legislature had such meaning in mind when such words were used in the statute. State v. Russell, 164 N.C. 482, 80 S.E. 66 (1913).

Prima facie evidence neither conclusively determines the guilt or innocence of the party who is accused nor withdraws from the jury the right and duty of passing upon and deciding the issue to be tried. The burden of proof remains continually upon the State to establish the accusation which it makes, as prima facie evidence does not change or shift the burden. State v. Russell, 164 N.C. 482, 80 S.E. 66 (1913).

While the prima facie case, unexplained, is sufficient to sustain a verdict of guilty, yet the defendant is not required to show, by the greater weight of evidence, that the whiskey was in his possession for lawful purposes, for such, in effect, would require him to establish his own innocence and relieve the State of the burden of the issue, which is placed upon it. State v. Wilkerson, 164 N.C. 431, 79 S.E. 888 (1913).

Where there is evidence that the defendant indicted under this section had in his possession sufficient spirituous liquors to raise the prima facie presumption that it was for the purpose of sale, it is competent to show this intent, and in furtherance of the presumption, that soon thereafter, about two months later, he was found working on a copper still on his premises, and had copper enough to make two of them; and that, upon his premises being searched, he had falsely denied the possession and had attempted to shoot the officer making the search. State v. Simmons, 178 N.C. 679, 100 S.E. 239 (1919).

The possession of more than one gallon (now four liters) of intoxicating (now spirituous) liquor is prima facie evidence of possession for the purpose of sale under this section, and is sufficient to take the case to the jury on the issue. State v. Tate, 210 N.C. 168, 185 S.E. 665 (1936).

Evidence that over a gallon of whiskey in pint bottles with unbroken seals was found on defendant's premises, that defendant admitted owning the whiskey, and that empty whiskey bottles were found around premises, is held sufficient to be submitted to the jury on a charge of illegal possession of intoxicating liquor for the purpose of sale. State v. Libby, 213 N.C. 662, 197 S.E. 154 (1938).

In a prosecution for the unlawful possession of intoxicating (now spirituous) liquor for the purpose of sale, evidence that defendant, who resided four miles from the still, came to the still and got one-half gallon of nontaxpaid whiskey and left with it, is sufficient to make out a prima facie case for the jury. State v. Graham, 224 N.C. 347, 30 S.E.2d 151 (1944).

For evidence sufficient to make out prima facie case against defendant, see State v. Buchanan, 233 N.C. 477, 64 S.E.2d 549 (1951).

In a prosecution for unlawful possession of intoxicating (now spirituous) liquor for the purpose of sale, where the evidence is that a quantity of beer less than five gallons and less than one gallon of gin was found in the house of defendants, no presumption arises thereupon against defendants. State v. Harrelson, 245 N.C. 604, 96 S.E.2d 867 (1957).

The evidence was sufficient to carry the case to the jury on the charge of unlawful possession of whiskey and beer for the purpose of sale. State v. Mills, 246 N.C. 237, 98 S.E.2d 329 (1957).

Power of Legislature to Change Rule of Evidence. — See full discussion in State v. Wilkerson, 164 N.C. 431, 79 S.E. 888 (1913).

Possession may be either actual or constructive within the meaning of this section. State v. Parker, 234 N.C. 236, 66 S.E.2d 907 (1951); State v. Rogers, 252 N.C. 499, 114 S.E.2d 355 (1960).

This section, making the possession of certain specified quantities of spirituous, vinous, or malt liquors prima facie evidence of its violation, intends that the "possession" shall be construed as either actual or constructive; so that the possession of such quantities by the agent will be deemed the possession of the principal for the purpose of the act. State v. Lee, 164 N.C. 533, 80 S.E. 405 (1913); State v. Buchanan, 233 N.C. 477, 64 S.E.2d 549 (1951).

Evidence tending to show that 96 gallons of intoxicating liquor were found in the basement of the tenant house on defendant's farm and tending to show that he alone had key to the door to the basement is sufficient to support constructive possession. State v. Parker, 234 N.C. 236, 66 S.E.2d 907 (1951).

If the liquor was within the power of the defendant, in such a sense that he could and did command its use, the possession was as complete within the meaning of the statute as if his possession had been actual. State v. Buchanan, 233 N.C. 477, 64 S.E.2d 549 (1951).

If nontaxpaid whiskey is on a person's premises with his knowledge and consent, he has constructive possession thereof while it remains on premises under his exclusive control. State v. Thompson, 256 N.C. 593, 124 S.E.2d 728, cert. denied, 371 U.S. 820, 83 S. Ct. 36, 9 L. Ed. 2d 60 (1962).

The possession of more than one gallon (now four liters) of intoxicating (now spirituous) liquor by the agent for the one accused of

violating the State prohibition law is sufficient to make out a prima facie case of guilt under the provisions of this section. State v. Blauntia, 170 N.C. 749, 87 S.E. 101 (1915).

Possession as Evidence of Sale. — See State v. McAllister, 187 N.C. 400, 121 S.E. 739 (1924); State v. Knight, 188 N.C. 630, 125 S.E. 406 (1924); State v. Pierce, 192 N.C. 766, 136 S.E. 121 (1926); State v. Parker, 234 N.C. 236, 66 S.E.2d 907 (1951).

Possession for Use of Owner. — The mere possession of spirituous liquor in the home for the use of the owner, his family and their guests on the premises in the absence of a count in the indictment charging that it was for prohibited purposes is not made unlawful. State v. Mull, 193 N.C. 668, 137 S.E. 866 (1927).

The law permits an individual to possess in his home an unlimited quantity of taxpaid intoxicating (now spirituous) liquor for his own use and that of his bona fide guests, but the possession of more than one gallon (now four liters) is prima facie evidence that such liquor is for the purpose of sale. State v. Causby, 269 N.C. 747, 153 S.E.2d 467 (1967).

Possession of Any Quantity of Nontaxpaid Liquor. — Nontaxpaid whiskey is outlawed by statute in this State. The possession of any quantity of nontaxpaid liquor is, without exception, unlawful, and this section raises the presumption, even though less than one gallon (now four liters) in quantity, that possession is for the purpose of sale. State v. Guffey, 252 N.C. 60, 112 S.E.2d 734 (1960).

Possession of nontaxpaid liquor is prima facie evidence that such liquor is kept for the purpose of being sold. State v. Tessnear, 265 N.C. 319, 144 S.E.2d 43 (1965).

From the mere possession of nontaxpaid whiskey, this section authorizes, but does not compel, the jury to infer that the possessor intended to sell the whiskey. State v. Tessnear, 265 N.C. 319, 144 S.E.2d 43 (1965).

Burden of Proof. — The possession of the specified quantity of spirituous liquors sufficient to make out prima facie evidence of an unlawful purpose is only sufficient to sustain a verdict of guilty, and does not shift the burden upon the defendant to show his innocence, and an instruction to that effect is reversible error. State v. Helms, 181 N.C. 566, 107 S.E. 228 (1921).

Where the possession of the specified quantities of intoxicating liquors under a statutory provision has made out prima facie evidence of guilt, and the defendant has not introduced evidence, an instruction to the jury placing the burden on the defendant to establish his innocence is reversible error, being equivalent to directing a verdict, which is not permissible in a criminal case. State v. Helms, 181 N.C. 566, 107 S.E. 228 (1921).

Instructions. — Where an instruction that "the possession of more than one gallon of liquor constitutes prima facie evidence of unlawful possession for the purpose of sale" is directed to a count charging unlawful possession for the purpose of sale, and defendant is convicted on that count and on two other counts of unlawful possession, and sentences imposed run concurrently, conceding the charge to be erroneous, it cannot avail defendant, who must show error affecting the whole case. State v. Gordon, 224 N.C. 304, 30 S.E.2d 43 (1944).

Evidence Sufficient to Warrant Finding that Possession Was for Purpose of Sale. — See State v. Jenkins, 234 N.C. 112, 66 S.E.2d 819 (1951).

Evidence Sufficient to Support Adverse Verdict. — See State v. Gordon, 224 N.C. 304, 30 S.E.2d 43 (1944).

Evidence Sufficient to Overrule Nonsuit. — Evidence tending to show that defendant was driving his automobile on a highway, that when officers attempted to stop him he attempted to elude them, threw a carton containing three gallons of nontaxpaid whiskey from the car, and drove in a reckless manner until struck from rear by the officers' car and run off the road, was held sufficient to overrule nonsuit upon each of the charges of illegal possession of whiskey for the purpose of sale and unlawful transportation of same. State v. Merritt, 231 N.C. 59, 55 S.E.2d 804 (1949).

Insufficient Evidence to Direct Verdict. — Evidence establishing defendant's possession of more than a gallon of intoxicating (now spirituous) liquor, without other incriminating evidence, is insufficient to support a directed verdict of guilty of possession of intoxicating liquor for the purpose of sale under this section. State v. Ellis, 210 N.C. 166, 185 S.E. 663 (1936).

§ 18A-8. Sale to or purchase by minors. — (a) It shall be unlawful for:

(1) Any person, firm, or corporation knowingly to sell or give any malt beverages or unfortified wine to any person under 18 years of age;

(2) Any person under 18 years of age to purchase or possess, or for anyone to aid or abet such person in purchasing, any malt beverages or unfortified wine;

(3) Any person, firm, or corporation knowingly to sell or give any alcoholic beverages to any person under 21 years of age; or

(4) Any person under 21 years of age to purchase or possess, or for anyone to aid or abet such person in purchasing, any alcoholic beverages.

(b) Whenever a sale of malt beverages or unfortified wine is made to a person under the age of 18 years, it shall be prima facie evidence that the person making the sale had knowledge that the purchaser was under the age of 18 years. Such prima facie evidence may be rebutted by showing that the purchaser produced for inspection a driver's license, selective service card, or military identification card showing the age of the purchaser to be 18 years or more and the description of the physical appearance of the person on the identification card reasonably describes the purchaser. In the absence of such identification, the prima facie evidence of knowledge of age may be rebutted by the vendor by other evidence which reasonably indicated at the time of sale that the purchaser was 18 years of age or more. (1933, c. 216, s. 8; 1959, c. 745, s. 1; 1967, c. 222, s. 3; 1969, c. 998; 1971, c. 872, s. 1; 1973, c. 27.)

§ 18A-9. Federal license prohibited. — (a) It is unlawful for any person, firm, partnership, or corporation to procure, obtain, possess, purchase, permit to be issued, or have issued to any person a license, permit, stamp, or other authorization from the government of the United States to manufacture, sell, possess, transport, handle, or purchase intoxicating liquors in the State of North Carolina. Provided, this section shall not apply to the Department of Defense and agencies of the armed services operating thereunder, nor to any agency, department, official, or agent of the State of North Carolina or any other person or persons engaged in any activity or transactions authorized under this Chapter.

(b) The possession of a license or the issuance to any person of a license to manufacture, rectify, or sell, at wholesale or retail, spirituous liquors by the United States government or any officer thereof in any county, city, or town where the manufacture, sale, or rectification of spirituous liquors is forbidden by the laws of this State shall be prima facie evidence that the person having such license, or to whom the license was issued, is guilty of doing the act permitted by the license in violation of the laws of this State. On the trial of any person charged with the violation of any such laws, it shall be competent to prove that such a license is in the possession of or has been issued to such person by the testimony of any witness who has personally examined the records of the government office where the official record of such licenses is kept. (1905, c. 339, s. 5; Rev., s. 2060; 1907, c. 931; C. S., s. 3408; 1951, c. 1025; 1971, c. 872, s. 1.)

§ 18A-10. Advertisements. — It shall be lawful to advertise anywhere or by any means or method liquor or the manufacture, sale, keeping for sale, or furnishing of the means by which it may be obtained, or where, how, from whom, or at what price it may be obtained, provided such advertising complies with the rules and regulations of the State Board of Alcoholic Control. (1923, c. 1, s. 3; C. S., s. 3411(c); 1933, cc. 216, 229; 1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1957, c. 1048; 1963, c. 426, s. 10; c. 460, s. 1; 1971, c. 872, s. 1.)

Authority of State Board of Alcoholic Control to Regulate Advertising. — See opinion of Attorney General to Mr. Lee P. Phillips, State A.B.C. Board, 40 N.C.A.G. 1 (1970).

§ 18A-11. Place of sale and delivery; place of prosecution. — In case of a sale of liquor where the delivery thereof was made by a common or other carrier, the sale and delivery shall be deemed to be made in the county wherein the delivery was made by such carrier or the consignee, his agent or employee, or in the county wherein the sale was made, or from which the shipment was made, and prosecution for such sale or delivery may be had in either county. (1923, c. 1, s. 8; C. S., s. 3411(h); 1971, c. 872, s. 1.)

§ 18A-12. Indictment and summons. — In any affidavit, information, warrant, or indictment for the violation of this Chapter, separate offenses may be united in separate counts, and the defendant may be tried on all at one trial, and the penalty for all offenses may be imposed. (1971, c. 872, s. 1.)

§ 18A-13. Mixed beverages. — (a) When any person applies to a county or municipal alcoholic control board for a license or permit for the sale of mixed beverages on any premises in the State, pursuant to any public or local act, said person shall also file written application for a permit to be issued by the State Board.

(b) No permit shall be issued by the State Board unless the premises and licensee meet the requirements established in the comprehensive plan approved by the State Board, and the licensee meets the requirements contained in G.S. 18A-39.

(c) The permit shall be an on-premise permit and the provisions of G.S. 18A-43 through 18A-45 shall be applicable to any premises or licensee selling alcoholic beverages under any special or local act.

(d) No permit shall be issued until after the local board certifies that the licensee and the premises meet the requirements of all applicable local and State laws and regulations, and any permit shall remain the property of the State Board, and shall be surrendered upon notice from the State Board.

(e) The State Board shall suspend or revoke the permit for a violation of any provision of the local act or of Chapter 18 or Chapter 18A of the General Statutes.

(f) All permits shall be for a period of one year unless sooner suspended or revoked and shall expire on April 30 of each year.

(g) Application for permit or renewal of permit shall be accompanied by a fee of one hundred and fifty dollars ($150.00), payable to the State Board of Alcoholic Control for deposit with the State Treasurer, and no fee is refundable in case a permit is refused, suspended, or revoked.

(h) The State Board shall adopt rules and regulations governing the transportation, possession, serving and use of mixed beverages, and it shall be unlawful and punishable as a misdemeanor for any person to violate the provisions of this section or any rule or regulation duly adopted by the State Board. (1971, c. 872, s. 1.)

Editor's Note. — This section was repealed and a new Article 3A, governing the sale of mixed alcoholic beverages, was enacted by Session Laws 1973, c. 316. The 1973 act was made subject to a statewide referendum, and was defeated at the general election held Nov. 6, 1973.

ARTICLE 2.

A.B.C. Boards and Enforcement.

Part 1. A.B.C. Boards.

§ 18A-14. State Board of Alcoholic Control. — (a) A State Board of Alcoholic Control is hereby created, and shall consist of a Chairman and two associate members. The Chairman and associate members of the Board shall be men well known for their character, ability, and business acumen. The Chairman of the Board shall devote his full time to his official duties. He shall receive a salary to be fixed by the Governor, subject to the approval of the Advisory Budget Commission, together with necessary traveling expenses allowed under the general law. The two associate members of the Board shall receive no compensation for their services except the per diem, subsistence, and travel allowances provided for members of similar State boards and commissions by Chapter 138 of the General Statutes.

(b) The Chairman and the associate members of the State Board of Alcoholic Control shall be appointed by the Governor and shall serve at the pleasure of the Governor. The Governor shall fill any vacancy arising on the State Board by appointment of a successor, to serve at the pleasure of the Governor. The Chairman of the Board shall have such powers and perform such duties as the Board shall prescribe, including the authority to appoint, promote, demote, and discharge all subordinate officers and employees of the State Board of Alcoholic Control. All such officers and employees shall perform such duties as the Chairman may assign. (1937, c. 49, ss. 2, 3; c. 411; 1939, c. 185, s. 5; 1941, c. 107, s. 5; 1963, c. 916, s. 1; 1965, c. 1102, ss. 1, 2; 1969, c. 294, ss. 1, 2; 1971, c. 872, s. 1.)

State Government Reorganization. — The State Board of Alcoholic Control was transferred to the Department of Commerce by former G.S. 143A-173, enacted by Session Laws 1971, c. 864. The Board has since been transferred to the Department of Crime Control and Public Safety by § 143A-293, Session Laws, 1977, c. 70, s. 1.

Local Modification. — Town of Brevard: 1977, c. 728.

Applied in Abernathy v. Schenley Indus., Inc., 420 F. Supp. 1 (W.D.N.C. 1976).

Cited in Fay v. State Bd. of Alcoholic Control, 30 N.C. App. 492, 227 S.E.2d 298 (1976).

§ 18A-15. Powers and authority of State Board. — The State Board of Alcoholic Control shall have power and authority as follows:

(1) In conjunction with the Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety, to see that all the laws relating to the sale and control of intoxicating liquor are observed and performed.

(2) To audit and examine the accounts, records, books, and papers relating to the operation of county and municipal stores or to have the same audited.

(3) a. To fix the retail price of each bottle of alcoholic beverages sold in the county and municipal A.B.C. stores at such levels as shall promote the temperate use of these beverages and as may facilitate policing, which price shall be uniform throughout the State;

b. To compute the taxes levied by G.S. 105-113.93 and 105-113.94 on the retail prices of spirituous liquors so fixed;

c. To add to said retail price:

1. An amount equal to three and one-half percent (3½%) of said retail price of spirituous liquors; and

2. One cent (1¢) per bottle on each bottle of alcoholic beverages containing fifty milliliters or less sold in said county and municipal A.B.C. stores and five cents (5¢) per bottle on each bottle of alcoholic beverages containing more than fifty milliliters sold in said stores; the sum of the retail price plus the foregoing additions thereto being the established price for each such bottle of alcoholic beverages. The foregoing additions to retail price shall not be subject to the tax levied by G.S. 105-113.93 and 105-113.94. The clear proceeds of the three and one-half percent (3½%) addition to the retail price of spirituous liquors shall be retained by the respective county or municipal A.B.C. boards in the same manner as other profits derived from the sale of spirituous liquors. The clear proceeds of the one cent (1¢) and five cents (5¢) per bottle addition to retail price shall be remitted to the county commissioners of the county in which such additions to retail price were collected, accompanied by forms or reports to be prescribed

and furnished by the State Board of Alcoholic Control, which remittances shall be spent in the discretion of the county commissioners only for projects for construction, maintenance and operation of facilities for education, research, treatment or rehabilitation of alcoholics. In connection with such projects and programs, the county commissioners, or such agencies as are by them designated, shall also have the authority to use said funds to purchase or lease real and personal property, and to renovate, remodel, furnish and equip buildings as and when required for the operation of such projects and programs. The funds may also be used for programs of education and research on problems of alcoholism and the treatment and rehabilitation of alcoholics. The county commissioners are hereby empowered to spend the funds for a project not located in the county but which benefits the citizens of the county. The Department of Human Resources and the State Department of Public Instruction are hereby empowered to enact guidelines for the expenditure of such funds by county commissioners and the county commissioners may expend the funds pursuant to those guidelines. Reports and remittances of the aforesaid additions to retail price shall be made monthly by the local boards on or before the fifteenth day of the next succeeding month.

d. To determine the total prices of all such alcoholic beverages, which total price shall be the sum of the established price plus the taxes levied by G.S. 105-113.93 and 105-113.94, and to notify the stores periodically of such prices.

(4) To remove any member, or members, of county and municipal boards whenever in the opinion of the State Board such member, or members, of the county or municipal board, or boards, may be unfit to serve thereon.

(5) To test any and all alcoholic beverages that may be sold, or proposed to be sold, to the county or municipal stores, and to install and operate such apparatus, laboratories, or other means or instrumentalities and employ to operate the same such experts, technicians, employees and laborers as may be necessary to operate the same, in accordance with the opinion of the Board. In lieu of establishing and operating laboratories as above directed, the Board may, with the approval of the Governor and the Commissioner of Agriculture, arrange with the State Chemist to furnish such information and advice and to perform such analyses and other laboratory services as the Board may consider necessary, or they may, if they deem advisable, cause such tests to be made otherwise.

(6) To supervise purchasing by the county and municipal boards when the State Board is of the opinion that it is advisable for it to exercise such power in order to carry into effect the purpose and intent of this Chapter, with full power to disapprove any such purchase. At all times it shall have the right to inspect all invoices, papers, books, and records in the county or municipal stores or boards relating to purchases.

(7) To exercise the power to approve or disapprove in its discretion all regulations adopted by the several county and municipal stores for the operation of said stores and the enforcement of alcoholic beverage control laws which may be in violation of the terms or spirit of this Chapter.

(8) To require that a sufficient amount be so allocated as to insure adequate enforcement; the amount shall in no instance be less than five percent

(5%) nor more than ten percent (10%) of the net profits arising from the sale of alcoholic beverages.

(9) To remove, in case of violation of the terms or spirit of this Chapter, officers employed, elected, or appointed in the several counties and municipalities where stores may be operated.

(10) To approve or disapprove, in its discretion, the opening and location of county and municipal stores; provided that in the location of control stores in any county in which a majority of the votes have been cast for liquor control stores, no store or stores shall be located in any community or town in which a majority of the votes cast were against control; provided further, however, that stores may be located in such communities and towns if and when as many as twenty percent (20%) of the qualified voters therein by petition, at any time after 18 months since the last election on such question, have requested the location of such a store or stores in such communities or towns and the State Board has found, upon due investigation after receipt of such petition, that a majority of the qualified electors in such community or town are at the time such investigation is made in favor of establishing such store or stores. Each county and municipality that may be entitled to operate stores for the sale of alcoholic beverages shall be entitled to operate at least one store for such purpose. No additional stores in each of said counties and municipalities shall be opened until and unless their opening and their place of location shall first be approved by the State Board, which at any time may withdraw its approval of the operation of any additional county or municipal store when the store is not operated efficiently and in accordance with the alcoholic beverage control laws and all valid regulations prescribed therefor, or whenever, in the opinion of the State Board, the operation of any county or municipal store shall be inimical to the morals or welfare of the community in which it is operated or for such other cause, or causes, as may appear to the State Board sufficient to warrant the closing of any county or municipal store.

(11) To require the use of a uniform accounting system in the operation of all county and municipal stores hereunder and to provide in said system for the keeping therein and the record of all such information as may, in the opinion of the said State Board, be necessary or useful in its auditing of the affairs of the said county and municipal stores, as well as in the study of such problems and subjects as may be studied by said State Board in the performance of its duties.

(12) To grant, to refuse to grant, or to revoke permits for any person, firm, or corporation to do business in North Carolina in selling alcoholic beverages to or for the use of any county or municipal store and to provide and to require that such information be furnished by such person, firm, or corporation as a condition precedent to the granting of such permit, or permits, and to require the furnishing of such data and information as it may desire during the life of such permit, or permits, and for the purpose of determining whether such permit, or permits, shall be continued, revoked, or regranted after expiration dates. No permit, however, shall be granted by the State Board to any person, firm, or corporation when the State Board has reason sufficient unto itself to believe that such person, firm, or corporation has furnished to it any false or inaccurate information or is not fully, frankly, and honestly cooperating with the State Board, the Alcohol Law Enforcement Division, and the several county and municipal boards in observing and performing all liquor laws that may now or hereafter be in force in this State, or whenever the Board shall be of

opinion that such permit ought not to be granted or continued for any cause. Upon the granting of a permit in accordance with this Chapter, the State Board of Alcoholic Control shall notify the county sheriff and county tax collector, and if applicable, the city chief of police and city tax collector, as well as the county alcoholic beverage control officer, whenever an alcoholic beverage control permit of any type is issued within the respective county and/or city.

(13) On or before June 30, 1975, and thereafter to provide for the receipt, storage and distribution of spirituous liquors by negotiated contract or by use of the procedures for purchase and contract of property by State agencies with a privately-owned warehouse in the Raleigh area or, alternatively and by the same procedure, with privately-owned warehouses in the several regions of the State which in the discretion of the Board would promote efficient distribution of spirituous liquors to the local boards of alcoholic control and maintain control of such beverages and the Board's supervision thereof. The State Board of Alcoholic Control shall provide for such warehousing and distribution through contracts or subleases with independent contractors, except that the State Board shall have the power and authority to operate such warehouses on an interim emergency or temporary basis pursuant to a change in independent operator or for some condition substantially impeding distribution of spirituous liquors from the warehouse. The Board shall prescribe such rules and regulations as they deem necessary for the receipt, storage and distribution of such beverages and violation of such rules and regulations shall be grounds for termination of a contract upon reasonable notice by the Board. The contract or contracts entered into pursuant to this subdivision shall provide for an annual audited financial statement, shall provide that the records of the warehouse or warehouses be available for inspection at all times by the State Board of Alcoholic Control and the Department of Revenue and shall provide that the accounts of the warehouse or warehouses regarding the receipt, storage and distribution of spirituous liquors be subject to audit by the State Auditor.

(14) To adopt, amend, or repeal reasonable rules and regulations for the purpose of carrying out the provisions of this Chapter, but not inconsistent herewith, which rules and regulations shall become effective when filed as provided by law.

(15) To appoint or commission one or more hearing officers who shall have the full authority to make investigations, hold hearings, and make findings of fact. Upon the approval by the State Board of the findings and orders of suspension or revocation of the permit of any licensee made and entered by any such hearing officer, the findings of such hearing officer shall be deemed to be the findings and the order of the Board.

(16) The Board is authorized to dispose of damaged liquors belonging to the Board by selling it to public or private hospitals to be used only for medicinal purposes, or by sale to military installations or by destroying such liquors as the Board may deem best. Sale shall be by:

a. Advertisement for sealed bids;
b. Negotiated offer, advertisement, and upset bids;
c. Public auction; or
d. Exchange.

Complete detailed records of such disposal shall be maintained by the Board showing the brand, amount and disposition. Any funds derived from such liquors shall be paid into the warehouse bailment fund.

(17) To provide for the storage and transportation of alcoholic beverages

for special occasions for a period of 48 hours prior to and following a special occasion by regulation and by the issuance of permits needed for control of such storage and transportation; provided, however, the transportation of alcoholic beverages shall be limited to 20 liters at any one time.

The State Board shall have all other powers which may be reasonably implied from the granting of express powers herein named, together with such other powers as may be incidental to, or convenient for, carrying out and performing the powers and duties herein given to the Board. (1937, c. 49, s. 4; cc. 237, 411; 1945, c. 954; 1949, c. 974, s. 9; 1961, c. 956; 1963, c. 426, s. 12; c. 916, s. 2; c. 1119, s. 1; 1965, c. 1063; c. 1102, s. 3; 1967, c. 222, s. 2; c. 1240, s. 1; 1971, c. 872, s. 1; 1973, c. 28; c. 473, s. 1; c. 476, s. 133; c. 606; c. 1288, s. 1; cc. 1369, 1396; 1975, cc. 240, 453, 640; 1977, c. 70, ss. 15.1, 15.2, 16; c. 176, ss. 2, 6.)

Editor's Note. — The first 1975 amendment added the fifth sentence in paragraph c 2 of subdivision (3).

The second 1975 amendment substituted "spirituous liquors" for "alcoholic beverages" throughout subdivision (13).

The third 1975 amendment added subdivision (17).

The first 1977 amendment added "In conjunction with the Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety" at the beginning of subdivision (1), inserted "the Alcohol Law Enforcement Division" near the middle of the second sentence of subdivision (12), and rewrote subdivision (15), which formerly read "To appoint or commission A.B.C. officers, hearing officers, and other enforcement personnel authorized by Part 2 of this Article."

The second 1977 amendment substituted "fifty milliliters" for "two ounces" in two places in the first sentence of paragraph c 2 of subdivision (3) and substituted "twenty liters" for "five gallons" in subdivision (17).

Section 105-113.94, referred to in subdivision (3), was repealed by Session Laws 1975, c. 53, s. 3.

As to making of necessary rules and regulations, see 15 N.C.L. Rev. 323. As to power of Board to grant, deny, or revoke permits, see 15 N.C.L. Rev. 328.

Section Empowers Board to Issue Permits. — This section provides for the issuance of permits by the State Board of Alcoholic Control, and except as authorized by the legally issued permit, sales, etc., of alcoholic beverages are made unlawful. Hursey v. Town of Gibsonville, 284 N.C. 522, 202 S.E.2d 161 (1974).

Unless Permit Authorizes Violation of Restrictions Fixed by Chapter. — The Board has no power to issue a permit which authorizes the holder to violate the restrictions fixed by this Chapter. Hursey v. Town of Gibsonville, 284 N.C. 522, 202 S.E.2d 161 (1974).

Power of Investigation. — The Board of Alcoholic Control can conduct, without traditional probable cause, an investigation of a distillery representative's books and records pertaining to promotional activities in North Carolina for his employer. Myers v. Holshouser, 25 N.C. App. 683, 214 S.E.2d 630 (1975).

The investigative demand must be reasonable and specific in directive so that compliance is not unreasonably burdensome. Myers v. Holshouser, 25 N.C. App. 683, 214 S.E.2d 630 (1975).

The information sought must be relevant to a lawful subject of investigation. Myers v. Holshouser, 25 N.C. App. 683, 214 S.E.2d 630 (1975).

The purpose of an administrative investigation is to protect the public; therefore, the public's interest in applying more relaxed criteria for administrative investigations is greater than the regulated person's, firm's or corporation's right to privacy. Myers v. Holshouser, 25 N.C. App. 683, 214 S.E.2d 630 (1975).

The Board of Alcoholic Control is not required to have evidence that petitioner has violated its rules and regulations before it undertakes an investigation of him. Myers v. Holshouser, 25 N.C. App. 683, 214 S.E.2d 630 (1975).

An administrative agency, in this case the Board of Alcoholic Control, is empowered to conduct inquiries to whatever extent is reasonably necessary to make the power of investigation effective. Myers v. Holshouser, 25 N.C. App. 683, 214 S.E.2d 630 (1975).

The Board, even if it has no probable cause, may require a distillery representative to produce relevant business books and records without abridging his constitutional rights under the Fourth Amendment. Myers v. Holshouser, 25 N.C. App. 683, 214 S.E.2d 630 (1975).

Subsection (12) requires the Board of Alcoholic Control to give notice and an opportunity to be heard to the applicant or permittee before a permit is refused or revoked for failure to produce records as ordered by the Board. Myers v. Holshouser, 25 N.C. App. 683, 214 S.E.2d 630 (1975).

A license to engage in a business or practice

a profession is a property right that cannot be suspended or revoked without due process of law. Myers v. Holshouser, 25 N.C. App. 683, 214 S.E.2d 630, (1975).

Construction of Regulations Issued under Subdivision (14). — The board's regulations issued under authority of subsection (14) are not criminal statutes to be strictly construed. They are civil regulations to be reasonably interpreted so as to accomplish the legitimate purposes for which they are issued. Fay v. State Bd. of Alcoholic Control, 30 N.C. App. 492, 227 S.E.2d 298 (1976).

§ 18A-16. County boards of alcoholic control. — (a) In each county that may be permitted to engage in the sale of alcoholic beverages, there is hereby created a county board of alcoholic control, to consist of a chairman and two other members. The members of this board shall be well known for their character, ability, and business acumen. The members of the board shall be selected in each respective county in a joint meeting of the board of county commissioners, the county board of health, and the county board of education. Each person voting at this joint meeting shall have only one vote, notwithstanding the fact that there may be instances in which some persons are members of another board.

The terms of office of the members of the county boards of alcoholic control shall be as follows: The chairman, who shall be so designated by the appointing boards, shall serve for his first term a period of three years, and one member shall serve for his first term a period of two years and the other member shall serve for a period of one year, all terms beginning with the date of their appointment. After each term has expired, each successor in office shall serve for a period of three years and shall be appointed in the same manner as herein provided in this section.

Any member of any of the county boards hereinabove referred to in this section may be removed at any time by the composite board consisting of the board of county commissioners, the board of education, and the board of health whenever such composite board finds by a majority vote of its entire membership that a member or members are unfit to serve on the county alcoholic beverage control board, each member of the composite board having only one vote as above provided for the selection of members of the county alcoholic beverage control boards. If any member of the county board is removed hereunder, his successor shall be selected to serve out the time for which such member was originally selected.

Upon the death or resignation of the chairman or any other member of the county board of alcoholic control, whether selected under the provisions of this Article or under the provisions of Chapter 418 or Chapter 493, Public Laws of 1935, before the expiration of the term of office for which said chairman or member has been appointed, elected, or selected, his successor to fill out the unexpired term shall be selected at a joint meeting of the board of county commissioners, the county board of health, and the county board of education, which joint meeting shall be held within 10 days after such resignation or death. This meeting shall be called by the chairman or some other member of the county board of alcoholic control by giving notice to each member of when and where it will be held.

(b) No person shall be appointed a member of either the State Board or any county board or employed thereby who is a stockholder in any brewery or the owner of any interest therein in any manner whatsoever, or interested therein directly or indirectly, or likewise interested in any distillery or other enterprise that produces, mixes, bottles, or sells alcoholic beverages, or related by blood to a degree of first cousin or closer to any person likewise interested or associated in business with any person likewise interested. Neither the State Board nor any county board shall employ any person who is interested in, directly or indirectly, or related by blood to a degree of first cousin or closer to any person interested in any firm, person, or corporation permitted to sell alcoholic beverages in this State. Notwithstanding the provisions of this section

the State Board may, upon its own motion and its discretion, make determinative rulings as to the exception to the rules and determine possible conflict of interest.

(c) The salaries of the members of the said county board shall be fixed by the joint meeting of the several boards that appoint them. They shall be fixed with the view to securing the very best members available, with due regard to the fact that such salaries shall be adequate compensation but not large enough to make said positions unduly attractive or the objects of political aspirations.

(d) The several members of the county board shall give bond for the faithful performance of their duties, in the penal sum of five thousand dollars ($5,000). This bond shall be payable to the State of North Carolina and to the county in which said board performs its duties with some corporate surety, which surety shall be satisfactory to and approved by the county attorney of said county and the Chairman of the State Board and shall be deposited with the Chairman of the State Board. The State Board for and on behalf of the State of North Carolina and the county named in said bond shall each be secured therein to the full amount of the penalty thereof, and the recovery or payment of any sums due thereunder to either shall not diminish or affect the right of the other obligee in said bond to recover the full amount of the said penalties thereof. The giving and the approval of such bond shall be a part of the qualification of said members, and no member shall be entitled to exercise any of the functions or powers incident to his appointment until and unless the said bond has been given and approved as herein provided. The three joint boards referred to above shall be authorized to relieve any member of the county boards who does not handle any money or funds from furnishing such bond, and shall be further authorized to require bond in excess of five thousand dollars ($5,000) of any member of the board handling money or funds if the joint boards deem it advisable to increase such bond. (1937, c. 49, ss. 6-9; cc. 411, 431; 1939, c. 202; 1971, c. 872, s. 1.)

Local Modification. — Granville: 1973, c. 946; Tyrrell: 1973, c. 1167; Currituck: 1977, c. 71; Martin: 1977, c. 417; Scotland: 1977, c. 558.

Conflict of Interest by Reason of Relationship. — See opinion of Attorney General to Morrison McKenzie, 41 N.C.A.G. 330 (1971).

§ 18A-17. Powers and duties of county boards. — The said county boards shall each have the following powers and duties:

(1) Control and jurisdiction over the importation, sale and distribution of alcoholic beverages within its respective county;

(2) Power to buy and to have in its possession and to sell alcoholic beverages within its county;

(3) Power and authority to adopt rules and regulations governing the operation of stores within its county and relating to the carrying out of the provisions and purposes of this Chapter;

(4) To prescribe and regulate and direct the duties and services of all employees of said county board;

(5) To fix the hours for the opening and closing of stores operated by it. No store, however, shall be permitted to remain open between the hours of 9:00 P.M. and 9:00 A.M.;

(6) To require any county stores to close on such days as it may designate, but all stores shall remain closed on Sundays, New Year's Day, Fourth of July, Labor Day, Thanksgiving, Christmas Day and statewide election days;

(7) To import, transport, receive, purchase, sell, and deliver and have in its possession for sale for present and future delivery alcoholic beverages;

(8) To purchase or lease property, furnish and equip buildings, rooms, and accommodations as and when required for the storage and sale of

alcoholic beverages and for distribution to all county stores within said county and for all other legal and proper purposes of the board;

(9) To dispose of property as provided in Article 12 of Chapter 160A of the General Statutes as if it were a governing body of a municipality;

(10) To borrow money, guarantee the payment thereof and the interest thereon, in such manner as may be required or permitted by law, and to issue, sign, endorse, and accept checks, promissory notes, bills of exchange, and other negotiable instruments and to do all such other and necessary things as may be required or may be convenient in the conduct of the liquor stores in its county;

(11) To investigate and aid in the prosecution of violations of this Chapter and other liquor laws, by whatever name called, and to seize alcoholic beverages in said county sold, kept, imported, or transported illegally and to apply for confiscation thereof and to cooperate in the prosecution of offenders in any court in said county;

(12) To require A.B.C. stores to sell alcoholic beverages at the prices fixed by the State Board of Alcoholic Control and to prescribe to whom the same may be sold;

(13) To locate stores in its county and to provide for the management thereof and to appoint and employ for each store conducted by it at least one person who shall be known as "manager" thereof. The duty of this manager shall be to conduct the store under directions of the county board and to carry out the law applying thereto. This manager shall give bond for the faithful performance of his duties in such sum as may be fixed by the county board, with sufficient corporate surety. Said surety, or sureties thereon, shall be approved by the county board as a part of the qualifications of the manager for his appointment, and the county board shall have the right to sue on said bond and to recover for all failures on the part of the manager faithfully to perform the duties as manager, to the extent of any loss occasioned by the manager on his part; but as against the surety, or sureties, thereon, such aggregate recovery, or recoveries, shall not exceed the penalty of said bond;

(14) To expend for law enforcement a sum not less than five percent (5%) nor more than fifteen percent (15%) of the total profits to be determined by quarterly audits, and in the expenditure of said funds to employ one or more persons to be appointed by and directly responsible to the respective county boards; the persons so appointed shall be designated county A.B.C. officers. Local A.B.C. boards shall submit quarterly reports to the State A.B.C. Board, under regulations prescribed by said State Board, evidencing compliance with provisions of this section requiring expenditures for law enforcement.

In addition, any county or municipal board shall expend not less than seven percent (7%) of its total profits, to be determined by quarterly audits, for education on the excessive use of alcoholic beverages and for the rehabilitation of alcoholics. Expenditures for the purposes specified in this paragraph may be made, in the discretion of the board, either for programs carried on by the board or as appropriations to nonprofit corporations or agencies sponsoring or engaging in such education, research, or rehabilitation.

(15) To discontinue the operation of any store in its county whenever it appears to the board that the operation thereof is not sufficiently profitable to justify a continuance of its operation, or when, in the board's opinion, the operation of any store is inimical or hurtful to the morals or welfare of the community in which it is operated, or when said county board may be directed to close any store by the State Board.

(16) To invest any funds temporarily held in the following: obligations of the United States or obligations fully guaranteed both as to principal and interest by the United States, shares of any building and loan association organized under the laws of this State, or of any federal savings and loan association having its principal office in this State, and certificates of deposit for time deposits or savings accounts in any bank or trust company authorized to do business in North Carolina, to the extent in each instance that such shares or deposits are insured by the State or federal government or agency thereof. If the board desires to deposit in bank, savings and loan, or trust company funds beyond the extent that such deposits are insured by the State or federal government or any agency thereof, the board shall require such depository to furnish a corporate surety bond or bonds of the United States government or of the State of North Carolina or of counties and municipalities of North Carolina whose bonds have been approved by the Local Government Commission. Nothing contained herein shall be deemed to authorize investments by local boards for periods of more than 90 days.

(17) To permit the installation in A.B.C. stores of containers by which customers may make contributions to the Alcoholism Research Fund established by G.S. 122-121.

All the powers and duties herein conferred upon county boards, or required of them, shall be subject to the powers herein conferred upon the State Board, and whenever or wherever herein the State Board has been given power to approve or disapprove anything in respect to county stores or county boards, then no power on the part of the county boards and no act of any county board shall be exercisable or valid until and unless it has been approved by the State Board. (1937, c. 49, ss. 10, 12; cc. 411, 431; 1939, c. 98; 1957, cc. 1006, 1335; 1963, c. 1119, s. 2; 1967, c. 1178; 1969, cc. 118, 902; 1971, c. 872, s. 1; 1973, cc. 85, 185; c. 1000, ss. 1, 2; 1977, c. 618.)

Local Modification. — Alamance, Dare, Lenoir, New Hanover and Rockingham, as to subdivision (14): 1977, c. 606; New Hanover, as to subdivision (14): 1973, c. 550; Wilson County A.B.C. Board, as to subdivision (14): 1975, c. 774; City of Cherryville, as to subdivision (14): 1975, c. 114.

Editor's Note. — The 1977 amendment added subdivision (17).

Applicability of Subdivision (14) Requirements. — Subdivision (14) requirements as to expenditure of percentage of total profits for education and rehabilitation are not applicable to a local board of alcoholic control where the local act contains different provisions regarding the percentages of profits so spent. Opinion of Attorney General to Mr. Terry R. Hutchins, 41 N.C.A.G. 610 (1971).

An alcoholic beverage control officer is a "public officer" within the meaning of § 14-223 and is entitled to the protection of that section. State v. Taft, 256 N.C. 441, 124 S.E.2d 169 (1962).

Cited in United States Labor Party v. Knox, 430 F. Supp. 1359 (W.D.N.C. 1977).

§ 18A-18. Salaries and expenses; net profits. — (a) All salaries and expenses incurred under the provisions of this Article, except those provided for in G.S. 18A-14, shall be paid out of the proceeds of the sales of the alcoholic beverages referred to in this Article. All salaries and expenses of the county boards and their employees shall be paid out of the receipts for their sales as operating expenses.

(b) After deducting the amount required to be expended for enforcement, education and rehabilitation, as herein provided, and retaining sufficient and proper working capital, the amount to be determined by the board, and except as hereinbefore provided in Chapters 493 and 418 of the Public Laws of 1935, the entire net profits derived from any stores shall be paid quarterly to the general fund of each respective county wherein county stores are operated. (1937, c. 49, ss. 20, 21; c. 411; 1971, c. 872, s. 1; 1975, c. 411, s. 3.)

Editor's Note. — The 1975 amendment inserted "education and rehabilitation" near the beginning of subsection (b). As subsection (a) was not changed by the amendment, it is not set out.

Part 2. Enforcement.

§ 18A-19. Department of Crime Control and Public Safety, Alcohol Law Enforcement Division — responsibilities. — (a) The Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety shall have the responsibility to enforce the provisions of this Chapter and Article 5 of Chapter 90 in controlling the sale, purchase, transporting, manufacture and possession of intoxicating liquors and controlled substances in the State, to perform investigatory and other duties, as directed by the Secretary of Crime Control and Public Safety, as may be required for the enforcement of the rules and regulations of the State Board of Alcoholic Control, and to perform such other duties as may be assigned by the Secretary of Crime Control and Public Safety or the Governor, as provided in Article 5A of Chapter 143B.

(b) The Secretary of Crime Control and Public Safety shall have the power and authority to appoint or commission Alcohol Law Enforcement Agents (previously referred to as State A.B.C. Officers) and other enforcement personnel authorized under Part 2 of this Article, and to appoint a "Director of the Alcohol Law Enforcement Division," who shall be in charge of the Alcohol Law Enforcement Division.

(c) The Secretary of Crime Control and Public Safety may commission as alcohol law enforcement agents such regular employees of the State Board of Alcoholic Control as the Secretary of Crime Control and Public Safety designates for the purpose of enforcing the provisions of this Chapter.

(d) Any person commissioned as an alcohol law enforcement agent shall have statewide jurisdiction. Such officers shall have the same powers and authorities as law-enforcement officers generally and may arrest as authorized in G.S. 15A-401.

Before any person commissioned as an alcohol law enforcement agent shall exercise any power of arrest under this Chapter, he shall take the oath required of public officers before an officer authorized to administer oaths.

(e) All alcohol law enforcement agents shall have authority to investigate the operation of the licensed premises of all persons licensed under this Chapter, to examine the books and records of such licensee, to procure evidence with respect to violations of this Chapter or any rules and regulations adopted thereunder, and to perform such other duties as prescribed by law or regulation. Alcohol law enforcement agents shall have the right to enter any licensed premises in the State in the performance of their duty, at any hour of the day or night. Refusal by a permittee or by any employee of a permittee to permit such officers to enter the premises shall be cause for revocation or suspension of the permit of the permittee.

(f) Notices, orders, or demands issued by the State Board of Alcoholic Control for the surrender of permits may be served and executed by alcohol law enforcement agents, and these officers, while serving and executing such notices, orders, or demands, shall have all the power and authority possessed by law-enforcement officers when serving and executing a warrant charging a violation of the criminal laws of the State. (1939, c. 158, s. 514; 1943, c. 400, s. 6; 1949, c. 974, ss. 11, 14; c. 1251, s. 4; 1951, c. 1056, s. 1; c. 1186, ss. 1, 2; 1953, c. 1207, ss. 2-4; 1957, c. 1440; 1961, c. 645; 1963, c. 426, ss. 1, 2, 4, 5, 12; 1967, c. 868; 1971, c. 872, s. 1; 1977, c. 70, s. 17.)

Cross Reference. — As to transfer of the State Board of Alcoholic Control Enforcement Division to the Department of Crime Control and Public Safety, see § 143A-293.

Editor's Note. — The 1977 amendment, effective April 1, 1977, rewrote this section.

§ 18A-20. Powers of local officers. — (a) County A.B.C. officers shall, after taking the oath prescribed by law for peace officers, have the same powers and authorities within their respective counties as other peace officers. And any person so appointed, or any other peace officer while in hot pursuit of anyone found to be violating the liquor laws of this State, shall have the right to go into any other county of the State and arrest such offender therein so long as the hot pursuit of such person continues; and the common law of hot pursuit shall be applicable to said offenses and such officers. Any law-enforcement officer appointed by a county board and any other peace officer is hereby authorized, upon request of the sheriff or other lawful officer in any other county, to go into such other county and assist in suppressing a violation of the liquor law therein, and while so acting shall have such powers of a peace officer as are granted to him in his own county and be entitled to all the protection provided for said officer while acting in his own county.

(b) Within their respective jurisdictions, all sheriffs, deputy sheriffs, municipal police, and local A.B.C. officers, as well as rural police and other local law-enforcement officers, shall have authority to investigate the operation of premises licensed under any provision of this Chapter and to procure evidence with respect to violations of this Chapter or any rule or regulation promulgated pursuant thereto. These law-enforcement officers shall have the right to enter the licensed premises in the performance of their duties at any hour of the day or night.

(c) A city or county board of alcoholic control may provide by resolution that persons who serve as volunteer A.B.C. officers at the request of the chief A.B.C. officer and under his authority, while undergoing official training and while performing duties on behalf of the city or county A.B.C. Board pursuant to orders or instructions of said chief A.B.C. officer shall be entitled to benefits under the North Carolina Workmen's Compensation Act and to any fringe benefits for which such persons qualify. (1949, c. 1251, s. 4; 1961, c. 645; 1963, c. 426, s. 2; 1967, c. 868; 1971, c. 872, s. 1; 1973, c. 29; 1977, c. 908.)

Editor's Note. — The 1977 amendment added subsection (c).

This Section and § 18A-19 Read Together. — This section and § 18A-19 are aimed at a similar problem. Analogous in function, they are to be construed cumulatively as part of a regulatory package although not necessarily in pari materia. Greensboro Elks Lodge v. North Carolina Bd. of Alcoholic Control, 27 N.C. App. 594, 220 S.E.2d 106 (1975), appeal dismissed, 289 N.C. 296, 222 S.E.2d 696 (1976).

Power of Entry and Inspection. — To engraft the implied demand and refusal provision of § 18A-19(c) onto the broad right of entry and inspection of subsection (b) of the present section would frustrate legislative purpose. Greensboro Elks Lodge v. North Carolina Bd. of Alcoholic Control, 27 N.C. App. 594, 220 S.E.2d 106 (1975), appeal dismissed, 289 N.C. 296, 222 S.E.2d 696 (1976). The 1977 amendment rewrote § 18A-19. For the present similar provision see § 18A-19(e).

Consent to Search. — By seeking liquor licenses, licensees (here permittees) waive their Fourth Amendment rights and consent to administrative searches. Greensboro Elks Lodge v. North Carolina Bd. of Alcoholic Control, 27 N.C. App. 594, 220 S.E.2d 106 (1975), appeal dismissed, 289 N.C. 296, 222 S.E.2d 696 (1976).

Local law-enforcement officers are not required to request and obtain permission to enter the premises of an alcoholic beverage permittee before entering such premises for the purpose of checking for violations of the alcoholic beverage control laws under the authority of this section. Greensboro Elks Lodge v. North Carolina Bd. of Alcoholic Control, 27 N.C. App. 594, 220 S.E.2d 106 (1975), appeal dismissed, 289 N.C. 296, 222 S.E.2d 696 (1976).

§ 18A-21. Seizure of liquor, equipment, materials, and conveyance; arrests; sale of property. — (a) When any officer of the law shall discover any

person in the act of transporting, in violation of law, intoxicating liquor, or equipment or materials designed or intended for use in the manufacture of intoxicating liquor, in any vehicle, motor vehicle, water or aircraft, or other conveyance, it shall be his duty to seize any and all intoxicating liquor, and any and all equipment or materials designed or intended for use in the manufacture of intoxicating liquor, found therein being transported contrary to law. Whenever intoxicating liquor, or equipment or materials designed or intended for use in the manufacture of intoxicating liquor, transported or possessed illegally, is seized by an officer, he shall take possession of the vehicle, motor vehicle, water or aircraft, or any other conveyance, and shall arrest any person in charge thereof. (Provided, that the transportation of the legal amount of alcoholic beverages in the passenger area of a motor vehicle with the cap or seal on the container or containers open or broken shall not be ground for confiscation of the motor vehicle.) The officer shall at once proceed against the person arrested in any court having competent jurisdiction; but the vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. All liquor and all equipment and materials seized under this section shall be held by the officer seizing same and shall, upon the acquittal of the person so charged, be returned to the established owner, except that any nontaxpaid liquor shall be destroyed. In the event of conviction or default of appearance of the person charged, or in event no criminal proceedings are initiated, the liquor, equipment, and materials shall be disposed of as provided in G.S. 18A-24. Provided, that any taxpaid spirituous liquor so seized shall within 10 days be turned over to the board of county commissioners, which shall within 90 days from the receipt thereof either turn it over to hospitals for medicinal purposes or sell it to alcoholic beverage control stores within the State of North Carolina (the proceeds of such sale being placed in the school fund of the county in which such seizure was made) or destroy it. Any malt beverages seized for being transported or possessed illegally shall be destroyed. Any wine (fortified or unfortified) seized for being transported or possessed illegally shall be destroyed or sold pursuant to the provisions of G.S. 18A-42.1. In the event that any wine (fortified or unfortified) is sold by law enforcement officers pursuant to the provisions of G.S. 18A-42.1, any proceeds derived from such sales shall be paid over to the treasurer or the proper officer in the county who receives fines and forfeitures, to be used for the school fund of the county.

(b) Unless the claimant can show that the vehicle or other conveyance seized is his property and that it was used in transporting liquor, or equipment or materials designed or intended for use in the manufacture of intoxicating liquor, without his knowledge and consent, with the right on the part of the claimant to have a jury pass upon his claim, the court shall order a sale by public auction of the property seized. The officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the costs of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceedings brought for the purpose, as being bona fide and as having been created without the lienor's having any notice that the conveyance was being used for illegal transportation of liquor, equipment or materials designed or intended for use in the manufacture of intoxicating liquor, and shall pay the balance of the proceeds to the treasurer or the proper officer in the county who receives fines and forfeitures, to be used for the school fund of the county. All liens against property sold under the provisions of this section shall be transferred from the property to be proceeds of the sale of the property.

(c) If, however, no one is found claiming the vehicle, water or aircraft, or other

conveyance, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or, if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure. If no claimant appears within 10 days after the last publication of the advertisement, the property shall be sold, and the proceeds, after deducting the expenses and costs, shall be paid to the treasurer or proper officer in the county who receives fines and forfeitures, to be used for the school fund of the county: Provided, that nothing in this section shall be construed to authorize any officer to search any vehicle or other conveyance or baggage of any person without a search warrant duly issued, except where the officer sees or has absolute personal knowledge that there is intoxicating liquor, equipment or materials designed or intended for use in the manufacture of intoxicating liquor, in the vehicle or baggage.

(d) When any vehicle or other conveyance confiscated under the provisions of this section is found to be specially equipped or modified from its original manufactured condition so as to increase its speed, the court shall, prior to sale, order that the special equipment or modification be removed and destroyed and the vehicle restored to its original manufactured condition. However, if the court should find that such equipment and modifications are so extensive that it would be impractical to restore the vehicle to its original manufactured condition, then the court may order that the vehicle be turned over to such governmental agency or public official within the territorial jurisdiction of the court as the court shall see fit to be used in the performance of official duties only, and not for resale, transfer, or disposition other than as junk: Provided, that nothing herein contained shall affect the rights of lienholders and other claimants to said vehicles as set out in this section; and provided further that where such equipment and modifications are so extensive that it would be impractical to restore said vehicle to its original manufactured condition and no one is found claiming said vehicle, water or aircraft, or other conveyance, then in lieu of selling the same, after advertisement, and if no claimant appears after the last publication of the advertisement, then the court may order that the vehicle, water or aircraft, or other conveyance be turned over to a governmental agency or public official within the territorial jurisdiction of the court, as the court shall see fit, to be used in the performance of official duties only, and not for resale, transfer, or disposition other than as junk.

(e) It shall be unlawful for any State, county, township, or municipal officer to use or cause to be used for any purpose whatsoever any vehicle or other article of personal property seized by said officer for the reason that the owner of said property or one in possession thereof at time of seizure has violated the terms of the State or federal liquor laws, or any other laws, until the respective rights of the owner or person in possession at time of seizure, or mortgagee if one should intervene, are passed upon by the proper court, and final order is made as to proper disposition of said personal property so seized.

It shall be the duty of the officer seizing said vehicle or other personal property to store same in a safe and suitable place, until final disposition is ordered. Municipalities and counties shall provide storage facilities for vehicles and all other property seized pursuant to any provision of this Chapter; and the officer shall not be liable for the costs of storage. (1923, c. 1, s. 6; C. S., s. 3411(f); 1927, c. 18; 1945, c. 635; 1951, c. 850; 1955, c. 560; 1957, c. 1235, s. 1; 1969, c. 789; 1971, c. 872, s. 1; 1977, c. 854, s. 2.)

I. In General.
II. Searches.
III. Arrests.
IV. Confiscation and Forfeiture.

I. IN GENERAL.

Editor's Note. — The 1977 amendment, in subsection (a), rewrote the former eighth sentence, which read "Any malt beverages or

wine (fortified or unfortified), so seized for being transported or possessed illegally, shall be destroyed," and added the ninth and tenth sentences.

For article discussing limits to search and seizure, see 15 N.C.L. Rev. 229. See also 15 N.C.L. Rev. 101. For note on search of motor vehicles without warrant, see 30 N.C.L. Rev. 421 (1952). For note as to requisites for forfeiture of vehicles transporting liquor in violation of law, see 35 N.C.L. Rev. 509 (1957).

Section Constitutional. — See State v. Godette, 188 N.C. 497, 125 S.E. 24 (1924).

The word "baggage" at the end of subsection (c) refers to baggage accompanying or in the vehicle transporting the intoxicating liquor. State v. Jenkins, 195 N.C. 747, 143 S.E. 538 (1928).

By "baggage" is understood such articles of personal convenience or necessity as are usually carried by passengers for their personal use and not merchandise or other valuables, though carried in the trunk of a passenger car, which are not designed for such use, but for other purposes, such as sale and the like. State v. Jenkins, 195 N.C. 747, 143 S.E. 538 (1928).

A suitcase or traveling bag with four one-half gallon cans of contraband liquor in it is not baggage under the definition in this section. State v. Jenkins, 195 N.C. 747, 143 S.E. 538 (1928).

"Other Vehicle". — A suitcase carried in one's hand along a public highway would not be an "other vehicle" within the meaning of this section. State v. Jenkins, 195 N.C. 747, 143 S.E. 538 (1928).

Use of Vehicle without Knowledge of Owner. — An instruction that if the jury should find by the greater weight of the evidence that petitioner, the owner of a car seized while being used in the unlawful transportation of intoxicating liquor, aided her husband in attempting flight to avoid arrest, to answer in the affirmative the issue of petitioner's knowledge that the car was being used for the transportation of liquor, is error when petitioner testifies that she did not know her husband was transporting liquor and that she thought the sheriff was pursuing them to serve a capias on her husband for a past offense, there being no evidence inconsistent with such belief on the part of petitioner, and the credibility of petitioner's testimony being for the jury. State v. Ayers, 220 N.C. 161, 16 S.E.2d 689 (1941).

Purpose of Subsection (b) of This Section. — Subsection (b) of this section is designed and intended to protect an owner of a vehicle used illegally within the meaning of the statute who is not the person arrested as "in charge thereof" at the time of the arrest for possession or concealment or illegal transportation. State v. O'Hora, 12 N.C. App. 250, 182 S.E.2d 823 (1971), decided under former similar provision.

II. SEARCHES.

Meaning of "Absolute Personal Knowledge". — Under this section an officer "discovers any person in the act" and has "absolute personal knowledge" (1) when he sees the liquor; (2) when he has absolute personal knowledge ... acquired through the senses of seeing, hearing, smelling, tasting or touching. 15 N.C.L. Rev. 131, citing State v. Godette, 188 N.C. 497, 125 S.E. 24 (1924). See also State v. Giles, 254 N.C. 499, 119 S.E.2d 394 (1961).

No search warrant is required where the owner or person in charge consents to the search. State v. Coffey, 255 N.C. 293, 121 S.E.2d 736 (1961).

As to conduct amounting to voluntary consent to search, see State v. Coffey, 255 N.C. 293, 121 S.E.2d 736 (1961).

Or Where Officer Sees or Has Absolute Personal Knowledge of Presence of Liquor. — No search warrant is required where the officer sees or has absolute personal knowledge that there is intoxicating liquor in an automobile. State v. Coffey, 255 N.C. 293, 121 S.E.2d 736 (1961).

The constitutional and statutory guarantee against unreasonable search and seizure does not prohibit seizure of evidence and its introduction into evidence on a subsequent prosecution where no search is required. State v. Simmons, 278 N.C. 468, 180 S.E.2d 97 (1971).

When officers saw the liquid in containers generally used to contain and transport nontaxpaid liquor, under the circumstances then existing, they had sufficient reasonable cause to believe that the jars contained nontaxpaid liquor to justify the seizure of the contraband without a search warrant. State v. Simmons, 278 N.C. 468, 180 S.E.2d 97 (1971).

Seizure of contraband does not require a warrant when its presence is fully disclosed without necessity of search. State v. Simmons, 278 N.C. 468, 180 S.E.2d 97 (1971).

When an officer sees nontaxpaid liquor clearly visible in a defendant's car, it becomes his duty under this section to take possession of the automobile and the liquor found therein and to arrest the defendant. It is his duty to act either with or without the aid of a search warrant. State v. Harper, 235 N.C. 67, 69 S.E.2d 164 (1952).

If an officer "saw and had absolute personal knowledge that there was intoxicating liquor in the automobile," it necessarily follows that a defendant's exception based on the court's refusal to suppress the evidence should be overruled. State v. Simmons, 10 N.C. App. 259,

178 S.E.2d 90 (1970), aff'd, 278 N.C. 468, 180 S.E.2d 97 (1971).

When the incriminating article, intoxicating liquor, is in plain view of the officers, no search warrant is necessary and the constitutional guaranty does not apply. State v. Simmons, 10 N.C. App. 259, 178 S.E.2d 90 (1970), aff'd, 278 N.C. 468, 180 S.E.2d 97 (1971).

No search warrant was required for the seizure from defendant's car of white plastic jugs containing nontaxpaid whiskey where the jugs were in plain view of the officers from outside the car and no search was necessary for their discovery, and the trial court did not err in the admission of the whiskey and testimony relating to it. State v. Simmons, 10 N.C. App. 259, 178 S.E.2d 90 (1970), aff'd, 278 N.C. 468, 180 S.E.2d 97 (1971).

The defendant, in operating his automobile in excess of 55 miles an hour in a 35 mile zone on the public streets in a city, committed a misdemeanor in the presence of the city police officers, and they had a right to pursue him and arrest him without a warrant. Consequently, after the defendant was taken into custody, it was the duty of the officers to return to defendant's car and to see that it was taken care of and not abandoned. If, upon approaching the automobile, the officers detected the smell of liquor or other intoxicating beverages therein, it was their duty to take possession of the car and seize the liquor without first obtaining a search warrant. State v. Giles, 254 N.C. 499, 119 S.E.2d 394 (1961).

Or Has Reasonable Grounds for Belief. — A search warrant is not necessary to search a suitcase for intoxicating liquor when carried by the defendant after arrest, when, under the circumstances, the officer had reasonable grounds for belief that it contained intoxicating liquor, and these conditions do not fall within the intent of this section. State v. Jenkins, 195 N.C. 747, 143 S.E. 538 (1928).

Automobiles and other conveyances may be searched without a warrant under circumstances that would not justify the search of a house, and a police officer in the exercise of his duties may search an automobile or other conveyance without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile or other conveyance carries contraband materials. State v. Simmons, 278 N.C. 468, 180 S.E.2d 97 (1971).

Search without Warrant. — Officers have no authority to search a car without a warrant, where they do not see or have "absolute personal knowledge" that there is intoxicating liquor in the car. State v. Godette, 188 N.C. 497, 125 S.E. 24 (1924); State v. Simmons, 192 N.C. 692, 135 S.E. 866 (1926); State v. DeHerrodora, 192 N.C. 749, 136 S.E. 6 (1926).

III. ARRESTS.

Arrest without Warrant. — An arrest may not be lawfully made by the properly authorized officers of the law for the violation of the State prohibition law, for the transportation of intoxicating liquors upon mere unfounded suspicion arising from information received that the supposed offenders would thus transgress the law on a future occasion, and an arrest so made, not upon an offense committed in the officers' presence or to their personal knowledge as to the particular offense, and without a search warrant, is unlawful and entitles the plaintiff in his action therefor, to recover damages. State v. DeHerrodora, 192 N.C. 749, 136 S.E. 6 (1926).

It follows that for an officer to fire upon a passing automobile with only an erroneous suspicion that the occupants thereof were thus unlawfully engaged, is without warrant of law, and the unintentional killing of one of those suspected as a result is manslaughter at least, and a verdict thereof under conflicting evidence will be sustained on appeal. State v. Simmons, 192 N.C. 692, 135 S.E. 866 (1926).

Where there is evidence that acting upon information previously received that intoxicating liquors are being unlawfully transported, the proper officers of the law lie in wait for and follow automobile and can see containers and smell the liquor, they have a right to arrest without warrant and seize the vehicle. State v. Godette, 188 N.C. 497, 125 S.E. 24 (1924).

Where an arrest by an officer of the law without a warrant was valid under the provisions of this Article, it may not successfully be maintained that evidence thereof should have been excluded. State v. Godette, 188 N.C. 497, 125 S.E. 24 (1924).

Evidence Required to Hold Passenger. — To hold a mere passenger, under this section, knowledge of the presence in the automobile of contraband whiskey is insufficient. The evidence must be sufficient to support an inference of some form of control, joint or otherwise, over the automobile or the liquor. State v. Ferguson, 238 N.C. 656, 78 S.E.2d 911 (1953); State v. Coffey, 255 N.C. 293, 121 S.E.2d 736 (1961).

IV. CONFISCATION AND FORFEITURE.

This section does not provide for seizure of all intoxicating liquor found in vehicle, but for seizure of any and all intoxicating liquor found therein being transported contrary to law. State v. Gordon, 225 N.C. 241, 34 S.E.2d 414 (1945).

Forfeiture of Property Used. — See article in 2 N.C.L. Rev. 126 for a review of the cases and statutes.

Confiscation and Forfeiture Are Mandatory. — Where one who was in possession of seized liquor at the time he was arrested for unlawful acts with respect thereto pleads guilty to

charges of unlawful possession and unlawful transportation of this liquor and thereupon personal judgment is rendered against him, the provisions of this section are mandatory that the judgment also order the confiscation and forfeiture of the liquor so unlawfully possessed and transported. State v. Hall, 224 N.C. 314, 30 S.E.2d 158 (1944).

Jurisdiction to declare forfeiture of a vehicle used in the transportation of intoxicating liquor is in the court which has jurisdiction of the offense charged against the person operating the vehicle. State v. Reavis, 228 N.C. 18, 44 S.E.2d 354 (1947).

Order Confiscating Car. — Defendant admitted ownership of the car in which two bottles of nontaxpaid whiskey were being transported at the time of his arrest, and he was found guilty of unlawful transportation of intoxicating liquor. This was held sufficient to sustain the court's order confiscating his car and ordering it sold in conformity with the statute. State v. Vanhoy, 230 N.C. 162, 52 S.E.2d 278 (1949).

Order for Forfeiture Nunc Pro Tunc. — Where defendant has been convicted of illegal transportation of nontaxpaid liquor, the court may at a subsequent term enter an order nunc pro tunc for the forfeiture and sale of the vehicle used for such transportation. State v. Maynor, 226 N.C. 645, 39 S.E.2d 833 (1946).

Rights under Lien on Automobile Forfeited and Sold. — This section expressly transfers the lien upon an automobile seized and sold for the unlawful transportation of liquor to the proceeds of the sale, and does not deprive the lienor of his property in conflict with N.C. Const., Art. I, § 19, or with the due process clause of the federal Constitution, the statute prescribing notice by publication, and the mode of giving notice being peculiarly a legislative function. C.I.T. Corp. v. Burgess, 199 N.C. 23, 153 S.E. 634 (1930).

One claiming a lien under an unregistered mortgage on an automobile seized and sold under the provisions of this section, after notice by publication required by the statute, may not successfully maintain his action for possession of the car against the purchaser at the sale had in conformity with law, though he may not have been aware of the proceedings and had no knowledge of the unlawful use of the automobile at the time of its seizure. C.I.T. Corp v. Burgess, 199 N.C. 23, 153 S.E. 634 (1930).

Failure to Notify Lienor of Seizure. — For a case relating to tort liability of the possessor of an automobile for failure to notify the lienor of a seizure and sale under this section, see Williams v. Aldridge Motors, Inc., 237 N.C. 352, 75 S.E.2d 237 (1953).

Liability of Sheriff for Destruction of Vehicle. — In a case arising prior to this section it was held that, where the sheriff took an automobile in custody, under a corresponding statute, and while he was holding it in a storage garage according to law it was destroyed by fire through no fault of his, he was not liable on his forthcoming bond. There were two dissenting opinions filed. T. & H. Motor Co. v. Sands, 186 N.C. 732, 120 S.E. 459 (1923).

Where a vehicle is seized by a municipal police officer for illegal transportation of intoxicating liquor, the vehicle is in the custody of the officer or of the law and not the municipality. State v. Law, 227 N.C. 103, 40 S.E.2d 699 (1946).

§ 18A-22. Law-enforcement officers to search for and seize distilleries; confiscation; disposal of property. — (a) It is the duty of all sheriffs, deputy sheriffs, municipal police, rural police, alcohol law enforcement agents and local A.B.C. officers, and other law-enforcement officers to search for and seize all equipment and materials used for the illegal manufacture of intoxicating liquor; and, except as provided in subsection (b), to retain the equipment and materials at the office of the law-enforcement agency making the seizure until disposed of by court order.

(b) It is the duty of the sheriff and other officers mentioned in this section to seize and then and there destroy any liquor, nonsalable equipment or perishable materials which may be found at any distillery for the illegal manufacture of intoxicating liquor, such not being required for evidence, and to arrest and hold for trial all persons found on the premises engaged in distilling or aiding or abetting in the manufacture of intoxicating liquor. (1923, c. 1, ss. 21, 22; C.S., s. 3411(u), (v); 1971, c. 872, s. 1; 1973, c. 80; 1977, c. 70, s. 18.)

Editor's Note. — The 1977 amendment substituted "alcohol law enforcement agents" for "State" near the beginning of subsection (a).

Arrest without Warrant. — An alcoholic beverage control officer who saw defendant at the still unlawfully engaged in the manufacture of whiskey had a lawful right to arrest defendant there without a warrant. State v. Taft, 256 N.C. 441, 124 S.E.2d 169 (1962).

§ 18A-23: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to Chapter 15. For present provisions as to search warrants, see §§ 15A-241 through 15A-259.

§ 18A-24. Disposal of seized property. — Any liquor, or equipment or materials designed or intended for use in the unlawful manufacture, sale, or possession of liquor, seized with or without a warrant shall be held by the officer seizing same, and upon acquittal of the defendant shall be returned to the established owner, except that any nontaxpaid liquor shall be destroyed. In the event of conviction or default of appearance of the person charged, or in event no criminal proceedings are initiated, the liquor, equipment, and materials shall be destroyed, sold or otherwise disposed of as ordered by the court. Provided, however, any taxpaid spirituous liquor so seized shall within 10 days be turned over to the county commissioners, who shall within 90 days from the receipt thereof turn it over to hospitals for medical purposes or sell it to alcoholic beverage control stores within North Carolina (the proceeds of the sale being placed in the school fund of the county in which the seizure was made) or destroy it. Any malt beverages or wine (fortified or unfortified), so seized for being transported or possessed illegally, shall be destroyed. (1923, c. 1, s. 12; C. S., s. 3411(l); 1939, c. 12; 1941, c. 310; 1957, c. 1235, s. 3; 1971, c. 872, s. 1.)

Legislative Intent. — The statutes seem to indicate the legislative intent to be that liquor itself, when the subject of unlawful traffic and capable of harmful effects, offends the law and should be regarded as a nuisance and contraband, to be summarily destroyed or otherwise disposed of. Only in case of failure to establish a violation of the law is the restoration of the liquor permitted. However, the processes of the courts are available to anyone legally interested to present his claim for seized liquor, and his plea will be heard. State v. Hall, 224 N.C. 314, 30 S.E.2d 158 (1944).

Article 3.

Sale, Consumption, Possession and Transportation of Alcoholic Beverages.

§ 18A-25. Prohibited sales. — (a) No alcoholic beverage shall be sold knowingly by any county or municipal store or the manager thereof or any employee therein at any time other than within the opening and closing hours for the store, as fixed in the manner herein provided, and otherwise as prescribed by the said county board. The manager and employees of and in any county or municipal store may, in their discretion, refuse to sell alcoholic beverages to any individual applicant, and shall refuse to sell to any person a quantity in excess of what can be lawfully transported.

It shall be unlawful for any person knowingly to buy any alcoholic beverage for any person who has been refused the right to purchase under this section or who is prohibited from purchasing for himself under any other provision of law.

(b) The possession for sale, or sales, of any liquor purchased from any county or municipal store is hereby prohibited. (1937, c. 49, ss. 11, 15; c. 411; 1971, c. 872, s. 1.)

Other than as authorized by a legally issued permit, there is no right to sell beer, wine, and other alcoholic beverages in North Carolina. Hursey v. Town of Gibsonville, 284 N.C. 522, 202 S.E.2d 161 (1974).

Possession for Purpose of Sale Is Essential Element. — Where the defendant was charged with the possession of taxpaid liquor for the purpose of sale, and the court removed from the warrant the charge that the possession was for the purpose of sale, he removed from the jury an essential element of the charge, and a

conviction under the warrant could not be had for unlawful possession. State v. Poe, 245 N.C. 402, 96 S.E.2d 5 (1957).

Sale of Liquor in Clubs or Restaurants Not Authorized. — There is no provision in this Chapter or in any other law in this State that authorizes the sale of liquor in private or public clubs or restaurants in this State. Hill v. State Bd. of Alcoholic Control, 17 N.C. App. 592, 195 S.E.2d 94 (1973).

When Search Warrant Unnecessary. — No search warrant is required where the officer sees or has absolute personal knowledge that there is intoxicating liquor in an automobile. State v. Leach, 272 N.C. 733, 158 S.E.2d 782 (1968).

What Warrant Should Charge. — Under this section a warrant or indictment should charge the unlawful possession for sale, or sale, of illicit liquors or the sale of any liquors purchased from the county stores. State v. May, 248 N.C. 60, 102 S.E.2d 418 (1958).

Where a warrant charged generally that defendant had in his possession "nontaxpaid" whiskey for the purpose of sale it was held that upon the facts of the case the word "nontaxpaid" was merely used to describe the whiskey and to designate it as unlawful rather than to restrict the offense charged to a violation of this section, and therefore the prima facie presumption from the possession of three gallons of such whiskey, that the possession was for the purpose of sale, obtains. State v. Merritt, 231 N.C. 59, 55 S.E.2d 804 (1949).

What State Must Prove. — This section places upon the State only the burden of proving the defendant unlawfully had illicit liquors in his possession for sale. State v. May, 248 N.C. 60, 102 S.E.2d 418 (1958).

Evidence Sufficient for Jury. — See State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963).

Evidence Insufficient to Carry Case to Jury. — See State v. Peterson, 226 N.C. 255, 37 S.E.2d 591 (1946).

Where the only evidence offered by the State was through its officers, including police officer's uncontradicted testimony that defendant said nontaxpaid liquor found in the room was for sick child, such evidence negatived possession for the purpose of sale, and was insufficient to carry case to jury. State v. McNeill, 225 N.C. 560, 35 S.E.2d 629 (1945).

Evidence tending to show that some 18 gallons of nontaxpaid liquor was found in defendant's home was sufficient to be submitted to the jury on a charge of unlawful possession of illicit liquor for the purpose of sale, the credibility of the exculpating evidence being for the jury. State v. Turner, 253 N.C. 37, 116 S.E.2d 194 (1960).

§ 18A-26. Transportation of alcoholic beverages. — (a) A person may transport, not for sale or barter, not more than four liters of alcoholic beverages, except as authorized by permit, to and from any place in the State; but if the cap or seal on the container or containers has been opened or broken, it shall be unlawful to transport the same in the passenger area of any motor vehicle.

It shall be unlawful for any person operating a for-hire passenger vehicle as defined in G.S. 20-4.01(27)b to transport alcoholic beverages except when the vehicle is actually transporting a bona fide paying passenger who is the actual owner of the alcoholic beverages being transported. Alcoholic beverages owned and possessed by each passenger shall be transported in the manner and amount authorized by this section, provided that the provisions of G.S. 20-16(a)(8) shall not apply to a person convicted under this section. The transportation of up to four liters of alcoholic beverages shall not be ground for confiscation of the motor vehicle.

(b) A person may purchase legally outside of this State and bring into the State for his own personal use not more than four liters of alcoholic beverage: Provided, that the container or containers of said alcoholic beverages are maintained within any vehicle as regulated and provided for in this Chapter. (1923, c. 1, s. 25; C. S., s. 3411(y); 1937, c. 49, ss. 14, 16; c. 411; 1967, c. 222, ss. 1, 7; c. 1256, s. 3; 1969, c. 598, ss. 2, 3; c. 1018; 1971, c. 872, s. 1; 1977, c. 176, s. 1; c. 586.)

Editor's Note. — The first 1977 amendment substituted "four liters" for "one gallon" in two places in subsection (a) and near the beginning of subsection (b).

The second 1977 amendment substituted "G.S. 20-4.01(27)b" for "G.S. 20-38(20)(b)" in the first sentence of the second paragraph of subsection (a).

Constitutionality. — There exists a "reasonable basis" for distinguishing transportation of alcoholic beverages in a for-hire passenger vehicle from other modes of

transportation. This section is not unconstitutional on its face or as applied to defendants. State v. Terry, 30 N.C. App. 372, 226 S.E.2d 846 (1976).

Section Has Statewide Application. — The legislature intended this section to have statewide application. D & W, Inc. v. City of Charlotte, 268 N.C. 577, 151 S.E.2d 241 (1966).

Section permits, with certain provisos, the transportation of taxpaid whiskey not in excess of one gallon (now four liters). State v. Bell, 264 N.C. 350, 141 S.E.2d 493 (1965).

Guilty Knowledge. — This section must be interpreted in the light of the common-law principle that guilty knowledge is an essential element of crime, and therefore a person cannot be held guilty of illegally transporting intoxicating liquors if he has no knowledge of the nature of the goods transported. State v. Welch, 232 N.C. 77, 59 S.E.2d 199 (1950).

Where Transporter Accompanied by Others. — This section cannot be construed to permit the driver of an automobile to carry or convey more than one gallon (now four liters) of alcoholic beverages in his automobile even though he is accompanied by others. State v. Welch, 232 N.C. 77, 59 S.E.2d 199 (1950).

Evidence held insufficient to fix defendant with ownership or possession of liquor found in baggage compartment of bus. State v. Love, 236 N.C. 344, 72 S.E.2d 737 (1952).

Cited in State v. Williams, 283 N.C. 550, 196 S.E.2d 756 (1973).

§ 18A-27. Transportation of up to 20 liters of fortified wine. — (a) Whenever any person desires to purchase or transport more than four liters but not exceeding 20 liters of fortified wine at one time (from an A.B.C. store or any retail permittee), he shall first obtain a "purchase-transportation permit" from the chairman of the local A.B.C. board, a member of the local board, or the general manager or supervisor of the local board of alcoholic control. No permit shall be issued by any authorized person to:

(1) Persons not of good character; or
(2) Persons not sufficiently identified, if unknown to the issuing person; or
(3) Persons known or shown to be alcoholics or bootleggers.

(b) The permit shall be signed by the person authorized to issue same and it shall authorize the purchaser named therein to purchase and transport the quantity of fortified wine therein indicated not to exceed 20 liters. The permit shall be issued by means of a printed form with at least two carbon copies of the same, and on the face of the permit shall appear the following information:

(1) Name and address of purchaser;
(2) The name and location of the place where purchase is to be made;
(3) Date issued and expiration date;
(4) Destination;
(5) Signature of person issuing the permit;
(6) A statement that the permit is valid for only one purchase on the date shown and that the permit must accompany the merchandise during transit and both the merchandise and the permit must be exhibited by purchaser to any law-enforcement officer upon request.

(c) The permit herein authorized shall be valid for only one purchase, and it shall expire at 6:00 P.M. of the date shown thereon. No purchase shall be made from any store except the store named on the permit. One copy of the permit shall be retained by the board issuing the same, one copy shall be delivered to the store from which the merchandise is purchased, and one copy shall be retained by the permittee. The permit shall authorize the permittee to transport fortified wine from the place of purchase to the destination indicated thereon. It must accompany the merchandise during transit, and both the merchandise and the permit must be exhibited to any law-enforcement officer upon request.

(d) The chairman or any member of a local county or municipal board or the general manager or supervisor of a local alcoholic control board is authorized to issue purchase-transportation permits.

(e) Permits to be used shall be in the form substantially as follows:

ALCOHOLIC BEVERAGE CONTROL BOARD

. . . . . County
. . . . . ., North Carolina
Date . . . . . ., 19 . . . . .

PURCHASE-TRANSPORTATION PERMIT

(not to exceed 20 liters)

Name of Purchaser . . . . . .
Address . . . . . .
Name of Store . . . . . Address of Store . . . . . .
Destination . . . . . .
Route to Be Used . . . . . .

Signed . . . . . .
(Person authorized to issue)
Board Member

Note: This permit is valid for only one purchase and it shall expire at 6:00 P.M. of the date shown above. Special Note: This permit must accompany the merchandise while in transit. Both the merchandise and the permit must be exhibited to any law-enforcement officer upon request. (1971, c. 872, s. 1; 1977, c. 176, ss. 1, 2.)

Editor's Note. — The 1977 amendment substituted "four liters" for "one gallon" in the first sentence of subsection (a) and "twenty liters" for "five gallons" in the first sentence of subsection (a), the first sentence of subsection (b), and in the permit form set out in subsection (e).

§ 18A-28. Transportation of up to 20 liters of alcoholic beverages. — (a) It shall be lawful to purchase, possess, and transport up to 20 liters of alcoholic beverages in containers not smaller than 750 milliliters from a county or municipal A.B.C. store to a named destination within the county or counties adjacent thereto; provided, the purchaser has in his possession a "purchase-transportation permit" and complies strictly with the provisions of this section, and provided further that said alcoholic beverages are not being transported for the purpose of sale and that the cap or seal on the container or containers of said alcoholic beverages has not been opened or broken.

(b) Whenever any person desires to purchase or transport more than four liters of alcoholic beverages at one time, he shall first obtain a purchase-transportation permit from the chairman of the local board, a member of the local board, or the general manager or supervisor of the local board of alcoholic control. No permit shall be issued by any authorized person to:

(1) Persons not of good character;
(2) Persons not sufficiently identified, if unknown to the issuing person; or
(3) Persons known or shown to be alcoholics or bootleggers.

(c) The permit shall be signed by the person authorized to issue it, and it shall authorize the purchaser named therein to purchase and transport the quantity of alcoholic beverages therein indicated not to exceed 20 liters. The permit shall be issued by means of a printed form with at least two carbon copies. On the face of the permit shall appear the following information:

(1) Name and address of purchaser;
(2) The name and location of the place where purchase is to be made;
(3) Date issued and expiration date;
(4) Destination;
(5) Signature of person issuing the permit;
(6) A statement that the permit is valid for only one purchase on the date

shown and that the permit must accompany the merchandise during transit and both the merchandise and the permit must be exhibited by purchaser to any law-enforcement officer upon request.

(d) The permit herein authorized shall be valid for only one purchase, and it shall expire at 9:30 P.M. of the date shown thereon. No purchase based on this permit shall be made from any A.B.C. store except the store named on the permit. One copy of the permit shall be retained by the permittee. The permit shall authorize the permittee to transport the alcoholic beverages from the place of purchase to the destination indicated thereon. The permit must accompany the merchandise during transit and both the merchandise and the permit must be exhibited to any law-enforcement officer upon request.

(e) The chairman or any member of a local county or municipal board or the general manager or supervisor of a local alcoholic control board is authorized to issue purchase-transportation permits. Provided further, that the manager and the assistant manager of any alcoholic control store may issue such permits if authorized in writing by the chairman of said board to do so.

(f) Permits to be used shall be in the form substantially as follows:

ALCOHOLIC BEVERAGE CONTROL BOARD

. . . . . County
. . . . . ., North Carolina
Date . . . . . ., 19 . . . . . .

PURCHASE-TRANSPORTATION PERMIT

(not to exceed 20 liters)

Name of Purchaser . . . . . .
Address . . . . . .
A.B.C. Store No. . . . . Address of the Store . . . . . .
Destination . . . . . .
Route to Be Used . . . . . .
Signed . . . . . .
(Person authorized to issue)
Board Member

Note: This permit is valid for only one purchase and it shall expire at 9:30 P.M. of the date shown above. Special Note: This permit must accompany the merchandise while in transit. Both the merchandise and the permit must be exhibited to any law-enforcement officer upon request.

(g) Repealed by Session Laws 1973, c. 819, s. 1. (1969, c. 617, s. 1; 1971, c. 872, s. 1; 1973, c. 94; c. 819, s. 1; 1975, c. 622, ss. 1-4; 1977, c. 176, ss. 1, 2, 4.)

Editor's Note. — The 1975 amendment inserted "or counties adjacent thereto" near the middle of subsection (a), substituted "9:30 P.M." for "6:00 P.M." in the first sentence of subsection (d) and in the first note to the form of permit in subsection (f) and added the second sentence of subsection (e).

The 1977 amendment substituted "twenty liters" for "five gallons" near the beginning of subsection (a), at the end of the first sentence of subsection (c) and in the permit form set out in subsection (f), substituted "seven hundred fifty milliliters" for "one-fifth gallon" near the beginning of subsection (a), and substituted "four liters" for "one gallon" in the first sentence of subsection (b).

§ 18A-29. Commercial transportation of spirituous liquors. — (a) The willful transportation of spirituous liquors within, into, or through the State of North Carolina in quantities in excess of four liters (or 20 liters with a permit) is prohibited except for delivery to federal reservations to which has been ceded

exclusive jurisdiction by the State of North Carolina, for delivery to an A.B.C. store or board, or for transport through this State to another state. The State Board of Alcoholic Beverage Control may adopt further regulations governing the transportation of spirituous liquors within, into, and through the State of North Carolina for delivery to a federal reservation, A.B.C. stores or boards, or in transit through this State to another state, as it may deem necessary to confine such transportation to legitimate purposes, and may issue transportation permits in accordance with such regulations.

(b) Before any person shall transport over the roads and highways of this State any spirituous liquors in excess of four liters (or 20 liters with a permit) within, into, or through the State of North Carolina for delivery to a federal reservation exercising exclusive jurisdiction, or in transit through this State to another state, he shall post with the State Board of Alcoholic Beverage Control a bond with surety approved by the Board, payable to the State of North Carolina in the penal sum of one thousand dollars ($1,000), running in the name of the State of North Carolina, conditioned that such person will not unlawfully transport or deliver any spirituous liquors within, into, or through the State of North Carolina. In case of conviction, the forfeiture shall be paid to the school fund of the county in which the seizure is made, and any such county shall have the right to sue for the same. When such spirituous liquors are desired to be transported within, into, or through the State of North Carolina, the transportation shall be engaged in only under the following conditions:

(1) Statement as to Bond and Bill of Lading Required. — There shall accompany such spirituous liquors a statement signed by the Chairman of the State Board of Alcoholic Beverage Control showing that the bond hereinbefore required has been furnished and approved. There shall accompany such spirituous liquors at all times during transportation a bill of lading or other memorandum of shipment signed by the consignor showing an exact description of the spirituous liquors being transported, the name and address of the consignee, and the route to be traveled by the vehicle while in the State of North Carolina; this route must be substantially the most direct route from the consignor's place of business to the place of business of the consignee.

(2) Route Stated in Bill of Lading to Be Followed. — Vehicles transporting spirituous liquors shall not substantially vary from the route specified in the bill of lading or other memorandum of shipment.

(3) Names of True Consignor and Consignee Must Appear. — The name of the consignor on any such bill of lading or other memorandum of shipment shall be the name of the true consignor of the spirituous liquors being transported, and such consignor shall be only a person who has a legal right to make such shipment. The name of the consignee on any such bill of lading or memorandum of shipment shall be the name of the true consignee of the spirituous liquors being transported and who had previously authorized in writing the shipment of the spirituous liquors being transported and who has a legal right to receive such spirituous liquors at the point of destination shown on the bill of lading or other memorandum of shipment.

(4) Officers May Require Driver to Exhibit Papers. — The driver or any person in charge of any vehicle so transporting such spirituous liquors shall, when required by any sheriff, deputy sheriff, or other peace officer having the power to make arrests, exhibit to such officer such papers or documents required by this law to accompany such shipment.

(c) Notwithstanding any provision of law contained in this Chapter or in Article 2C of Chapter 105 of the General Statutes, spirituous liquors may be imported into North Carolina under United States customs bonds and may be held in North Carolina in United States customs bonded warehouses. Spirituous

liquors may be removed from any such United States customs bonded warehouse, wherever situated within the State, to any other such warehouse located in the State and be held in the State. Such spirituous liquors so imported or removed to such warehouses in North Carolina shall be released from customs bonds in North Carolina only on permits issued by the State Board of Alcoholic Control for delivery to oceangoing vessels which ply the high seas in interstate or foreign commerce, in the transport of freight or passengers, or both, for hire exclusively, when delivered to officers or agents of such vessels for use or consumption on such vessels. Provided, the Board shall have the authority to issue permits as referred to in this subsection and shall have the power and authority to promulgate rules and regulations to control the release of said spirituous liquors from United States customs bonded warehouses and the delivery of same to oceangoing vessels. (1945, c. 457, ss. 1, 2; 1965, c. 1102, s. 4; 1971, c. 872, s. 1; 1975, c. 411, s. 5; c. 586, s. 2; 1977, c. 176, ss. 1, 2.)

Editor's Note. — The first 1975 amendment substituted "spirituous liquors" for "alcoholic beverages" throughout subsections (a) and (b).

The second 1975 amendment added subsection (c).

The 1977 amendment substituted "four liters (or twenty liters with a permit)" for "one gallon (or five gallons with a permit)" in the first sentence of subsections (a) and (b).

Possession Necessary Element of Transportation. — Only a person in the actual or constructive possession of nontaxpaid whiskey, absent conspiracy or aiding and abetting, could be guilty of the unlawful transportation thereof. State v. Wells, 259 N.C. 173, 130 S.E.2d 299 (1963).

Purpose of Transportation. — Whether the transportation of nontaxpaid whiskey is unlawful does not depend upon whether it is being transported for the purpose of sale. State v. Wells, 259 N.C. 173, 130 S.E.2d 299 (1963).

§ 18A-30. Possession and consumption of alcoholic beverages at designated places. — It shall be lawful in any county or municipality of this State for any person who is at least 21 years of age to possess, for lawful purposes, alcoholic beverages in quantities not in excess of four liters, unless otherwise authorized, provided that these alcoholic beverages are obtained from an authorized alcoholic beverage control store within this State or from a lawful source outside this State, and provided that said alcoholic beverages are possessed for a purpose other than for sale or barter, and provided that said alcoholic beverages are purchased, possessed, and consumed in accordance with this and other applicable sections of this Chapter, including the following:

(1) Residence and Related Places. — A person may possess and consume said alcoholic beverages in his private residence, or in any private residence of another where permission has been given, or in any hotel or motel room that said person has rented or to which he is invited, or at any place of secondary residence similarly used, where permitted by the owner. A person may also possess and consume said alcoholic beverages, but not in view of the general public, on any other private property not primarily engaged in commercial entertainment and not open to the general public at the time, when such person, association, or corporation has obtained the express permission of the owner or person lawfully in possession of said property, and when said alcoholic beverages are consumed by said person, his family, his bona fide guest, or bona fide guests of the association or corporation; provided, however, that this sentence shall not be construed to permit or in any way or manner authorize the possession or consumption of alcoholic beverages on premises for which a permit is required pursuant to subdivisions (2), (3), or (4) of this section.

(2) Social Establishments. — Any person, association, or corporation may furnish facilities located on its premises, which facilities shall not be open to the general public, for the storage of alcoholic beverages for

its bona fide members, in quantities not in excess of four liters for each member, unless otherwise authorized, and for consumption by its members and their guests, but subject to the following conditions:

a. The establishment is organized and operated solely for purposes of a social, recreational, patriotic, or fraternal nature; and
b. It has a valid permit from the State Board of Alcoholic Control for this purpose; and
c. The alcoholic beverages are stored in individual lockers and the name of the beverage owner shall be clearly displayed on both the locker and the bottle or bottles; and
d. Any alcoholic beverage stored in any locker is for the exclusive use of the member and his guests and not to be sold or distributed to any other person.

(3) Special Occasions. — Alcoholic beverages in quantities in excess of four liters may be possessed by a person on a special occasion, subject to the rules and regulations adopted by the State Board of Alcoholic Control, not for sale or barter, for the use and consumption of himself and his guests, when he meets one or more of the following requirements:

a. He is using his personal residence or premises under his exclusive control, or
b. He is using a facility, as a member, as defined in subdivision (2) of this section, and said facility has a valid permit from the State Board of Alcoholic Control for this purpose; or
c. He is using a commercial establishment or any part thereof for a private meeting or party limited in attendance to members or guests of a particular person, group, association, or organization, and said commercial establishment has obtained a permit from the State Board of Alcoholic Control for this purpose.

(4) Restaurants and Related Places.— It shall be unlawful for any person to possess or consume any alcoholic beverages of any and all kinds, other than fortified wines (which contain more than fourteen percent (14%) of alcohol by volume) on the premises of any business establishment that is not permitted under subdivisions (1), (2), or (3) of this section unless said establishment meets the following requirements:

a. The premises have an inside dining area with a seating capacity of at least 36 persons and a kitchen facility; and
b. The business is engaged primarily and substantially in preparing and serving meals or furnishing lodging; and provided further, that the State Board of Alcoholic Control shall have broad power to examine the type and nature of the business and the combination and location of separate or affiliated businesses at the same location to determine if the establishment is a bona fide restaurant-type facility; and
c. The business has a valid permit from the State Board of Alcoholic Control for this purpose, including the requirement that the business post the type of notices required by said Board.

(5) Unlawful Possession or Use. — It shall be unlawful for:

a. Any person to drink alcoholic beverages or to offer a drink to another person
   i. On the premises of a county or municipal liquor control store, or
   ii. Upon any premises used or occupied by a county or municipal alcoholic control board, or
   iii. On any public road, street, or highway.

b. Any person to make any public display of alcoholic beverages at any athletic contest.

c. Any person to possess or consume any alcoholic beverages upon any of the premises designated under subdivisions (2), (3), or (4) of this section, unless there is conspicuously displayed a valid permit or notice on said premises from the State Board of Alcoholic Control.

d. Any person, association, or corporation to permit any alcoholic beverages to be possessed or consumed upon any premises not authorized by this Chapter.

e. Any person to possess or consume any alcoholic beverages upon any premises where such possession or consumption is not authorized by law, or where said person has been forbidden to possess or consume alcoholic beverages by the owner, operator, or person in charge of said premises.

f. Any person, firm, or corporation to refuse to surrender any permit or notice upon request of the State Board of Alcoholic Control, or falsely to display any such notice, or to display any notice not permitted by the State Board of Alcoholic Control, or to obtain any facsimile permit or notice from any person.

(6) Hours for Consumption. — It shall be unlawful for any alcoholic beverages to be consumed on any premises having a permit issued under the provisions of this section between the hours of 1:30 A.M. and 7:00 A.M. Provided however, that during the period commencing on the last Sunday of April of each year and ending on the last Sunday of October of each year alcoholic beverages may be consumed on said premises until 2:30 A.M. Subsequently, on Sundays, consumption of these beverages may not resume until 1:00 P.M. (1905, c. 498, ss. 6-8; Rev., ss. 3526, 3534; C. S., s. 3371; 1937, c. 49, ss. 12, 16, 22; c. 411; 1955, c. 999; 1967, c. 222, ss. 1, 8; c. 1256, s. 3; 1969, c. 1018; 1971, c. 872, s. 1; 1973, c. 1226; 1977, c. 176, s. 1.)

Editor's Note. — The 1977 amendment substituted "four liters" for "one gallon" in the introductory language and in subdivisions (2) and (3).

This section carefully prescribes the type of businesses which may hold "brown bagging" permits. Hursey v. Town of Gibsonville, 284 N.C. 522, 202 S.E.2d 161 (1974).

Question of such classification is legislative, and not legal. Hursey v. Town of Gibsonville, 284 N.C. 522, 202 S.E.2d 161 (1974).

Where the legislature makes the classification, the courts are not authorized to supplant the legislative intent and purpose by substituting their own. Hursey v. Town of Gibsonville, 284 N.C. 522, 202 S.E.2d 161 (1974).

Burden on Plaintiff to Show Unreasonable Classification. — The legislature is presumed to have provided for a reasonable classification and the burden is on the plaintiff to show the classification is unreasonable. Hursey v. Town of Gibsonville, 284 N.C. 522, 202 S.E.2d 161 (1974).

§ 18A-31. Permits for social establishments, restaurants, etc. — (a) Permits. — Any person, association, or corporation making application for a permit under this Article shall file said application and appropriate fee with the State Board of Alcoholic Control, and said Board shall have the exclusive authority, not inconsistent herewith, in issuing any permit, or in renewing, suspending, or revoking any temporary or annual permit. The additional provisions relating to said permits are as follows:

(1) Said Board may issue temporary permits where application in proper form has been received, with applicable fees, which shall be valid for 90 days, unless sooner suspended or revoked. No applicant or permittee shall be entitled to any hearing with reference to the issuance, suspension, or revocation of any temporary permit.

(2) Any temporary or annual permit shall be suspended or revoked by said

Board, upon the suspension or revocation of any other permit or license by the State Board of Alcoholic Control, pursuant to any other section of this Chapter.

(3) All annual permits issued under this section shall be valid until May 1, 1968, unless sooner suspended or revoked, and thereafter all annual permits shall be valid for one year, renewable on May 1, 1968, and annually thereafter, unless sooner suspended or revoked. A permit for the possession of alcoholic beverages at a special occasion may be limited to a single 48-hour period by the State A.B.C. Board.

(4) Any person, association, or corporation shall promptly surrender any permit issued hereunder upon request of said Board.

(5) Before exercising any privilege granted hereunder, and immediately upon the receipt of any temporary or annual permit, said person, association, or corporation receiving the same shall keep conspicuously displayed said permit and in addition shall post a notice or notices, approved by said Board, designating the type of permit that is applicable to the premises. The Board shall approve and designate the type of signs, notices, and exhibits that may be displayed or used on any premises.

(6) All permits shall be the property of the State Board of Alcoholic Control, and no permit shall be transferable. Upon the termination of any business, or upon a change of ownership or control, all permits issued hereunder shall be immediately surrendered to said Board.

(7) All permits shall be issued for a designated location, a separate permit being required for each separate location of any business.

(8) Said Board shall not refuse the issuance of any permit to any person, firm, or corporation who shall comply with the provisions of this Chapter, and the issuance of a permit shall not be arbitrary in any case, but issuance of a permit shall be mandatory to any person, firm, or corporation complying with the provisions of this Chapter.

(b) Fees. — Applications for permits shall be accompanied by appropriate fees, payable to the State Board of Alcoholic Control, which shall not be refundable in case a permit is refused, suspended, or revoked. No additional fees or licenses shall be collected by any county or municipality under this section, and the fees received by the State Board of Alcoholic Control shall be deposited with the State Treasurer of North Carolina, as in the case of any other permit fees collected by said Board. No additional charge shall be imposed for any temporary permit. The schedule of fees for the original permit is as follows:

(1) Two hundred dollars ($200.00) for a social establishment as defined in G.S. 18A-30(2);

(2) Two hundred dollars ($200.00) for a commercial establishment as defined in G.S. 18A-30(3)c;

(3) One hundred dollars ($100.00) for a restaurant as defined in G.S. 18A-30(4) having a seating capacity of less than 50;

(4) Two hundred dollars ($200.00) for a restaurant as defined in G.S. 18A-30(4) having a seating capacity of 50 or more;

(5) Three hundred dollars ($300.00) for any establishment which obtains permits having two or more of the foregoing schedules for the same premises;

(5a) Twenty-five dollars ($25.00) for a permit for the possession of alcoholic beverages at a special occasion if the permit is not valid for more than 48 hours;

(6) The annual renewal fees for such permits shall be twenty-five percent (25%) of the original permit as herein set forth.

(c) Exemptions. —

(1) Exemption from Fees. — No fee shall be charged by the State Board

of Alcoholic Control for any permit issued under this section to the State or any county or municipality for any premises operated by the State, county or municipality.

(2) Exemption of Counties. — Until at least one county or municipal alcoholic beverage control store has been lawfully established within any county, no permit shall be issued by the State Board of Alcoholic Control for the purposes defined in subdivision (4) of G.S. 18A-30 to any person, association, or corporation for premises located in said county.

(d) Procedures. — The provisions of Article 4 as to procedures to be followed in the issuance, suspension, and revocation of permits shall be applicable to permits issued under this Article. (1971, c. 872, s. 1; 1977, c. 668, ss. 1, 2.)

Editor's Note. — The 1977 amendment added the second sentence of subdivision (a)(3) and added subdivision (b)(5a).

Right to Sell Only as Authorized by Lawful Permit. — Other than as authorized by a legally issued permit, there is no right to sell beer, wine, and other alcoholic beverages in North Carolina. Hursey v. Town of Gibsonville, 284 N.C. 522, 202 S.E.2d 161 (1974).

A permit grants a privilege. It does not convey either a constitutional right or a property right. Hursey v. Town of Gibsonville, 284 N.C. 522, 202 S.E.2d 161 (1974).

It is subject to cancellation by the issuing authority for cause. Hursey v. Town of Gibsonville, 284 N.C. 522, 202 S.E.2d 161 (1974).

§ 18A-31.1. Permits to keep and use alcoholic beverages for culinary purposes. — (a) Notwithstanding the provisions of G.S. 18A-30, the State A.B.C. Board may grant to restaurants holding a Grade A rating from the Commissioner for Health Services [Department of Human Resources], a permit which will enable them to keep in the kitchen of the restaurant, alcoholic beverages for culinary purposes only, provided each such restaurant regularly serves foods in which such beverages are used, and provided that these alcoholic beverages are obtained from a lawful source within the State. The State A.B.C. Board may adopt, amend or repeal such regulations as it may deem necessary to carry out the purpose of this section as provided in G.S. 18A-43, and shall require the permittee to retain all receipts and records of alcoholic beverages purchased with the quantities purchased not exceeding a reasonable amount for culinary purpose intended herein. No more than 12 liters of alcoholic beverages may be possessed by any restaurant, and it shall be kept in the kitchen or storage area. Nothing contained in this section shall be construed to permit the sale of Irish coffee or any other beverage containing any spirituous liquor whatsoever.

(b) Application for a culinary permit shall be accompanied with a fee of fifty dollars ($50.00) which shall not be refundable in case a permit is refused, suspended, or revoked. No additional fees or licenses shall be collected by any county or municipality under this section, and the fees collected by the State A.B.C. Board shall be deposited with the State Treasurer of North Carolina. The annual renewal fee for such permit shall be twenty-five percent (25%) of the original permit. (1975, c. 680; 1977, c. 176, s. 5.)

Editor's Note. — The 1977 amendment substituted "twelve liters" for "three gallons" in the third sentence of subsection (a).

§ 18A-32. Transportation, possession, and sale at installations operated by or for armed forces. — Alcoholic beverages in quantities in excess of four liters may be purchased by, transported to, possessed and sold by any open mess or officers' club at any installation located in any county in this State where alcoholic beverages may be legally sold or possessed, which installation is operated by or for any of the armed forces of the United States and where the possession, dispensing, and sale of such alcoholic beverages is under the control

and supervision of the department of the armed forces concerned; provided, however, that all such alcoholic beverages transported, possessed, dispensed, or sold pursuant to this section on the premises of any such installation shall be purchased at the retail alcoholic beverage control store of the county in which such installation is located at the full retail price prevailing at the time of such purchase. Transportation permits may be issued by the State Board of Alcoholic Beverage Control under regulations adopted pursuant to G.S. 18A-29 for the transportation of alcoholic beverages in excess of four liters from the alcoholic beverage control store of the county in which such installation is located for delivery to the responsible officer of such installation operated by or for any of the armed forces of the United States. The provisions of this section shall not be construed as to affect the source, or place of purchase, or the price paid for alcoholic beverages purchased, possessed, sold, and dispensed by or at any open mess or officers' club or other facility located at or maintained at or by any of the armed forces of the United States at any place where jurisdiction has been ceded to or taken by the United States government. (1955, c. 1211; 1971, c. 872, s. 1; 1977, c. 176, s. 1.)

Editor's Note. — The 1977 amendment substituted "four liters" for "one gallon" near the beginning of the first sentence and near the middle of the second sentence.

Cited in State v. Williams, 283 N.C. 550, 196 S.E.2d 756 (1973).

ARTICLE 4.

Malt Beverages and Wine.

Part 1. Retail Sales and Personal Use.

§ 18A-33. Sale and consumption during certain hours prohibited; sales by off-premises permittees. — (a) No malt beverages or wine (fortified or unfortified) shall be sold between the hours of 1:00 A.M. and 7:00 A.M., nor shall any malt beverages or wine (fortified or unfortified) be consumed in any place where malt beverages or wine (fortified or unfortified) is sold between the hours of 1:30 A.M. and 7:00 A.M. Provided however, that during the period commencing on the last Sunday of April of each year and ending on the last Sunday of October of each year these beverages may be sold until 2:00 A.M. and may be consumed on the licensed premises until 2:30 A.M. Subsequently, on Sundays, sales of these beverages may not resume until 1:00 P.M.

(b) In addition to the restrictions on the sale of malt beverages and/or wines (fortified or unfortified) set out in this section, the governing bodies of all municipalities and counties in North Carolina shall have, and they are hereby vested with, full power and authority to regulate and prohibit the sale of malt beverages and/or wine (fortified or unfortified) from 1:00 P.M. on each Sunday until 7:00 A.M. on the following Monday. Provided, however, that municipalities and counties shall have no authority under this subsection to regulate or prohibit sales after 1:00 P.M. on Sundays by establishments having a permit issued under G.S. 18A-30(2) and (4).

The power herein vested in governing bodies of municipalities shall be exclusive within the corporate limits of their respective municipalities, and the powers herein vested in the county commissioners of the various counties in North Carolina shall be exclusive in all portions of their respective counties not embraced in the corporate limits of municipalities therein.

(c) It shall be unlawful to consume malt beverages on any premises having only an off-premises malt beverage permit; and it shall also be unlawful to consume wine (fortified or unfortified) on any premises having only an off-premises permit for the type of wine being so consumed. (1943, c. 339, ss. 1-3; 1949, c. 974, s. 12; 1951, c. 997, s. 1; 1953, c. 675, s. 4; 1963, c. 426, ss. 7-9, 12; 1969, c. 1131; 1971, c. 872, s. 1; 1973, cc. 56, 153.)

The right to sell has its foundation in the permit and does not exist as a constitutional or property right. Hursey v. Town of Gibsonville, 284 N.C. 522, 202 S.E.2d 161 (1974).

Operators of establishments without a "brown-bagging" permit who were prohibited by ordinance from selling wine and beer on Sunday were not deprived of a constitutional or property right. Hursey v. Town of Gibsonville, 284 N.C. 522, 202 S.E.2d 161 (1974).

Legislative Classification of Establishments Entitled to "Brown-Bagging" Permits Not Unconstitutional. — See Hursey v. Town of Gibsonville, 284 N.C. 522, 202 S.E.2d 161 (1974).

Authority of Counties and Municipalities to Regulate Sale of Beer and Wine on Sundays. — See opinion of Attorney General to Mr. H.L. Riddle, Jr., 41 N.C.A.G. 484 (1971).

Applied in Hill v. State Bd. of Alcoholic Control, 17 N.C. App. 592, 195 S.E.2d 94 (1973).

§ 18A-34. Prohibited acts of licensees; wine and malt beverage purchases limited as to quantity. — (a) No holder of a license or permit authorizing the sale at retail of malt beverages or wine (fortified or unfortified) for consumption on or off the premises where sold, or any servant, agent, or employee of the licensee, shall do any of the following upon the licensed premises:

(1) Knowingly permit the consumption of any kind of any intoxicating liquors not allowed to be consumed on said premises;

(2) Knowingly sell such beverages to any person while such person is in an intoxicated condition;

(3) Sell such beverages upon the licensed premises or permit such beverages to be consumed thereon, on any day or at any time when such sale or consumption is prohibited by law;

(4) Permit on the licensed premises any disorderly conduct, breach of peace, or any lewd, immoral, or improper entertainment, conduct, or practices; or permit on the licensed premises any conduct or entertainment by nude performers or entertainers, or persons wearing transparent clothing or performances by any male or female performers simulating sexual acts or sexual activities with any person, object, device or other paraphernalia;

(5) Sell, offer for sale, possess, or knowingly permit the consumption on the licensed premises of any kind of intoxicating liquors the sale or possession of which is not authorized by law.

(b) All retail license or permit holders shall keep their places of business clean, well lighted, and in an orderly manner.

(c) It shall be unlawful for any person selling at retail or wholesale any wines (fortified or unfortified) to sell wines the brands of which are not on the approved list of wines prepared by the State Board of Alcoholic Control unless specific authority for the sale of said wines has been obtained from the Board. It shall be the duty of all retailers to secure from the State Board of Alcoholic Control an approved list of wines, and it shall be unlawful for retailers to purchase from wholesalers or distributors any wines not on said approved list, unless specific authority for such purchase is obtained from the State Board of Alcoholic Control. The Board may in its discretion grant permits for the ordering of wines (fortified or unfortified) not on the Board's approved list, provided these wines meet the Standards of Identity and Labeling set forth in Title 27, Code of Federal Regulations, Part 4, Subchapter A, and provided further that the wines be used by the purchaser or his bona fide guests and not for resale except by Grade A restaurants. A permit issued under this subsection shall specifically list the wines to be imported and shall be valid for a period of one year.

(d) No retailer shall sell or deliver to any one person at any one time more than 80 liters of malt beverages, other than draft malt beverages in kegs. Nor may more than 20 liters of unfortified wine nor more than four liters of fortified wine be sold at any one time to any one person, except as authorized by permit. (1943, c. 400, s. 6; 1945, c. 708, s. 6; c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c.

974, ss. 13, 15; c. 1251, s. 3; 1957, c. 1048; 1959, c. 745, s. 2; 1963, c. 426, ss. 6, 10, 12; c. 460, s. 1; 1971, c. 872, s. 1; 1973, c. 30; c. 1295; c. 1452, s. 4; 1977, c. 176, ss. 1-3.)

Editor's Note. — The 1977 amendment in subsection (d), substituted "eighty liters" for "20 gallons" in the first sentence and "twenty liters" for "five gallons" and "four liters" for "one gallon" in the second sentence.

The grantee of a privilege license need not surrender his constitutional protections in order to get the state-controlled license. C'est Bon, Inc. v. North Carolina State Bd. of Alcoholic Control, 325 F. Supp. 404 (W.D.N.C. 1971).

"Permit". — To permit as used in subsection (a)(4) means to acquiesce with knowledge, to knowingly consent. Underwood v. State Bd. of Alcoholic Control, 278 N.C. 623, 181 S.E.2d 1 (1971).

"Permit" has been construed to mean in effect "knowingly permit." To permit sale of alcoholic beverages to a minor connotes some opportunity for knowledge and prevention of the sale. Underwood v. State Bd. of Alcoholic Control, 278 N.C. 623, 181 S.E.2d 1 (1971).

The words "permit" and "allow" are synonymous. Underwood v. State Bd. of Alcoholic Control, 278 N.C. 623, 181 S.E.2d 1 (1971).

Knowledge Required. — To permit the unlawful sale of liquor in his building, an owner must have knowledge of the violation and consent to it. Underwood v. State Bd. of Alcoholic Control, 278 N.C. 623, 181 S.E.2d 1 (1971).

A finding that a licensee's employee sold wine to an intoxicated person, without a finding that the employee "knowingly" made the sale to an intoxicated person, is insufficient to sustain an order suspending retail beer and wine license. Watkins v. State Bd. of Alcoholic Control, 14 N.C. App. 19, 187 S.E.2d 500 (1972).

"Knowingly". — See Campbell v. North Carolina State Bd. of Alcoholic Control, 263 N.C. 224, 139 S.E.2d 197 (1964); D & W, Inc. v. City of Charlotte, 268 N.C. 577, 151 S.E.2d 241 (1966).

"Knowledge". — "Knowledge" means an impression of the mind, the state of being aware; and this may be acquired in numerous ways and from many sources. It is usually obtained from a variety of facts and circumstances. Underwood v. State Bd. of Alcoholic Control, 278 N.C. 623, 181 S.E.2d 1 (1971).

Generally speaking, when it is said that a person has knowledge of a given condition, it is meant that his relation to it, his association with it, his control over it, and his direction of it are such as give him actual information concerning it. Underwood v. State Bd. of Alcoholic Control, 278 N.C. 623, 181 S.E.2d 1 (1971).

The mere fact that two boys violated the law on petitioner's premises on a single night within a period of 35 minutes does not constitute substantial evidence that petitioner knowingly permitted the consumption of alcoholic liquors on his premises. Underwood v. State Bd. of Alcoholic Control, 278 N.C. 623, 181 S.E.2d 1 (1971).

Knowledge may be implied from the circumstances. Underwood v. State Bd. of Alcoholic Control, 278 N.C. 623, 181 S.E.2d 1 (1971).

Sale of Beer to Minor Unknowingly on Single Occasion. — Under this section as it stood prior to the 1973 amendment, the sale of beer or wine to a person under 18 years of age by a licensee or an employee of a licensee was ground for the suspension or revocation of the license only if the sale was knowingly made to such minor; therefore, evidence that an employee of the licensee sold beer on a single occasion to a 17-year-old boy, without any evidence that the employee or the licensee knew the boy to be under 18 years of age, would not support order of the A.B.C. Board suspending the license. National Food Stores v. North Carolina Bd. of Alcoholic Control, 268 N.C. 624, 151 S.E.2d 582 (1966), overruling Campbell v. North Carolina State Bd. of Alcoholic Control, 263 N.C. 224, 139 S.E.2d 197 (1964), to the extent of any conflict.

Proprietor Responsible Even If One Carries His Own Beverage. — The proprietor is responsible if he knowingly permits another to drink on his premises, even if he carried his own beverage. Campbell v. North Carolina State Bd. of Alcoholic Control, 263 N.C. 224, 139 S.E.2d 197 (1964); D & W, Inc. v. City of Charlotte, 268 N.C. 577, 151 S.E.2d 241 (1966).

Enforcement of Subsection (a)(4). — All the evidence adduced at the hearing and considered by the Board tends to show that the licensee was making a reasonable effort in good faith to enforce the provisions of subsection (a)(4) where licensee's employees were ejecting troublemakers from his premises, thus indicating petitioner's disapproval of the disorderly conduct in which the participants were engaged. Underwood v. State Bd. of Alcoholic Control, 278 N.C. 623, 181 S.E.2d 1 (1971).

The failure to observe all activities on a busy parking lot for a period of 35 minutes is not a failure, within the meaning of the law, to give the licensed premises proper supervision. Underwood v. State Bd. of Alcoholic Control, 278 N.C. 623, 181 S.E.2d 1 (1971).

Arranging Not to See Violations. — The holder of a license for the sale of wine and beer

who is aware of violations on his premises but who arranges never to see them cannot be said to be ignorant of their existence. He must take steps to avoid violations or suffer the penalties prescribed. Underwood v. State Bd. of Alcoholic Control, 278 N.C. 623, 181 S.E.2d 1 (1971).

Evidence Sufficient to Find Improper Entertainment. — There was ample, competent, material and substantial evidence to support the factual finding issued under authority of subsection (a)(4) that petitioner did permit improper entertainment, conduct and practices upon the licensed premises "by allowing dancing where the dancing girl exposed her pubic area to customers." Fay v. State Bd. of Alcoholic Control, 30 N.C. App. 492, 227 S.E.2d 298, cert. denied, 291 N.C. 175, 229 S.E.2d 689 (1976).

§ 18A-35. Transportation and possession of malt beverages and unfortified wine; out-of-state purchases. — (a) Except as otherwise provided in this Chapter, the purchase, transportation, and possession of malt beverages and unfortified wine by individuals 18 years of age or older for their own use are permitted without restriction or regulation. Provided, the local government units of the State shall have, and they are hereby vested with, full power and authority to regulate the consumption of malt beverages or unfortified wines on property owned or occupied by the local government unit.

(b) Whenever any person desires to purchase more than 20 liters but not exceeding 80 liters of unfortified wine at one time, he shall first obtain a purchase-transportation permit from the chairman of the local board, a member of the local board, or the general manager or supervisor of the local board of alcoholic control. No permit shall be issued by any authorized person to:

(1) Persons not of good character; or
(2) Persons not sufficiently identified, if unknown to the issuing person; or
(3) Persons known or shown to be alcoholics or bootleggers.

(c) The permit shall be signed by the person authorized to issue same and it shall authorize the purchaser named therein to purchase the quantity of unfortified wine therein indicated not to exceed 80 liters. The permit shall be issued by means of a printed form with at least two carbon copies of the same. On the face of the permit shall appear the following information:

(1) Name and address of purchaser;
(2) The name and location of the place where purchase is to be made;
(3) Date issued and expiration date;
(4) Destination;
(5) Signature of person issuing the permit;
(6) A statement that the permit is valid for only one purchase on the date shown and that the permit must accompany the merchandise while in transit and both the merchandise and the permit must be exhibited by purchaser to any law-enforcement officer upon request.

(d) The permit herein authorized shall be valid for only one purchase, and it shall expire at 6:00 P.M. of the date shown thereon. No purchase shall be made from any store except the store named on the permit. One copy of the permit shall be retained by the board issuing the same, one copy shall be delivered to the store from which the merchandise is purchased, and one copy shall be retained by the permittee. The permit shall authorize the permittee to transport unfortified wine from the place of purchase to the destination indicated thereon. It must accompany the merchandise during transit, and both the merchandise and the permit must be exhibited to any law-enforcement officer upon request.

(e) The chairman or any member of a local county or municipal board or the general manager or supervisor of any local alcoholic control board is authorized to issue purchase permits.

(f) Permits to be used shall be in the form substantially as follows:

ALCOHOLIC BEVERAGE CONTROL BOARD

. . . . . County
. . . . . ., North Carolina

Date ....., 19 ....

PURCHASE-TRANSPORTATION PERMIT

(not to exceed 80 liters)

Name of Purchaser .....
Address .....
Name of Store ..... Address of Store .....
Destination .....
Route to Be Used .....
Signed .....
(Person authorized to issue)
Board Member

Note: This permit is valid for only one purchase, and it shall expire at 6:00 P.M. of the date shown above. Special Note: This permit must accompany the merchandise during transit. Both the merchandise and the permit must be exhibited to any law-enforcement officer upon request.

(g) A person may purchase legally outside of this State and bring into this State for his own personal use the same quantity of malt beverages or unfortified wine as may be legally purchased by said person within this State. (1939, c. 158, s. 503; 1971, c. 872, s. 1; 1973, c. 1452, ss. 1-3; 1977, c. 176, ss. 2, 3; c. 693.)

Editor's Note. — The first 1977 amendment substituted "twenty liters" for "five gallons" and "eighty liters" for "20 gallons" in the first sentence of subsection (b) and substituted "eighty liters" for "20 gallons" at the end of the first sentence of subsection (c) and in the permit form set out in subsection (f).

The second 1977 amendment added the second sentence of subsection (a).

Municipal Ordinance Conflicting with Subsection (a) Was Invalid. — A municipal ordinance providing that "No person shall have open and in his possession, . . . beer, . . . on or in the public streets" conflicted with subsection (a); therefore, the municipal ordinance was invalid, and warrants drawn thereunder charging defendants with the possession of open beer were properly quashed. State v. Williams, 283 N.C. 550, 196 S.E.2d 756 (1973).

Cited in Greene v. City of Winston-Salem, 287 N.C. 66, 213 S.E.2d 231 (1975).

§ 18A-35.1. Storage, possession and consumption of malt beverages and unfortified wine. — Those beverages defined in G.S. 18A-2(5) and (14) may be possessed, consumed, and stored in those places listed in G.S. 18A-30(2) in the same manner and under the same terms and conditions as alcoholic beverages. (1975, c. 700.)

§ 18A-36. Making wines and malt beverages for private use. — Notwithstanding any other provisions of law, it shall be lawful for an individual to make native wines and to possess and transport such wines for the use of his family and bona fide guests; provided that such native wine is made from wild or cultivated grapes, fruits or berries grown or purchased by him. It shall be lawful for an individual to sell or purchase wine kits approved by the State Board of Alcoholic Control which contain concentrates made from grapes, fruits or berries, and to make wine for the use of his family and bona fide guests. It shall be lawful for an individual to sell or purchase malt beverage kits approved by the State Board of Alcoholic Control which contain grain extracts or concentrates, and to make malt beverages for the use of his family and bona fide guests. No license or permit shall be required for wines made pursuant to this section and no tax shall be imposed. (1971, c. 872, s. 1; 1973, c. 1218.)

Part 1A. Commercial Wineries.

§ 18A-36.1. Commercial wineries. — (a) In addition to the authority to make

native wines conferred in G.S. 18A-36, it shall be lawful for any commercial winery after securing a permit from the State Board of Alcoholic Control to manufacture and distribute to wholesalers holding valid wine permits issued by the State Board of Alcoholic Control any wine, fortified or unfortified, after compliance with the provisions of this Chapter and other applicable law. The sale of wine, fortified and unfortified, to nonresident wholesalers is authorized when the purchase is not for resale in this State.

(b) "Commercial winery" means any business establishment which manufactures and sells wines for consumption by persons other than the families or guests of the person, firm or corporation owning or operating the winery.

(c) A commercial winery is authorized to grow crops, purchase crops and other materials, manufacture, possess and transport wine without limitation as to quantity except that any wine in transport shall be subject to the provisions of G.S. 18A-41.

(d) Any applicable law with regard to tests for quality of the wine shall apply to wine possessed by commercial wineries in this State.

(e) The State Board of Alcoholic Control shall have all authority with regard to the issuance, denial, suspension and revocation of permits for commercial wineries which the Board has with regard to any permit issued by the Board.

(f) A resident manufacturer of fortified or unfortified wine may sell "short-filled" packages to its employees for the sole use of said employees, members of their families and bona fide guests in this State, provided that such manufacturer sell only such "short-filled" packages on which the appropriate North Carolina taxes have been paid or will be paid, based upon the size of the bottle or container short-filled. Any sale made to any employee of the manufacturer under this section shall not be construed as a retail or wholesale sale under Article 2C of Chapter 105, and Chapter 18A of the General Statutes, and such manufacturer shall not be required by reason of such sale to obtain a permit under Chapter 18A or license under Article 2C of Chapter 105. (1973, c. 511, ss. 1, 2; 1975, c. 411, s. 6.)

Editor's Note. — The 1975 amendment substituted "G.S. 18A-41" for "subdivisions (1) through (4) of G.S. 18A-29(b)" in subsection (c).

Part 2. Permits.

§ 18A-37. Permit and license required. — Malt beverages and wine (fortified and unfortified) may be manufactured, bottled or sold in this State only after the person desiring to engage in such activity has acquired an appropriate permit from the State Board of Alcoholic Control as provided in this Article, and has secured the license or licenses required by Article 2C, Subchapter I, Chapter 105 of the General Statutes.

Permits for salesmen for a wholesale distributor of malt beverages or wine (fortified or unfortified) and permits for the retail and wholesale sale of malt beverages and wine shall continue until voluntarily surrendered to the Board, or until suspended or revoked by the Board, or in the event of change of location, change of ownership, or death of the owner.

All other permits shall be for a period of one year unless sooner revoked or suspended and shall expire on April 30 of each year.

The State Board of Alcoholic Control shall arrange to computerize the files for permits as soon as feasible and once computerized shall retain a permanent number for each permit.

No permit issued under this Chapter shall be transferable. When the ownership of any business to which a permit has been issued changes by merger,

consolidation or otherwise, the permit shall automatically be terminated and returned immediately to the State Board of Alcoholic Control.

A change in ownership does not occur simply from the exchange or sale of stock unless a stockholder acquires more than twenty-five percent (25%) of the stock and such acquiring stockholder has not previously held twenty-five percent (25%) of the stock of the corporation. (1971, c. 872, s. 1; 1975, c. 330, s. 1; c. 411, s. 4.)

Editor's Note. — The first 1975 amendment substituted "and" for "or" in the parenthesis near the beginning of the first paragraph, substituted "Article 2C, Subchapter I, Chapter 105 of the General Statutes" for "Article 2C of Chapter 105" at the end of the first paragraph, added the present second paragraph, inserted "other" and substituted "revoked or suspended" for "suspended or revoked" in the present third paragraph, deleted the former last paragraph, which made the provisions of this Article applicable to permits issued under Article 3 of this Chapter, and added the present last paragraph.

The second 1975 amendment added the last two paragraphs of the section.

§ 18A-38. Power of State Board of Alcoholic Control to issue permits. — (a) The State Board of Alcoholic Control shall be referred to herein as "the Board." The Board shall have the sole power, in its discretion, to determine the fitness and qualifications of an applicant for a permit to sell, manufacture, or bottle malt beverages or wine (fortified and unfortified). With the assistance of the Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety, the Board shall inquire into the character of the applicant and the location, general appearance, and type of place or business of the applicant. The Board, in addition to all powers now conferred upon it by law, is hereby vested with additional powers to regulate the distribution and sale of wine (fortified and unfortified) and malt beverages as follows:

(1) Permits issued to wineries, importers and wholesalers shall be as follows:

a. Unfortified winery permits shall authorize the permittee to manufacture unfortified wines and to sell and deliver or ship the same in accordance with the regulations of the Board, in bottles or other closed containers to persons permitted under the provisions of this Chapter and Article 2C of Chapter 105 to sell at wholesale. A holder of an unfortified winery permit may sell unfortified wine to nonresident wholesalers when the purchase is not for resale in this State.

b. Fortified winery permits shall authorize the permittee to manufacture, purchase, import, and transport brandy and other ingredients and equipment used in the manufacture of fortified wines. A permittee holding a fortified winery permit may manufacture fortified wines and sell and deliver or ship the same in accordance with the regulations of the Board in bottles, or other permitted closed containers to persons authorized under the provisions of this Chapter to sell at wholesale. The permittee may also sell fortified wine to nonresident wholesalers when the purchase is not for resale in this State.

c. Limited Winery Permits. — A resident winery holding an unfortified winery permit may also obtain a limited winery permit from the State Board of Alcoholic Control provided that the winery produces its wines principally from honey, grapes or other fruit grown in North Carolina. A limited winery permit shall authorize the permittee to provide visitors with samples for tasting free of charge subject to the rules and regulations of the State Board of Alcoholic Control and the North Carolina Department of Revenue.

d. Wine importers permits authorize the permittee to import wines

from outside the United States in bottles, or other closed containers to warehouse, and sell the same at wholesale for purposes of resale.

e. Wholesale unfortified wine permits authorize the permittee to acquire and receive delivery shipments of unfortified wine and to sell and deliver or ship the same in accordance with regulations of the Board, in bottles or other closed containers, approved by the Board, to persons licensed under the provisions of this Chapter to sell the same at wholesale or retail for purposes of resale. An unfortified wine wholesaler may furnish and sell unfortified wine to his employees subject to the regulations of the State A.B.C. Board and the North Carolina Department of Revenue.

f. Fortified wine wholesalers' permits shall authorize the permittee to possess, transport, warehouse and sell as a wholesaler, fortified wines in any county of the State provided such sales are to persons, firms or corporations that are licensed under the provisions of this Chapter and Chapter 105. A fortified wine wholesaler may furnish or sell fortified wine to his employees subject to the regulations of the State A.B.C. Board and the North Carolina Department of Revenue.

(2) Permits issued to brewers, bottlers, importers and wholesalers shall be as follows:

a. Brewery permits shall authorize the permittee to manufacture malt beverages, and sell them in barrels, bottles, or other closed containers, only to persons permitted under the provisions of this Article and Chapter 105 to sell at wholesale. The sale of malt beverages to nonresident wholesalers is authorized when the purchase is not for resale in this State. The sale of malt, hops and other ingredients used in the manufacture of malt beverages is hereby permitted and allowed.

A resident manufacturer of malt beverages may furnish or sell packages not conforming to the manufacturer's marketing standards or marketable malt beverage products to its employees for the sole use of said employees and members of their families, provided that appropriate North Carolina taxes have been paid or will be paid on these beverages. A resident manufacturer also may give its products to its employees and to its bona fide guests for consumption on its premises. Any sale or gift made by said manufacturer under this section shall not be construed as a retail or wholesale sale under any other provision of this Chapter or Article 2C of Chapter 105.

A resident manufacturer of malt beverages holding a permit under this section may receive malt beverages that are manufactured by him at some point outside this State, but within the United States, for transshipment to dealers in other states.

b. Wholesale malt beverage permits authorize the permittee to acquire and receive deliveries and shipments of malt beverages and to sell and deliver or ship the same, in accordance with regulations of the Board, in barrels, bottles or other closed containers to persons licensed under the provisions of this Chapter to sell the same at wholesale or retail for purposes of resale. A malt beverage wholesaler may furnish or sell malt beverages to his employees for the sole use of said employees and members of their families, and, where the legal sale of such beverages is permitted, may furnish malt beverages to guests and nonpermit holders for promotional purposes, subject to regulations of the State A.B.C. Board.

c. Bottlers' permits shall authorize the permittee to acquire and receive

deliveries and shipments of malt beverages or wine (fortified and unfortified), in bottles or other closed containers and to bottle, sell and deliver or ship the same in accordance with regulations of the Board to persons permitted under the provisions of this Chapter to sell the same at wholesale for the purpose of resale.

A holder of a bottler's permit may furnish or sell packages not conforming to the manufacturer's marketing standards to its employees for the sole use of said employees and members of their families, provided such bottlers furnish only such substandard packages on which the appropriate taxes have been paid or will be paid. Any sale made to any employee of said bottler under this section shall not be construed as a retail or wholesale sale under any other provisions of this Chapter or Article 2C of Chapter 105.

d. Malt beverage importers' permits authorize the permittee to import malt beverages from outside the United States in barrels, bottles, or other closed containers to warehouse and sell the same at wholesale for purposes of resale.

(b) The sale, distribution, soliciting orders for, or delivery of malt beverages or wine (fortified or unfortified) in this State without a permit shall be unlawful. The fact that any brewery or winery or any manufacturer or bottler of malt beverages or wine (fortified or unfortified) has applied for or obtained a permit under the provisions of this Article shall not be construed as domesticating said brewery, manufacturer, or bottler, and shall not be evidence for any other purpose that such brewery, manufacturer, or bottler is doing business in North Carolina.

(c) The Board may issue temporary permits where application in proper form has been received, with applicable fees, which shall be valid for 90 days, unless sooner suspended or revoked. No applicant or permittee shall be entitled to any hearing with reference to the issuance, suspension, or revocation of any temporary permit.

(d) Permits issued for the retail sale of malt beverages shall be of two kinds:

(1) "On-premises" permits, which shall be issued for bona fide restaurants, cafes, cafeterias, hotels, lunch stands, drugstores, filling stations, grocery stores, cold-drink stands, tearooms, or incorporated or chartered clubs. Such permit shall authorize the permittee to sell at retail malt beverages for consumption on the premises designated in the permit, and to sell malt beverages in original packages for consumption off the premises.

(2) "Off-premises" permits, which shall authorize the permittee to sell at retail malt beverages for consumption only off the premises designated in the permit, and only in the immediate container in which the beverage was received by the permittee.

(e) Permits issued for the retail sale of unfortified wine shall be of two kinds:

(1) "On-premises" permits shall be issued only to bona fide hotels, cafeterias, cafes, and restaurants which have a Grade A rating from the Commission for Health Services, and shall authorize the permittees to sell at retail unfortified wine, either separate or mixed with nonalcoholic beverages, for consumption on the premises designated in the permit, and to sell unfortified wine in original containers for consumption off the premises. Provided, no such permit shall be issued except to such hotels, cafeterias, cafes, and restaurants where prepared food is customarily sold and only to such as are permitted under the provisions of G.S. 105-62(a).

(2) "Off-premises" permits shall authorize the permittee to sell unfortified wine at retail for consumption off the premises designated in the permit, and all such sales shall be made in the immediate container in which the wine was purchased by the permittee.

(e1) Before the Board shall issue a permit to an applicant, it shall give notice of such application to the municipal governing authority of the incorporated city or town, or to the board of county commissioners, if the application be for a permit outside the boundaries of incorporated cities or towns. Such local government shall have the right to file written objections with the Board within 10 days after date of transmittal of such notice. Such objections shall include a statement of all facts upon which such objections are based, and upon request, the Board may, in its discretion, hold a formal hearing.

(f) In any county or municipality in which the operation of alcoholic beverage control stores is authorized by law, it shall be legal to sell fortified or unfortified wines for consumption on the premises in hotels and restaurants that have a Grade A rating from the Commission for Health Services, and it shall be legal to sell said wines in drugstores and grocery stores for off-premises consumption. Fortified wine sold for consumption on licensed premises may be sold either separate or mixed with nonalcoholic beverages. All sales of fortified wine shall be subject to the rules and regulations of the State ABC Board. In the event a Grade A restaurant with an "on premise" permit receives a Grade B sanitation rating, the establishment must stop selling "on premise" wine after 30 days until the Grade A is restored.

(g) Notwithstanding any provision of law contained in this Chapter or in Article 2C of Chapter 105 of the General Statutes, it shall be lawful for any wholesaler or retailer in possession of a valid permit issued by the State Board of Alcoholic Control to sell and deliver malt beverages and wine (both fortified and unfortified) for use or consumption by or on oceangoing vessels which ply the high seas in interstate or foreign commerce, in the transport of freight or passengers, or both, for hire exclusively, when delivered to an officer or agent of such vessel. The State Board shall have authority to promulgate regulations and rules governing the sale and delivery of such malt beverages and wine including the authority to issue such permits as may be reasonably required by the State Board. (1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, s. 1; 1957, cc. 1048, 1448; 1963, c. 426, ss. 10, 12; c. 460, s. 1; 1971, c. 872, s. 1; 1973, c. 476, s. 128; 1975, c. 586, s. 1; c. 654, ss. 1, 2; c. 722, s. 1; 1977, c. 70, s. 19; c. 182, s. 1; c. 669, ss. 1, 2; c. 676, ss. 1, 2; c. 911.)

Editor's Note. — The first 1975 amendment added subsection (g).

The second 1975 amendment rewrote former subsection (b), which has been redesignated subdivision (2) of subsection (a) in the section as set out above, and added a new subsection (c), which has been redesignated (b) in the section as set out above.

The third 1975 amendment rewrote former subsection (a) as the introductory paragraph and subdivision (1) of subsection (a) in the section as set out above.

The first 1977 amendment added "With the assistance of the Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety" at the beginning of the third sentence of subsection (a).

The second 1977 amendment inserted "or unfortified" near the beginning of subsection (f).

The third 1977 amendment added subsection (e1).

The fourth 1977 amendment, in the first sentence of subdivision (1) of subsection (e), deleted "shall" following "and restaurants which" and inserted "unfortified wine, either separate or mixed with nonalcoholic beverages," and in subsection (f), deleted "such sales, however, shall be subject to the rules and regulations of the State Alcoholic Beverage Control Board" from the end of the first sentence and added the second and third sentences.

The fifth 1977 amendment added the fourth sentence of subsection (f).

The superior court is without power to order the Board of Alcoholic Control to issue a permit, but can order the Board to exercise its discretion in accordance with law. Waggoner v. North Carolina Bd. of Alcoholic Control, 7 N.C. App. 692, 173 S.E.2d 548 (1970).

Issuance of Certain Wine Permits Is Prohibited. — Section 18A-57(b) prohibits the issuance under subsection (f) of this section of permits for the sale of fortified wines in certain retail establishments in a territory having A.B.C. stores where the electorate voted against the sale of beer and wine in the territory in a local option election held pursuant to former §

18-124 et seq., notwithstanding at the time of the election fortified wines were sold only in A.B.C. stores. Clark v. North Carolina Bd. of Alcoholic Control, 14 N.C. App. 464, 188 S.E.2d 705 (1972).

State Board of Alcoholic Control May Issue Permits for the Retail Sale of Fortified Wines in Those Counties and Cities Where A.B.C. Stores Are Authorized. — See opinion of Attorney General to Mr. N.H. Person, 41 N.C.A.G. 616 (1971).

In Locality Where Election for Off-Premises Sale of Unfortified Wine Only Has Been Held, Retail Sales of Wine Are Restricted to Those Conditions Despite Revision of General Statutes. — See opinion of Attorney General to Mr. Lee P. Phillips, State Board of Alcoholic Control, 41 N.C.A.G. 630 (1971).

§ 18A-39. Application for permit; contents and fees. — (a) All resident bottlers, wineries, importers or manufacturers of malt beverages or wine (fortified or unfortified) and all resident wholesalers and retailers of malt beverages or wine (fortified or unfortified) shall file a written application for a permit with the State Board of Alcoholic Control, and in the application shall state under oath therein:

(1) The name and residence of the applicant and the length of his residence within the State of North Carolina;

(2) The particular place for which the license is desired, designating the same by street and number if practicable; if not, by such other apt description as definitely locates it; and the distance to the nearest church or public or private school from said place;

(3) The name of the owner of the premises upon which the business licensed is to be carried on, and, if the owner is not the applicant, that such applicant is the actual and bona fide lessee of the premises. However, if the permit is for the possession of alcoholic beverages at a special occasion and is valid for no more than 48 hours, in lieu of a statement that the applicant is a bona fide lessee the Board may require a written statement from the owner or person in control of the premises authorizing the applicant's use of the premises for the special occasion;

(4) That the place or building in which it is proposed to do business conforms to all laws of health and fire regulations applicable thereto, and is a safe and proper place or building;

(5) That the applicant intends to carry on the business authorized by the permit for himself or under his immediate supervision and direction;

(6) That the applicant has been a bona fide resident of this State for a period of at least one year immediately preceding the date of filing his application and that he is not less than 21 years of age; provided, that no provision of this Chapter or any rule or regulation adopted pursuant thereto shall be construed to prohibit a person who is 18 years of age or older from being a manager, employee or other person in charge of any establishment which has a license and permit for on- or off-premises sales of malt beverages or wine (fortified or unfortified);

(7) The place of birth of applicant and, if a naturalized citizen, when and where naturalized;

(8) That the applicant has not been convicted of, or entered a plea of guilty or nolo contendere to, a felony or other crime involving moral turpitude within the past three years; that the applicant's citizenship has been restored by the court if he has been so deprived of it; that he has not, within the two years next preceding the filing of the application, been adjudged guilty of violating the prohibition or liquor laws, either state or federal. It shall be within the discretion of the Board, after making investigation, to determine whether any person who has ever been convicted of, or entered a plea of guilty or nolo contendere to, a felony shall be deemed a suitable person to receive and hold a malt beverage or wine (fortified or unfortified) permit;

(9) That the applicant has not during the three years next preceding the date

of said application had any permit issuable hereunder, or any license issued to him pursuant to the laws of this State or any other state to sell intoxicating liquors of any kind, revoked;

(10) That the applicant is not the holder of a federal special tax liquor stamp;

(11) If the applicant is a firm, association, or partnership, the application shall state the matters required in subdivisions (6), (7), (8), and (9), with respect to each of the members thereof, and each of said members must meet all the requirements in said subdivisions provided;

(12) If the applicant is a corporation, organized or authorized to do business in this State, the application shall state the matters required in subdivisions (7), (8) and (9), with respect to each of the officers and directors thereof, and any stockholder owning more than twenty-five percent (25%) of the stock of such corporation, and the person or persons who shall conduct and manage the licensed premises for the corporation. Each of said persons must meet all the requirements in said subdivisions provided; provided, however, that the requirement as to residence shall not apply to said officers, directors, and stockholders of such corporation; however, such requirement shall apply to any such officer, director or stockholder, agent, or employee who is also the manager and in charge of the premises for which permit is applied, but the Board may, in its discretion, waive such requirement.

(b) The application must be verified by the affidavit of the applicant before a notary public or other person duly authorized by law to administer oaths. The foregoing provisions and requirements are mandatory prerequisites for the issuance of a permit; if any applicant fails to qualify under the same, or if any false statement is knowingly made in any application, the permit shall be refused. If a permit is granted on any application containing a false statement knowingly made, it shall be revoked and the applicant upon conviction shall be guilty of a misdemeanor. In addition to the information furnished in any application, the Director of the Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety shall make such additional and independent investigation of each applicant and of the place to be occupied, as deemed necessary or advisable.

(c) Every person applying to the State Board of Alcoholic Control for a permit to sell malt beverages or wine (fortified or unfortified) under the provisions of this section shall pay an application fee at the time of application according to the following schedule:

(1) For an application for a retail permit under the provisions of this section, a fee of fifty dollars ($50.00); provided, that if applications for a malt beverage permit and a wine (fortified or unfortified) permit are filed at the same time for the same location, the total fee shall be fifty dollars ($50.00);

(2) For an application for a new permit under the provisions of this section by reason of the fact that a new manager has been assigned to an establishment for which a permit or permits are presently held, a fee of ten dollars ($10.00); provided, this fee shall not be payable if the new manager has within 30 days of the time of filing of the application held a permit as the manager of another establishment of the same person;

(3) For an application for a wholesale, importer, brewery, winery, and bottler permit under the provisions of this section, a fee of one hundred dollars ($100.00); provided, that if applications for a malt beverage permit and a wine (fortified or unfortified) permit are filed at the same time for the same location, the total fee shall be one hundred dollars ($100.00).

All fees required by this section shall be paid by check or money order made payable to the State Board of Alcoholic Control, and they shall be deposited by the State Board of Alcoholic Control with the State Treasurer.

The application of any person who fails to comply with the provisions of this section shall be refused, and if the permit has been granted, it shall be canceled. (1949, c. 974, ss. 1, 2; 1963, c. 119; c. 426, s. 12; 1965, c. 326; 1971, c. 872, s. 1; 1973, c. 758, s. 2; c. 1012; 1975, c. 19, s. 5; 1977, c. 70, s. 19.1; c. 668, s. 3; c. 977, ss. 1, 2.)

Editor's Note. — The 1975 amendment corrected an error in the first 1973 amendatory act by substituting "or" for "of" following "Chapter" in the proviso to subdivision (6) of subsection (a).

The first 1977 amendment substituted "Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety" for "Enforcement Division" in the last sentence of subsection (b).

The second 1977 amendment added the second sentence of subdivision (3) of subsection (a).

The third 1977 amendment inserted "importers" near the beginning of subsection (a), and in subsection (c), inserted "retail" in subdivision (1), substituted "fifty dollars ($50.00)" for "twenty-five dollars ($25.00)" in two places in subdivision (1), and added subdivision (3).

§ 18A-40. Permits prohibited. — (a) No permit shall be issued for the sale of malt beverages or wine (fortified or unfortified) upon the campus or property of any public school or college in this State.

(b) No permit shall be issued to a poolroom or billiard parlor or to any person operating same for the sale of wine (fortified or unfortified).

(c) No retail malt beverage or wine (fortified or unfortified) on-premise permit shall be issued for any establishment within 15 meters of a church or a public school unless the State Board of Alcoholic Control determines upon proper investigation and a hearing, if requested, that the establishment is a suitable one and that the failure to issue a permit will result in undue hardship. (1971, c. 872, s. 1; 1977, c. 176, s. 8.)

Editor's Note. — The 1977 amendment substituted "fifteen meters" for "50 feet" in subsection (c).

§ 18A-41. Permits for commercial transportation of malt beverages and wine (fortified and unfortified). — (a) Malt beverages and wine (fortified and unfortified) may be transported into, out of, or between points in this State by railroad companies, express companies, or steamboat companies engaged in public service as common carriers and having regularly established schedules of service upon condition that such companies shall keep accurate records of the character and volume of such shipments and the character and number of packages or containers and shall keep records open at all times for inspection by the State Board of Alcoholic Control and alcohol law enforcement agents, and upon condition that such common carriers shall make report of all shipments of such beverages into, out of, or between points in this State at such times and in such detail and form as may be required by the State Board of Alcoholic Control.

Malt beverages and wine (fortified and unfortified) may be transported into, out of, or between points in this State over the public highways of this State by motor vehicles upon condition that every person intending to make such use of the highways of this State shall as a prerequisite thereto register such intention with the State Board of Alcoholic Control in advance of such transportation, with notice of the kind and character of such products to be transported and the license and motor number of each motor vehicle intended to be used in such transportation. Upon the filing of such information, together with an agreement to comply with the provisions of this Chapter, the State Board

of Alcoholic Control shall without charge therefor issue a numbered permit to each such owner or operator for each motor vehicle intended to be used for such transportation, which numbered permit shall be prominently displayed on the motor vehicle used in transporting malt beverages or wine (fortified and unfortified). Every person transporting such products over any of the public highways of this State shall during the entire time he is so engaged have in his possession an invoice or bill of sale or other record evidence showing the true name and address of the person from whom he has received such beverages, the character and contents of containers, the number of bottles, cases, or liters of such shipment, and the true name and address of every person to whom deliveries are to be made. The person transporting such beverages shall, at the request of any alcohol law enforcement agents, produce and offer for inspection said invoice or bill of sale or record evidence. If said person fails to produce an invoice or bill of sale or record evidence, or if when produced, the document fails to clearly and accurately disclose said information, the failure shall be prima facie evidence of the violation of this Article. Every person engaged in transporting such beverages over the public highways of this State shall keep accurate records of the character and volume of such shipments and the character and number of packages or containers, and shall keep records open at all times for inspection by the State Board of Alcoholic Control and alcohol law enforcement agents. Such person shall make report of all shipments of such beverages into, out of, or between points in this State at such times and in such detail and form as may be required by the State Board of Alcoholic Control.

The provisions of this section as to transportation of malt beverages and wine (fortified and unfortified) by motor vehicles over the public highways of this State shall in like manner apply to the owner or operator of any boat using the waters of the State for such transportation, and all of the provisions of this section with respect to permits for such transportation and reports to the State Board of Alcoholic Control by the operators of motor vehicles on public highways shall in like manner apply to the owner or operator of any boat using the waters of this State.

(b) The State A.B.C. Board shall promulgate rules and regulations to prohibit the direct shipment of malt beverages from points outside this State to a United States military or naval reservation within the geographical confines of North Carolina for resale on such military or naval reservation.

(c) The permits required by this section shall be waived for any person already having a permit required under another section of this Article. (1923, c. 1, s. 15; C. S., s. 3411(o); 1939, c. 158, s. 503; 1971, c. 872, s. 1; 1975, c. 411, s. 7; 1977, c. 70, s. 20; c. 176, s. 7.)

Editor's Note. — The 1975 amendment substituted "wine (fortified and unfortified)" for "unfortified wine" throughout subsection (a).

The first 1977 amendment substituted "alcohol law enforcement agents" for "State A.B.C. officers" in three places in subsection (a).

The second 1977 amendment substituted "liters" for "gallons" near the middle of the second paragraph.

§ 18A-42. Salesman's permit. — (a) Every salesman for a wholesale distributor of malt beverages or wine (fortified or unfortified) shall apply to the Board for a wholesale salesman's permit to sell such beverages. This shall be deemed to include salesmen stationed at the wholesaler's warehouse as well as route salesmen who sell and deliver malt beverages or wine (fortified or unfortified) to retailers. All persons entering such employment after May 1, 1951, shall apply to the Board in like manner for a salesman's permit. A salesman's permit shall continue until voluntarily surrendered to the Board, or until suspended or revoked by the Board, or until the salesman ceases to be

employed by the employer for whom he was working when he obtained his most recent permit.

(b) Such salesman shall be 21 years of age. No salesman's permit shall be issued to any person who has been convicted within two years preceding the filing of his application of violating the State or federal liquor laws, or who has been convicted of, or entered a plea of guilty or nolo contendere to, a felony or of any crime involving moral turpitude within the past three years and without restoration of his citizenship by the court. No salesman's permit shall be issued to any person whose permit or license issued to him pursuant to the laws of this State or any other state to sell intoxicating liquors of any kind has been revoked during the three years next preceding the date of application for a permit.

(c) Each route salesman shall be responsible under this Article for all sales and deliveries of malt beverages or wine (fortified or unfortified) by his helper.

(d) No wholesale distributor of malt beverages or wine (fortified or unfortified) shall employ as a salesman any person who does not have a salesman's permit.

(e) The permit of any salesman or wholesale distributor violating any provision of this Chapter or any regulation promulgated pursuant thereto shall be subject to revocation or suspension by the Board. Permit holders cited for a violation by the Board shall have the right to a hearing as provided in this Article for other permittees. (1951, c. 378, ss. 1, 2, 5-8; 1963, c. 426, s. 13; 1971, c. 872, s. 1; 1975, c. 330, s. 2; c. 411, s. 8.)

Editor's Note. — The first 1975 amendment deleted "and shall renew the permit by May 1 of each succeeding year thereafter" following "such beverages" at the end of the first sentence, and added the last sentence, of subsection (a). The amendment directed that the new sentence be added "at the end of that section," but it appears that the intention of the act was to add it at the end of subsection (a).

The second 1975 amendment deleted "and a citizen of the United States" at the end of the first sentence of subsection (b).

§ 18A-42.1. Special permit; inheritance; bankruptcy; confiscation; individuals and governmental agencies. — Whenever any person not in possession of a permit for the sale of malt beverages or wine (fortified or unfortified), whether wholesale or retail, or any governmental agency, State or federal, shall legally come into possession and ownership of any quantity of tax paid intoxicating liquor, said person or agency may apply to the State Board of Alcoholic Control for a special permit authorizing the sale, or disposition otherwise, of said intoxicating liquor at a time and place, and pursuant to procedures, designated by the State Board; and the State Board shall have the authority to issue such permits.

By way of illustration, but not limitation, the State Board may issue permits for the disposition of intoxicating liquors by persons or governmental agencies gaining possession and ownership of same through inheritance, bankruptcy, confiscation and liens for nonpayment of taxes. (1977, c. 854, s. 1.)

Cross Reference. — As to the seizure of illegally transported or possessed liquor, see § 18A-21.

§ 18A-43. Revocation or suspension of permit. — (a) If any permittee violates any of the provisions of this Chapter, or Chapter 105, or any rule or regulation promulgated under authority of either Chapter, or fails to superintend in person or through a manager the business for which the permit was issued, or allows the premises with respect to which the permit was issued to be used for any unlawful, disorderly, or immoral purposes, or knowingly employs in the sale or distribution of malt beverage or wine (fortified or unfortified) any person who has been convicted of, or entered a plea of guilty

or nolo contendere to, a felony involving moral turpitude (federal or state) within the past three years, or adjudged guilty of violating the liquor or drug laws (federal or state) within two years, or leaves the licensed premises in charge of any person who has had a license or permit for the sale of malt beverages or wine (fortified or unfortified) revoked within the past two years, or otherwise fails to carry out in good faith the purposes of this Chapter, his permit may be revoked or suspended by the State Board of Alcoholic Control.

(b) The Board may refuse to issue a new permit or may suspend or revoke any permit issued by it if in the discretion of the Board it is of the opinion that the applicant or permittee is not a suitable person to hold such permit or that the place occupied by the applicant or permittee is not a suitable place. In making its determination, the Board may consider the number already holding permits within the neighborhood, parking facilities and traffic conditions, the recommendations of governing body of the city or county in which the premises is located, reputation and criminal record of the applicant, and any other factors directly related to the suitability of the person and the premises.

(c) Whenever any license or permit which has been issued by the Secretary of Revenue or by the State Board of Alcoholic Control has been revoked, the State Board may, at its discretion, refuse to issue a permit for said premises to any person for any period not to exceed six months after the revocation of such permit or license.

(d) The State A.B.C. Board may suspend or revoke any permit issued by it if the Board finds that the permittee has violated any provision of this Chapter or Chapter 105, or any rule or regulation of the State A.B.C. Board or the State Department of Revenue. (1939, c. 158, s. 514; 1943, c. 400, s. 6; 1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, ss. 7, 14; 1953, c. 1207, ss. 2-5; 1957, cc. 1048, 1440; 1963, c. 426, ss. 4, 5, 10, 12; c. 460, s. 1; 1971, c. 872, s. 1; 1973, c. 476, s. 193; 1977, c. 669, s. 1.)

Editor's Note. — The 1977 amendment added the second sentence of subsection (b).

Legislation for Revocation and Suspension of Permits Is Constitutional. — See Boyd v. Allen, 246 N.C. 150, 97 S.E.2d 864 (1957).

A violation of either a statute or a regulation is sufficient to support the suspension of a license. C'est Bon, Inc. v. North Carolina Bd. of Alcoholic Control, 279 N.C. 140, 181 S.E.2d 448 (1971).

Authority of Board. — Authority to conduct a hearing and determine whether a State retail (or wholesale) beer permit should be revoked is lodged in the State Board of Alcoholic Control by this section. J. Lampros Whsle., Inc. v. North Carolina Bd. of Alcoholic Control, 265 N.C. 679, 144 S.E.2d 895 (1965).

Inquiry into Permittee's Suitability to Hold Permit at Several Locations. — See opinion of Attorney General to Mr. D.L. Pickard, Assistant Director — Hearing Officer, State Board of Alcoholic Control, 41 N.C.A.G. 50 (1970).

Authority of State Board of Alcoholic Control to Regulate Advertising of Alcoholic Beverages. — See opinion of Attorney General to Mr. Lee P. Phillips, State Board of Alcoholic Control, 40 N.C.A.G. 1 (1970).

Board Charged with Duty of Finding Facts. — The agency that hears the witnesses and observes their demeanor as they testify — the Board of Alcoholic Control — is charged with the duty of finding the facts. J. Lampros Whsle., Inc. v. North Carolina Bd. of Alcoholic Control, 265 N.C. 679, 144 S.E.2d 895 (1965).

Duty of Court. — The duty of the court is to review the evidence and determine whether the Board had before it any material and substantial evidence sufficient to support its findings. J. Lampros Whsle., Inc. v. North Carolina Bd. of Alcoholic Control, 265 N.C. 679, 144 S.E.2d 895 (1965).

A permit is a privilege granted only to those who meet the standards which the Board has set up and may, and should, be revoked if the permittee fails to keep faith with the Board by observing its regulations and obeying the laws of the State. J. Lampros Whsle., Inc. v. North Carolina Bd. of Alcoholic Control, 265 N.C. 679, 144 S.E.2d 895 (1965).

Who May Engage in Sale and Distribution of Beer. — Only those authorized by the Board and granted its permit may engage in the sale and distribution of beer. J. Lampros Whsle., Inc. v. North Carolina Bd. of Alcoholic Control, 265 N.C. 679, 144 S.E.2d 895 (1965).

Revocation of Permit Requires Notice and Hearing. — Before a permit may be revoked the permittee is entitled to notice and a hearing

before the Board. J. Lampros Whsle., Inc. v. North Carolina Bd. of Alcoholic Control, 265 N.C. 679, 144 S.E.2d 895 (1965).

Nature of Proceedings to Suspend Beer Permit. — A proceeding by the State Board of Alcoholic Control to suspend a beer permit is an administrative proceeding, which does not involve any criminal liability of the holder of such permit. Boyd v. Allen, 246 N.C. 150, 97 S.E.2d 864 (1957).

The Board's findings are conclusive if supported by material and substantial evidence. Freeman v. State Bd. of Alcoholic Control, 264 N.C. 320, 141 S.E.2d 499 (1965); J. Lampros Whsle., Inc. v. North Carolina Bd. of Alcoholic Control, 265 N.C. 679, 144 S.E.2d 895 (1965).

The findings of the Board, when made in good faith and supported by evidence, are final. J. Lampros Whsle., Inc. v. North Carolina Bd. of Alcoholic Control, 265 N.C. 679, 144 S.E.2d 895 (1965).

And Its Decision Cannot Be Reversed by Jury Verdict. — The verdict of the jury in a criminal prosecution does not have the effect of reversing the decision of the Board of Alcoholic Control. Freeman v. State Bd. of Alcoholic Control, 264 N.C. 320, 141 S.E.2d 499 (1965).

Findings Held to Support Judgment Suspending Permit. — Findings of fact, supported by evidence, that the holders of a beer permit sold whiskey on the premises, and sold beer consumed by the purchaser on the premises after closing hours and at a time when the sale of beer was prohibited by law, support judgment suspending the permit, notwithstanding the further finding that the holders had no knowledge of the unlawful conduct of the employees. Boyd v. Allen, 246 N.C. 150, 97 S.E.2d 864 (1957).

Findings Held Insufficient to Sustain Order Suspending License. — A finding that a licensee's employee sold wine to an intoxicated person, without a finding that the employee "knowingly" made the sale to an intoxicated person, is insufficient to sustain an order suspending retail beer and wine license. Watkins v. State Bd. of Alcoholic Control, 14 N.C. App. 19, 187 S.E.2d 500 (1972).

Evidence of Age of Person to Whom Licensee Sold Beer. — Testimony of officers that a person who had bought beer from a licensee declared he was under 18 is incompetent as hearsay, and a certified copy of a birth certificate without testimony of any person having knowledge thereof that it was the record of the purchaser of the beer is incompetent to prove the age of the purchaser, and therefore such evidence is insufficient to sustain a finding of the State Board of Alcoholic Control that the licensee sold beer to a minor or failed to give his licensed premises proper supervision. Thomas v. State Bd. of Alcoholic Control, 258 N.C. 513, 128 S.E.2d 884 (1963).

The superior court erred in setting aside an order of the State Board of Alcoholic Control suspending a petitioner's retail beer permit where the evidence before the Board was sufficient to sustain its findings (1) that on a certain date an intoxicated person was permitted to loiter on the licensed premises of the petitioner in violation of the Board's regulations and (2) that the operator of the petitioner failed to give the premises proper supervision on the above occasion and where there was no evidence that the Board acted arbitrarily or in excess of lawful authority in suspending the license. State Keg, Inc. v. State Bd. of Alcoholic Control, 277 N.C. 450, 177 S.E.2d 861 (1970).

As to dismissal of certiorari to review revocation of license by town authorities for violation of this section, see Harney v. Mayor & Bd. of Comm'rs, 229 N.C. 71, 47 S.E.2d 535 (1948).

Judicial Review of Suspension of Permit. — Judicial review of an order of the State Board of Alcoholic Control suspending a retail beer permit is governed by § 150A-43. Fay v. State Bd. of Alcoholic Control, 30 N.C. App. 492, 227 S.E.2d 298, cert. denied, 291 N.C. 175, 229 S.E.2d 689 (1976).

Applied in Hill v. State Bd. of Alcoholic Control, 17 N.C. App. 592, 195 S.E.2d 94 (1973); Greensboro Elks Lodge v. North Carolina Bd. of Alcoholic Control, 27 N.C. App. 594, 220 S.E.2d 106 (1975).

§ 18A-44. Hearing before suspension or revocation of permit. — (a) Before the State A.B.C. Board may suspend or revoke any permit issued under the provisions of this Chapter, at least 10 days' notice of such proposed or contemplated action by the Board shall be given to the affected permittee. Such notice shall be in writing, shall contain a statement in detail of the grounds or reasons for such proposed or contemplated action of the Board, and shall be served on the permittee by sending the same to such permittee by registered or certified mail to his last known post-office address or by personal service by an agent of the Board. The Board shall in such notice appoint a time and place when and at which the permittee shall be heard as to why the permit should not be suspended or revoked. The permittee shall at such time and place have the right to produce evidence in his behalf and to be represented by counsel.

(b) Whenever there is filed with the State Board of Alcoholic Control a

certified copy of a judgment of a court convicting a licensee of a violation of the State or federal liquor or drug laws, or any of the provisions of this Chapter, or of any rule or regulation issued by the Board, the Board may suspend or revoke the permit of such licensee; and shall serve a written notice of such suspension or revocation upon the licensee either by requiring the delivery of such notice to the licensee in person by an agent of the Board or by sending same by registered mail to his last known post-office address. Except as provided in the preceding sentence, before the State permit authorizing the sale of intoxicating liquors may be revoked or suspended, the Board shall give the affected permittee such notice and hearing as is required by subsection (a) of this section. Upon such hearing, the duly authorized agents of the Board may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers, and documents belonging to the permittee.

(c) Any person who refuses to surrender any permit on demand under authority of the Board after such permit has been duly canceled, suspended, or revoked shall be guilty of a misdemeanor.

(d) Upon the appeal to the superior court of decisions of the Board suspending or revoking permits or disapproving applications for permits, and the appealing parties request a transcript of the entire record or a portion thereof, a transcript shall be furnished to the appealing parties upon payment to the Board of a fee of fifty cents (50¢) per page, but in no event shall the minimum fee be less than twenty-five dollars ($25.00) per copy of the record. (1939, c. 158, s. 514; 1943, c. 400, s. 6; 1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, ss. 8, 14; 1953, c. 1207, ss. 2-4; 1957, cc. 1048, 1440; 1963, c. 426, ss. 4, 5, 10-12; c. 460, s. 1; 1971, c. 872, s. 1.)

Prerequisites to Suspension or Revocation of Permit. — Before a permit can be suspended or revoked, this section requires notice to the permittee of the time and place for a hearing with an opportunity for the permittee to offer evidence and to be represented by counsel. The charges against the permittee must be specific. The hearing may be before the director or a hearing officer. After the hearing, the hearing officer reviews all the evidence, records his findings of fact and conclusions of law, and makes his recommendations to the State Alcoholic Control Board. The Chairman of the Board causes the record, findings, conclusions, and recommendations of the hearing officer to be submitted to the Board for approval, modification, or rejection as the Board may find to be justified by the record. The Board makes the final decision. C'est Bon, Inc. v. North Carolina Bd. of Alcoholic Control, 279 N.C. 140, 181 S.E.2d 448 (1971).

Hearing Sufficient to Meet Requirements of Due Process. — A hearing by an examiner for the State Alcoholic Control Board, under provisions of statute and the rules promulgated pursuant thereto, of which hearing the permittee is given notice, is represented by counsel, introduces evidence, cross-examines the adverse witnesses, all witnesses being sworn, with right to object and except to any ruling and argue the matter, is held sufficient to meet the requirements of due process of law. Sinodis v. State Bd. of Alcoholic Control, 258 N.C. 282, 128 S.E.2d 587 (1962).

The failure to furnish a copy of the hearing examiner's proposed findings and recommendations without a request cannot be held violative of due process or the statutes providing for a hearing. Sinodis v. State Bd. of Alcoholic Control, 258 N.C. 282, 128 S.E.2d 587 (1962).

Failure to Request Hearing by Board. — The holder of a permit to sell malt beverages is entitled, after a hearing by an examiner for the Board of charges of violations of law warranting a revocation of permit, to request a hearing by the Board, and when he does not request such hearing after notice of the date the Board would consider the matter, his application for jurisdiction review under former § 143-307 (now § 150A-43) must be dismissed for failure to exhaust available administrative remedies. Sinodis v. State Bd. of Alcoholic Control, 258 N.C. 282, 128 S.E.2d 587 (1962).

Whether a Hearing Is Required in All Cases before Revocation of a Permit. — See opinion of Attorney General to Mr. Lee P. Phillips, State Board of Alcoholic Control, 40 N.C.A.G. 10 (1970).

Findings of Board Are Final. — The findings of the Board, when made in good faith and supported by evidence, are final. C'est Bon, Inc. v. North Carolina Bd. of Alcoholic Control, 279 N.C. 140, 181 S.E.2d 448 (1971).

After a hearing to determine whether the permittee has violated the law or regulations, the findings of the State Alcoholic Control Board are conclusive if supported by competent,

material and substantial evidence. C'est Bon, Inc. v. North Carolina Bd. of Alcoholic Control, 279 N.C. 140, 181 S.E.2d 448 (1971).

Judicial Review. — On appeal to the court for judicial review of the State Alcoholic Control Board's decision, it is the duty of the court to review the evidence and determine whether the Board had before it any material and substantial evidence sufficient to support its findings. C'est Bon, Inc. v. North Carolina Bd. of Alcoholic Control, 279 N.C. 140, 181 S.E.2d 448 (1971).

§ 18A-44.1. Location of hearing. — The hearing held by a hearing officer shall be held in the following localities: Ahoskie, Asheville, Charlotte, Elizabeth City, Fayetteville, Franklin, Goldsboro, Greensboro, Greenville, Hickory, Jacksonville, Kinston, New Bern, Raleigh, Statesville, Wilmington and Winston-Salem. Such hearing shall be held no more than 160 kilometers, as can reasonably be determined by the A.B.C. Board, from the county seat of the county in which any person whose property or rights are the subject matter of the hearing maintains his residence. In any case, the person whose property or rights are the subject of the hearing and the State Board may agree that the hearing is to be held in some other location. The location of hearings held under the authority of Chapter 18A shall be governed by this section, notwithstanding the provisions of the Administrative Procedure Act as contained in Chapter 150A. (1975, c. 825, s. 1; 1977, c. 176, s. 9.)

Editor's Note. — The 1977 amendment substituted "160 kilometers" for "100 miles" in the second sentence.

§ 18A-45. Permit to be posted; effect of revocation. — (a) Each form of permit required by this Chapter shall be kept posted in a conspicuous place at each place where the business requiring the permit is carried on, and a separate permit shall be required for each place of business. Permits shall not be transferred to any other person or to any other location, except as provided in this Chapter.

(b) When a permit is canceled, revoked, or suspended by the Board, such cancellation, revocation, or suspension shall render void any State, county, or municipal license issued under this Chapter or Chapter 105, and in the event any State license is revoked, such revocation shall automatically revoke any other license or permit held by the licensee. (1939, c. 158, s. 514; 1943, c. 400, s. 6; 1949, c. 974, s. 14; 1953, c. 1207, ss. 2-4; 1957, c. 1440; 1963, c. 426, ss. 4, 5; 1971, c. 872, s. 1.)

§ 18A-46. Permit list to Department of Revenue. — The State Board of Alcoholic Control shall furnish to the Department of Revenue a list of all permits as issued. (1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1957, c. 1048; 1963, c. 426, s. 10; c. 460, s. 1; 1971, c. 872, s. 1.)

Part 3. Miscellaneous Wine and Malt Beverage Provisions.

§ 18A-47. Wine regulations. — (a) The State Board of Alcoholic Control is authorized and empowered:

(1) To adopt rules and regulations establishing standards of identity, quality, and purity for wines (fortified or unfortified). These standards shall be such as are deemed by said Board to best protect the public against wine containing deleterious, harmful, or impure substances or elements, or an improper balance of elements, and against spurious or imitation wines and wines unfit for beverage purposes.

(2) To test wines (fortified or unfortified) possessed or offered for sale or sold in this State and to make chemical or laboratory analyses of said

wines or to determine in any other manner whether said wines meet the standards established by the Board.

(b) Except as otherwise provided by law, no wines (fortified or unfortified) shall be transported or sold in this State unless there be firmly fastened or impressed on the barrel, bottle, or other container in which the wine may be a written statement showing the alcoholic content thereof reckoned by volume. No such written statement shall be required for a glass in which wine is sold, either separate or mixed with nonalcoholic beverages, for consumption on licensed premises.

The possession, transportation, or sale of wines (fortified or unfortified) without such statement, or any misrepresentation made in any such statement, shall constitute a misdemeanor.

(c) Manufacturers, wineries, bottlers, and wholesalers, or any other persons selling wine (fortified or unfortified) for the purpose of resale, whether on their own account or for or on behalf of other persons, shall upon request of the State A.B.C. Board or the Director of the Alcohol Law Enforcement Division, furnish a verified statement of a laboratory analysis of any wine sold or offered for sale by such persons.

(d) The "Standards of Identity for Wine" and the regulations relating to "Labeling and Advertising of Wine" promulgated by the federal alcohol administration of the United States Treasury Department and known respectively as Regulation Number Four, Article 2, and Regulation Number Four, Articles 3 and 6, are hereby adopted by North Carolina. The State A.B.C. Board may further restrict the standards of identity for wine and the regulations relative to the labeling and advertising of wine promulgated by the federal alcohol administration of the United States Treasury Department, within the discretion of the Board.

(e) The Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety is authorized and empowered to test wines (fortified and unfortified) possessed or offered for sale or sold in this State and to make chemical or laboratory analyses of said wines or to determine in any other manner whether said wines meet the standards established by the State Board of Alcoholic Control; to confiscate and destroy any wines (fortified or unfortified) not meeting said standards; to enter and inspect any premises upon which said wines (fortified and unfortified) are possessed or offered for sale; to examine any and all books, records, accounts, invoices, or other papers or data which in any way relate to the possession or sale of said wines. (1937, c. 335, s. 2; 1939, c. 158, s. 502; 1941, c. 339, s. 4; 1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1957, c. 1048; 1963, c. 426, s. 10; c. 460, s. 1; 1971, c. 872, s. 1; 1977, c. 70, ss. 20.1, 20.2, 20.3; c. 676, s. 3.)

Editor's Note. — The first 1977 amendment eliminated, in subdivision (2) of subsection (a), provisions authorizing the Board to confiscate and destroy wines not meeting standards, to enter and inspect certain premises, and to examine certain books and records. In subsection (c), the amendment inserted "or the Director of the Alcohol Law Enforcement Division" near the end of the subsection. The amendment also added subsection (e).

The second 1977 amendment added the second sentence of the first paragraph of subsection (b).

§ 18A-48. Standards for malt beverages. — (a) The State Board of Alcoholic Control is authorized to fix such standards for malt beverages as are determined by the Board to best protect the public against beverages containing deleterious, harmful, or impure substances or elements, or an improper balance of elements, and against spurious or imitation beverages unfit for human consumption. The State Board of Alcoholic Control and the Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety are authorized to test malt beverages possessed or offered for sale or sold in this State and to make

chemical or laboratory analyses of such beverages or to determine in any other manner whether the beverages meet the standards established by the State Board of Alcoholic Control.

(b) The Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety is authorized and empowered to confiscate and destroy any beverages not meeting the standards established by the State Board of Alcoholic Control; to enter and inspect any premises on which such beverages are possessed or offered for sale; to examine any and all books, records, accounts, invoices, or other papers or data which in any way relate to the possession or sale of such beverages; and to take all proper steps for the prosecution of persons violating the provisions of this section and for carrying out the provisions and intent thereof.

(c) The owner of malt beverages confiscated under this section shall be served with written notice to show cause within five days before the State Board of Alcoholic Control why the order should not be made permanent. No beverages may be destroyed until the order is final. The owner shall have the right to appeal from the ruling of the State Board of Alcoholic Control to the Superior Court Division of the General Court of Justice in the county in which the beverages were confiscated within 10 days from the final order of the State Board of Alcoholic Control.

(d) Manufacturers, bottlers, wholesalers, or any other persons selling malt beverages for the purpose of resale, whether on their own account or for or on behalf of other persons, shall, upon the request of the State A.B.C. Board or the Director of the Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety furnish a verified statement of a laboratory analysis of any malt beverage sold or offered for sale by such persons. (1939, c. 158, s. 514; 1943, c. 400, s. 6; 1949, c. 974, s. 14; 1953, c. 1207, ss. 2-4; 1957, c. 1440; 1963, c. 426, ss. 4, 5; 1971, c. 872, s. 1; 1977, c. 70, s. 20.4.)

Editor's Note. — The 1977 amendment rewrote this section.

§ 18A-49. Prohibition against exclusive outlets. — It shall be unlawful for any manufacturer, bottler, or wholesaler of wine (fortified or unfortified) or malt beverages, whether licensed in this State or not, or any officer, director, or an affiliate of such manufacturer, bottler or wholesaler either directly or indirectly:

(1) To require by agreement or otherwise that any retailer engaged in the sale of wine (fortified or unfortified) or malt beverages purchase any such products from such person, firm, or corporation to the exclusion in whole or in part of wine (fortified or unfortified) or malt beverages sold or offered for sale by other persons, firms, or corporations in North Carolina; or

(2) To have any financial interest, direct or indirect, in the business for which any retailer's permit has been issued under this Article or in the premises where the business of any person to whom a retailer's permit has been issued hereunder is conducted; or

(3) To lend or give to any person licensed hereunder as a retailer or his employee or to the owner of the premises on which the business of any such retailer is conducted any money, services, equipment, furniture, fixtures, or other things of value with which the business of such retailer is or may be conducted.

All of the above restrictions are subject to such exceptions as may be prescribed by the State Board of Alcoholic Control having due regard for public health, the quantity and value of articles involved, established trade customs not contrary to the public interest, and the purposes of this section. (1945, c. 708, s. 6; 1953, c. 1207, s. 1; 1971, c. 872, s. 1.)

§ 18A-50. Breweries forbidden to coerce or persuade wholesalers to violate Chapter or unjustly cancel contracts or franchises; prima facie evidence of franchise; injunctions; revocation or suspension of licenses and permits. — (a) It shall be unlawful, and punishable as provided in G.S. 18A-56, for any brewery or any officer, agent, or representative of any brewery:

(1) To coerce or attempt to coerce or persuade any person licensed to sell malt beverages at wholesale to enter into any agreement to take any action which would violate or tend to violate any provision of Chapter 18A or Chapter 105 of the General Statutes or any rules or regulations promulgated by the State Board of Alcoholic Control or the Department of Revenue of the State of North Carolina in accordance therewith; or

(2) To unfairly, without due regard to the equities of such wholesaler, or without just cause or provocation, to cancel or terminate any agreement or contract, written or oral, or the franchise of such wholesaler existing on January 1, 1965, or thereafter entered into, to sell malt beverages manufactured by the brewery; provided also, that, from and after June 17, 1965, this provision shall be a part of any franchise, contract, agreement, or understanding, whether written or oral, between any wholesale dealer in malt beverages licensed to do business in North Carolina, and any brewery doing business with such licensed wholesaler, just as though said provision had been specifically agreed upon between said wholesaler and said brewery.

(b) The doing or accomplishment of any of the following acts shall constitute prima facie evidence of a contractual franchise relationship within the contemplation of this section, as between a licensed malt beverage wholesaler and a brewery, to wit:

(1) The shipment, preparation for shipment, or acceptance of any order by any brewery or its agent for any malt beverage to a licensed wholesale distributor within the State of North Carolina;

(2) The payment by a licensed wholesale distributor in the State or the acceptance of payment by any brewery or its agent for the shipment of an order of malt beverage intended for sale within the State.

(c) The superior court of North Carolina is hereby vested with jurisdiction and power to enjoin the cancellation or termination of a franchise or agreement between a wholesaler of malt beverages and a brewery at the instance of such wholesaler who is or might be adversely affected by such cancellation or termination. In granting such an injunction, the superior court of North Carolina shall provide that no brewery shall supply the customers or territory of the wholesaler through servicing said territory or customers through other distributors or means while the injunction is in effect.

(d) The Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety is empowered to investigate any violations of this section and to furnish to the prosecuting attorney of any court having jurisdiction of the offense information with respect to any violations of this section. The State Board of Alcoholic Control shall have the power to enforce conformance with the provisions of any injunction granted by the superior court under the terms of this section, and, if the court finds that there has been a violation of the provisions of any injunction granted by it, the Board may revoke or suspend the permit of any wholesaler and the permit of any brewery to ship malt beverages into the State of North Carolina. (1965, c. 1191; 1971, c. 872, s. 1; 1977, c. 70, s. 20.5.)

Editor's Note. — The 1977 amendment substituted "Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety" for "State Board of Alcoholic Control" in the first sentence, and inserted "of Alcoholic Control" near the beginning of the second sentence of subsection (d).

Article 5.

Elections.

Part 1. A.B.C. Store Elections.

§ 18A-51. County elections as to alcoholic beverage control stores. — No county alcoholic beverage control store shall be established, maintained or operated in any county of this State until and unless there has been held in the county an election as provided herein, and the election shall be held under the same general laws, rules and regulations applicable to elections for county officers, insofar as practicable, provided that no absentee ballots or markers shall be permitted. At this election there shall be submitted to the qualified voters of the county the question of setting up and operating in the county an alcoholic beverage control store, or stores, as herein provided. Those favoring the setting up and operation of alcoholic beverage control stores in the county shall mark in the voting square to the left of the words "for county alcoholic beverage control stores" printed on the ballot, and those opposed to setting up and operating alcoholic beverage control stores in the county shall mark in the voting square to the left of the words "against county alcoholic beverage control stores," printed on the same ballot. If a majority of the votes cast in such election shall be for county alcoholic beverage control stores, then an alcoholic beverage control store, or alcoholic beverage control stores, may be set up and operated in the county as herein provided. If a majority of the votes cast at the election are against county alcoholic beverage control stores, then no alcoholic beverage control store shall be set up or operated in the county under the provisions of this Chapter.

The election shall be called in the county by the board of elections of the county only upon the written request of the board of county commissioners therein, or upon a petition to the board of elections signed by a number of voters of the county equal to at least twenty percent (20%) of the number of registered voters of the county according to the registration figures as certified by the board of elections on the date the petition is presented to the county board of elections. In calling the special election, the county board of elections shall give at least 30 days' public notice of the election before the closing of the registration books for said election, and the registration books shall close at the same time as for a regular election. A new registration of voters for such special alcoholic beverage control election is not required, and all qualified electors who are properly registered prior to the registration for the special election, as well as those electors who register for the special alcoholic beverage control election, shall be entitled to vote in the election.

Unless otherwise specified in this section, the procedural requirements relating to the petition shall be as provided in G.S. 18A-52(b), (c), (d), and (e), except the question shall be "FOR" and "AGAINST" county alcoholic beverage control stores.

If any county, while operating any alcoholic beverage control store under the provisions of Chapters 418 or 493 of the Public Laws of 1935, or under the terms of this Chapter hereafter under the provisions of this Article holds an election and if at this election a majority of the votes are cast "against county alcoholic beverage control stores," then the alcoholic beverage control board in such county shall, within three months from the canvassing of the vote and the declaration of the result thereof, close the stores and shall thereafter cease to operate them. During this period, the county control board shall dispose of all alcoholic beverages on hand, all fixtures, and all other property in the hands and under the control of the county control board and shall convert the same into money and shall, after making a true and faithful accounting, turn all money in its hands over to the general funds of the county.

No election under this section shall be held on the day of any biennial election

for county officers, or within 45 days of such an election. The date of any elections held under this section shall be fixed by the board of elections of the county wherein the election is held.

No other election shall be called and held in any of the counties in the State under the provisions of this section within three years from the holding of the last election under this section. In any county in which an election was held either under the provisions of Chapters 418 and 493 of the Public Laws of 1935, an election may be called under the provisions of this section, provided that no such election shall be called within three years of the holding of the last election.

Nothing herein contained shall be so construed as to require counties in which alcoholic beverage control stores have been established under Chapters 418 or 493 of the Public Laws of 1935 to have any further election in order to enable them to establish alcoholic beverage control stores. Counties in which alcoholic beverage control stores are now being operated under Chapters 418 or 493 of the Public Laws of 1935 shall from February 22, 1937, be operated under the terms of this Chapter. (1937, c. 49, ss. 25, 26; c. 431; 1971, c. 872, s. 1; 1973, c. 32.)

Part 2. Malt Beverage and Unfortified Wine Elections.

§ 18A-52. Malt beverage and unfortified wine elections in counties or municipalities. — (a) An election shall be called for the purpose of determining whether unfortified wine or malt beverages or both shall be sold in any municipality having a population of 500 or more, according to the last federal census of population, or within the county as a whole, only when the conditions of this Part are complied with.

(b) Such election shall be called in the county or municipality upon written request of the governing body or upon a petition to the appropriate board of elections conducting the election for the county or municipality. If the governing body requests the election, no petition shall be required, but the board of elections shall set a date for the election which shall not be later than 120 days after the written request is filed with the board. Notice of the election as hereinafter provided shall be given. The request shall specify the question or questions and the type of sale to be voted on in the election.

(c) The board of elections shall, upon written request, furnish petition forms to any person wishing to circulate a petition calling for an election on the sale of unfortified wine or malt beverages, or both, as hereinafter authorized. The board of elections shall date the petition, which must be returned to the board within 90 days from the date of delivery to the person; the date of return shall appear on the petition. Failure to return the petition as required shall render it void. Upon issuing the petition, the board of elections shall immediately give public notice that the petition is being circulated in some newspaper having general circulation in the county or municipality where the election is to be held and by posting the notice at three public places within the county or municipality. The notice shall be run at least twice in the newspaper. The person requesting the petition shall pay the cost of the notice.

(d) The board of elections shall call an election upon receipt of a petition which meets the following requirements:

(1) The petition must contain the genuine signature, address, and precinct name or number of each signer.

(2) The petition must be signed by a number of voters of the county or municipality equal to at least twenty percent (20%) of the number of registered voters of the county or municipality according to the registration figures as certified by the board of elections on the date the petition is presented to the board of elections.

(3) The petition must request that an election be held in the county or the

municipality to submit to the voters the question or questions of the legal sale of unfortified wine or malt beverages, or both. The petition must specify the particular question or questions to be voted on as specified in writing by the person requesting the petition, and whether the sale shall be "on-premises" or "off-premises" or both, or whether "on-premises" sales by Grade A notels and restaurants only and "off-premises" sales by other licensees.

(4) The petition must show that it was returned to the board of elections within 90 days from the date it was delivered to the person requesting the petition.

(e) The board of elections shall determine the sufficiency of the petition within 30 days after its receipt. If the petition meets the requirements of this Part, the board of elections shall immediately set a date for the election, which shall be held not later than 120 days after the petition is returned to the board of elections. Public notice of the election shall be given by the board of elections 30 days prior to the closing of the registration books. The notice shall be given at least twice in some newspaper having general circulation in the county or municipality where the election is to be held. The person requesting the petition shall pay the cost of the notice before the board causes it to be published.

(f) The election shall be held under the same general laws, rules and regulations, insofar as practicable, as provided for the election of county or municipal officers wherein the election is being held, but no absentee ballots or markers shall be allowed. The opponents and proponents shall have the right to appoint two watchers to attend each voting place. The persons authorized to appoint watchers shall, three days before the election, submit in writing to the registrar of each precinct a signed list of the watchers appointed for that precinct. The persons appointed as watchers shall be registered voters of the precinct for which appointed. The registrar and judges for the precinct may for any good cause reject any appointee and require that another be appointed. Watchers shall do no electioneering at the voting place nor in any manner impede the voting process, interfere or communicate with or observe any voter in casting his ballot. Watchers shall be permitted in the voting place to make such observation and to take such notes as they may desire. No watcher shall enter the voting enclosure or render assistance to a voter. No new registration shall be required, and all qualified and registered voters shall be entitled to vote in the election.

(g) No election shall be held under this Part within 45 days of the date of any general, special, or primary election to be held in the county or the municipality in which an election under this Part is held. Provided, however, that an election under this Part may be held, in the discretion of the board of elections, on the same day of a general, special, or primary election held within the county or the municipality or an election to determine whether alcoholic beverage control stores shall be established therein.

If an election is to be held pursuant to a special act to determine whether alcoholic beverage control stores shall be operated within a county or municipality, and if there is not sufficient time before the election to comply with the petition or notice requirements of this Part for holding an election on the question or questions authorized by this Part, then the governing body of the county or municipality in which the election relating to the operation of alcoholic beverage control stores is to be held may, in its discretion, direct the board of elections to submit to the voters the question or questions relating to the sale and type of sale of unfortified wine or malt beverages, or both, as authorized by this Part and as specified by the governing body. The question or questions authorized by this Part may be submitted on a separate ballot or placed on the same ballot relating to the operation of alcoholic beverage control stores. Provided, that the governing body shall not exercise the authority conferred by

this paragraph within seven days of the day the election relating to alcoholic beverage control stores is to be held. Provided further, that if the governing body exercises the authority conferred by this paragraph, the board of elections shall immediately give public notice in some newspaper having general circulation in the county or municipality in which the election is to be held and by posting said notice in at least three public places within the county or municipality. The notice shall set forth the specific question or questions relating to the sale and type of sale of unfortified wine or malt beverages, or both, that will be submitted to the voters, and whether such question or questions will appear on the same ballot as the questions to determine whether alcoholic beverage control stores shall be established.

(h) Whenever an election has been held pursuant to this Part in any county or municipality, no other election hereunder shall be held in such county or municipality within three years of the preceding election within such county or municipality.

(i) No municipality shall hold an election under this Part unless there has been an election in the county where the municipality is located and the last vote in the county election was against the legal sale of the beverages authorized by this Part.

(j) The ballot shall give the voter the opportunity to vote "For" or "Against" the question or questions presented.

If the election is to determine whether unfortified wine is to be sold, the ballot shall contain one or more of the following:

(1) FOR "on-premises" sales of unfortified wine by Grade A hotels and restaurants only and "off-premises" sales by other licensees.
AGAINST "on-premises" sales of unfortified wine by Grade A hotels and restaurants only and "off-premises" sales by other licensees.

(2) FOR "off-premises" sales only of unfortified wine.
AGAINST "off-premises" sales only of unfortified wine.

If the election is to determine whether malt beverages are to be sold, the ballot shall contain one or more of the following:

(1) FOR "on-premises" and "off-premises" sales of malt beverages,
AGAINST "on-premises" and "off-premises" sales of malt beverages, or

(2) FOR "on-premises" sales only of malt beverages,
AGAINST "on-premises" sales only of malt beverages, or

(3) FOR "off-premises" sales only of malt beverages,
AGAINST "off-premises" sales only of malt beverages, or

(4) FOR "on-premises" sales of malt beverages by Grade A hotels and restaurants only and "off-premises" sales by other licensees,
AGAINST "on-premises" sales of malt beverages by Grade A hotels and restaurants only and "off-premises" sales by other licensees.

Any one or more of the above questions shall, if requested in the petition, or by the governing body as authorized in subsections (b) and (g), be placed on the same ballot.

(k) For the purposes of this section a "restaurant" shall mean a business having a kitchen facility and a seating capacity of 36 persons or greater and which is engaged primarily and substantially in preparing and serving meals. Provided, that the State Board of Alcoholic Control shall have broad power to examine the type and nature of the business and the combination and location of separate or affiliated businesses at the same location to determine if the establishment is a bona fide restaurant.

(l) Notwithstanding any other provision of this Chapter, it shall be lawful to sell unfortified wine in those retail establishments described in G.S. 18A-38(f). (1947, c. 1084, ss. 1, 2, 4; 1951, c. 999, ss. 1, 2; 1957, c. 816; 1963, c. 265, ss. 1-3; 1965, c. 506; 1969, c. 647, s. 1; 1971, c. 872, s. 1; 1973, c. 33; 1977, c. 149, s. 1; c. 182, s. 2.)

Local Modification. — Brunswick: 1977, c. 399; Town of Cameron: 1977, c. 371.

Editor's Note. — The first 1977 amendment added subsection (k).

The second 1977 amendment added subsection (l).

Session Laws 1977, c. 149, s. 2, provides: "This act shall apply only to those counties or municipalities wherein elections are held under G.S. 18A-52 subsequent to the ratification of this act." The act was ratified April 4, 1977.

Former Provisions Construed. — See State v. Cochran, 230 N.C. 523, 53 S.E.2d 663 (1949); Weaver v. Morgan, 232 N.C. 642, 61 S.E.2d 916 (1950); Ferguson v. Riddle, 233 N.C. 54, 62 S.E.2d 525 (1950); Tucker v. State Bd. of Alcoholic Control, 240 N.C. 177, 81 S.E.2d 399 (1954); Green v. Briggs, 243 N.C. 745, 92 S.E.2d 149 (1956).

§ 18A-53. Effect of vote for or against questions. — (a) If a majority of the votes cast in such election shall be in favor of any question or questions on the ballot, then it shall be legal in accordance with the applicable law to sell only the beverage or beverages in the manner prescribed that received a favorable vote.

(b) If, at the time of the election, it is legal to sell the beverage or beverages presented on the ballot and the majority of the votes cast be against the sale of such beverage or beverages, then after the expiration of 60 days from the day of the election, it shall be unlawful to sell or possess for the purpose of sale the beverage or beverages receiving an unfavorable vote.

(c) The result of any county election held under this Part shall not affect the legal sale of unfortified wine or malt beverages, or both, or the type of sales in any municipality in the county in which the legal sale of such beverages has been authorized by an election or special act in the municipality prior to the time of the county election, and the result of a municipal election shall not in any manner affect the legal sale of such beverages, or the type of sale, which is legal in the county outside the municipality at the time of the municipal election.

(d) Nothing in this Part shall prevent bottlers, manufacturers or wholesalers of malt beverages or wine (fortified or unfortified) who have complied with this Chapter and Chapter 105 from bottling, manufacturing, possessing, transporting, or selling malt beverages or wine (fortified or unfortified) as a wholesaler to any person who has complied with the provisions of this Chapter and Chapter 105 and the rules and regulations of the State Board of Alcoholic Control, or selling to nonresident wholesalers when the purchase is not for resale in this State. (1947, c. 1084, s. 3; 1969, c. 647, s. 2; 1971, c. 872, s. 1.)

ARTICLE 6.

Miscellaneous Provisions.

§ 18A-54. Power of Governor to prohibit all sales during an emergency. — (a) When the Governor finds that a state of emergency, as defined in G.S. 14-288.1, exists anywhere within the State, he may order the closing of county and municipal alcoholic beverage control stores in all or any portion of the State for the period of the emergency. His order shall be directed to the Chairman of the State Board of Alcoholic Control and the Secretary of Crime Control and Public Safety. The express authority granted by this section is not intended to limit any other authority, express or implied, to order the closing of these stores.

(b) When the Governor finds that a state of emergency, as defined in G.S. 14-288.1, exists anywhere within the State, he may order the cessation of all sale or transfer, manufacture, or bottling of malt beverages or wine (fortified or unfortified) in all or any portion of the State for the period of the emergency. His order shall be directed to the Chairman of the State Board of Alcoholic Control. The express authority granted by this section is not intended to limit

any other authority, express or implied, to order cessation of these activities. (1969, c. 869, ss. 4, 5; 1971, c. 872, s. 1; 1977, c. 70, s. 21.)

Editor's Note. — The 1977 amendment added "and the Secretary of Crime Control and Public Safety" at the end of the second sentence of subsection (a).

§ 18A-55. Books, records, reports. — All persons, possessing or offering for sale or reselling any intoxicating liquors shall keep clear, complete, and accurate records which will reveal the sources from which said liquor was acquired, the date of acquisition, and any other information that may be required to be preserved by rules and regulations of the State A.B.C. Board. All such persons shall freely permit alcohol law enforcement agents to enter and inspect the premises upon which liquor is possessed or offered for sale, to test and analyze any of such liquor, and to examine all books, records, accounts, invoices, or other papers or data relating to such liquor. (1971, c. 872, s. 1; 1977, c. 70, s. 21.1.)

Editor's Note. — The 1977 amendment substituted "alcohol law enforcement agents" for "representatives of the Board" near the beginning of the second sentence.

Stated in Myers v. Holshouser, 25 N.C. App. 683, 214 S.E.2d 630 (1975).

§ 18A-56. Violation a misdemeanor. — (a) Except as otherwise expressly provided, anyone who violates any provision of this Chapter shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine or by imprisonment, or by both fine and imprisonment, in the discretion of the court.

(b) The second or any subsequent conviction for violating G.S. 18A-5(a) is a felony, punishable by imprisonment for not less than four months and not exceeding five years in the discretion of the court.

(c) If any permittee or licensee is convicted of violating any provisions of this Chapter the court (in addition to the criminal penalty imposed) may declare his permit and license revoked, and shall notify the State Board of Alcoholic Control thereof; and no permit or license shall thereafter be granted to the person so convicted within a period of three years thereafter.

(d) The conviction of a member or employee of the State A.B.C. Board, or of a county or municipal A.B.C. board, shall constitute sufficient cause for removing him from the board or from his employment by the board; in addition to the powers of the State Board to remove any of its employees or any member of a county or municipal board and the power of a county or municipal board to remove any of its employees, the court in which the conviction is had shall have the power upon such conviction (and as a part of its judgment thereon) to remove such person from membership on, or employment by, said board. (1923, c. 1, ss. 26, 27; C. S., s. 3411(z), (aa); 1937, c. 49, ss. 16, 23; c. 411; 1941, c. 339, s. 5; 1943, c. 339, s. 4; 1945, c. 903, s. 1; 1949, c. 1251, s. 3; 1963, c. 426, s. 11; 1967, c. 222, s. 1; c. 1256, s. 3; 1969, c. 617, s. 2; c. 1018; 1971, c. 872, s. 1; 1977, c. 18, ss. 1, 2; c. 150.)

Editor's Note. — The 1977 amendment deleted "or any rule or regulation promulgated pursuant thereto" following "this Chapter" in subsection (a) and near the beginning of subsection (c).

Session Laws 1977, c. 18, s. 3, provides: "Anyone who has been convicted of a misdemeanor for a violation of a rule or regulation promulgated by the State A.B.C. Board as provided in G.S. 18A-56(a) and G.S. 18A-56(c) as the same appeared in the 1975 Replacement Volume 1C of the General Statutes shall have the record of that violation expunged upon application to the court wherein the conviction was rendered."

Session Laws 1977, c. 150, corrected a spelling error in Session Laws 1977, c. 18, s. 3, by substituting "conviction" for "confiction."

§ 18A-57. Local acts and local option. — (a) Nothing in this Chapter shall operate to repeal any of the local acts of the General Assembly of North Carolina prohibiting the possession or consumption of intoxicating liquor within any county, municipality, or portion thereof, and all such local acts shall continue in full force and effect and in concurrence herewith, until repealed or modified.

(b) Nothing in this Chapter shall require a permit to be issued for any territory where the sale of malt beverages or wine (fortified or unfortified) is prohibited by special legislative act or for any area where the sale or possession for the purpose of sale of malt beverages or wine (fortified or unfortified) is unlawful as a result of a local option election; and this Chapter shall not repeal any special, public-local, or private act prohibiting or regulating the sale of these beverages in any county in this State, or any act authorizing the board of commissioners of any county of this State, or the governing body of any municipality, in its discretion, to prohibit the sale of malt beverages or wine (fortified or unfortified). (1923, c. 1, s. 28; C. S., s. 3411(bb); 1949, c. 974, s. 10; 1963, c. 426, s. 12; 1971, c. 872, s. 1.)

Issuance of Certain Wine Permits Prohibited by Subsection (b) of This Section. — Subsection (b) of this section prohibits the issuance under § 18A-38(f) of permits for the sale of fortified wines in certain retail establishments in a territory having A.B.C stores where the electorate voted against the sale of beer and wine in the territory in a local option election held pursuant to former § 18-124 et seq., notwithstanding at the time of the election fortified wines were sold only in A.B.C stores. Clark v. North Carolina Bd. of Alcoholic Control, 14 N.C. App. 464, 188 S.E.2d 705 (1972).

In Locality Where Election for Off-Premises Sale of Unfortified Wine Only Has Been Held, Retail Sales of Wine Are Restricted to Those Conditions Despite Revision of General Statutes. — See opinion of Attorney General to Mr. Lee P. Phillips, State Board of Alcoholic Control, 41 N.C.A.G. 630 (1971).

Local Act Prohibiting the Sale of Sweet Wine in City of Monroe Still Effective. — See opinion of Attorney General to Mr. Koy E. Dawkins, 42 N.C.A.G. 4 (1972).

§ 18A-58. Effective date of standards for intoxicating liquors; disposition of liquor on hand. — No standards adopted by the State Board of Alcoholic Control for any intoxicating liquor shall be effective until 30 days after the adoption of the regulation establishing said standards; and provided further, that any person affected by the adoption of any standard by the Board shall be granted 60 days after the effective date of the standard within which to dispose of any liquor on hand at the effective date of the standard which does not comply with the standard. (1945, c. 903, s. 1; 1971, c. 872, s. 1.)

Chapter 19.

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ARTICLE 1.

Abatement of Nuisances.

§ 19-1. What are nuisances under this Chapter. — (a) The erection, establishment, continuance, maintenance, use, ownership or leasing of any building or place for the purpose of assignation, prostitution, gambling, illegal possession or sale of intoxicating liquors, illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or illegal possession or sale of obscene or lewd matter, as defined in this Chapter, shall constitute a nuisance.

(b) The erection, establishment, continuance, maintenance, use, ownership or leasing of any building or place wherein or whereon are carried on, conducted, or permitted repeated acts which create and constitute a breach of the peace shall constitute a nuisance.

(c) The building, or place, or vehicle, or the ground itself, in or upon which a nuisance as defined in subsections (a) or (b) above is carried on, and the furniture, fixtures, and contents, are also declared a nuisance, and shall be enjoined and abated as hereinafter provided. (Pub. Loc. 1913, c. 761, s. 25; 1919, c. 288; C. S., s. 3180; 1949, c. 1164; 1967, c. 142; 1971, c. 655; 1977, c. 819, ss. 1, 2.)

Cross References. — As to criminal actions: For prostitution, see § 14-203 et seq.; for gambling, see § 14-289 et seq.; for unlawful sale of whiskey, see § 18A-56.

Editor's Note. — The 1977 amendment deleted "or" preceding "illegal possession or sale" and substituted "North Carolina Control Substances Act, or illegal possession or sale of obscene or lewd matter, as defined in this Chapter" for "Uniform Narcotic Drug Act" in

subsection (a) and inserted "or vehicle" in subsection (c).

For note on estuarine pollution, see 49 N.C.L. Rev. 921 (1971).

Constitutionality. — This and the following sections, providing for the abatement of public nuisances, are constitutional as a valid exercise of the police power of the State. Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938). See also Barker v. Palmer, 217 N.C. 519, 8 S.E.2d 610 (1940); State ex rel. Summrell v. Carolina-Virginia Racing Ass'n, 239 N.C. 591, 80 S.E.2d 638 (1954); State ex rel. Taylor v. Carolina Racing Ass'n, 241 N.C. 80, 84 S.E.2d 390 (1954).

Agency Acting under Color of Legislative Authority. — In State ex rel. Amick v. Lancaster, 228 N.C. 157, 44 S.E.2d 733 (1947), the action was brought under this Chapter to enjoin as a nuisance the operation of a liquor store by a town pursuant to Session Laws 1947, c. 862. The court held that since the alcoholic control board was acting "under color of legislative authority" the remedy by action under this Chapter was inappropriate. But this ruling should be restricted to actions to enjoin the operations of a governmental board acting "under color of legislative authority," and should not be extended to actions to enjoin the operations of a private person, firm, association or corporation acting "under color of legislative authority." State ex rel. Taylor v. Carolina Racing Ass'n, 241 N.C. 80, 84 S.E.2d 390 (1954).

Betting on dog races under a pari-mutuel system, having no other purpose than that of providing the facilities for placing bets, calculating odds and determining winnings, if any, constitutes gambling, and is subject to abatement by injunction as a statutory nuisance under this Chapter unless specifically permitted by a constitutional statute. State v. Carolina Racing Ass'n, 241 N.C. 80, 84 S.E.2d 390 (1954).

Race Track Operated under Unconstitutional Statute. — Where the statute under which defendant maintains and operates a race track for pari-mutuel betting is unconstitutional, a private citizen may maintain an action in the name of the State to enjoin the operation of such track as a public nuisance, in proceeding under this Chapter. State ex rel. Summrell v. Carolina-Virginia Racing Ass'n, 239 N.C. 591, 80 S.E.2d 638 (1954).

Establishment Facilitating Betting on Races. — The maintenance of an establishment with ticker tape and other paraphernalia to facilitate the making of wagers on horse races, and in which offers to lay wagers were transmitted to race tracks outside the State, and through which wagers were paid off to successful betters, constitutes a public nuisance. State v. Brown, 221 N.C. 301, 20 S.E.2d 286 (1942).

Authority of Municipalities concerning Nuisances. — Under the authority conferred upon a municipal corporation to adopt ordinances for the government of the corporation and to abate nuisances, no power is granted to enact that the permitting of prostitution by the owner or occupant of any house therein shall constitute such owner or occupant the keeper of a house of ill fame, nor to declare what shall be a bawdy house or a disorderly house. State v. Webber, 107 N.C. 962, 12 S.E. 598 (1890).

Nuisance Need Not Be Nucleus of Crime. — It is not essential to the nuisance defined by this section that the acts of the customers, which impart that quality to the premises and the business conducted there, should be violations of the criminal law, either generally speaking or under the terms of the statute. It is not necessary that the nuisance declared should have a nucleus of crime essential to its existence. While nuisance is frequently associated with criminal offenses, the law is not under the necessity of predicating one crime upon another to make valid its denunciation of an act which it denominates a nuisance. State v. Brown, 221 N.C. 301, 20 S.E.2d 286 (1942).

Opening Safe on Premises Where Nuisance Maintained. — Where, in an action under this section and § 19-2 to abate a public nuisance on the sole ground that the premises were used for the unlawful sale of whiskey, etc., a safe found in the padlocked building was opened by the sheriff and no whiskey or other intoxicating beverages found therein, the court could not thereafter require that the safe be reopened for the purpose of taking an inventory thereof, there being nothing to show the materiality of anything in the safe as bearing upon the question of abatement. Such inventory would be an invasion of the property rights of defendant without due process of law. State ex rel. Hooks v. Flowers, 247 N.C. 558, 101 S.E.2d 320 (1958).

Admissibility of Evidence. — Where defendant was not charged with maintaining a nuisance, the admission of evidence tending to show the general reputation of defendant's premises was error. State v. Tessnear, 265 N.C. 319, 144 S.E.2d 43 (1965).

Applied in State ex rel. Amick v. Lancaster, 228 N.C. 157, 44 S.E.2d 733 (1947); State ex rel. Bowman v. Fipps, 266 N.C. 535, 146 S.E.2d 395 (1966).

Cited in State v. Alverson, 225 N.C. 29, 33 S.E.2d 135 (1945); State v. Murphy, 235 N.C. 503, 70 S.E.2d 498 (1952); State ex rel. Summrell v. Carolina-Virginia Racing Ass'n, 240 N.C. 614, 83 S.E.2d 501 (1954); State ex rel. Bowman v. Malloy, 264 N.C. 396, 141 S.E.2d 796 (1965); State v. Smith, 265 N.C. 173, 143 S.E.2d 293 (1965).

§ 19-1.1. Definitions. — As used in this Chapter relating to illegal possession or sale of obscene matter or to the other conduct prohibited in G.S. 19-1(a), the following definitions shall apply:

(1) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in the lewd matter, or knowledge of the acts of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or prostitution which occur on the premises.

(2) "Lewd matter" is synonymous with "obscene matter" and means any matter:

(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which depicts patently offensive representations of:

1. Ultimate sexual acts, normal or perverted, actual or simulated;
2. Masturbation, excretory functions, or lewd exhibition of the genitals or genital area;
3. Masochism or sadism; or
4. Sexual acts with a child or animal.

Nothing herein contained is intended to include or proscribe any writing or written material, nor to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political, educational, or scientific value.

(3) "Lewdness" is synonymous with obscenity and shall mean the act of selling, exhibiting or possessing for sale or exhibition lewd matter.

(4) "Matter" means a motion picture film or a publication or both.

(5) "Motion picture film" shall include any:

(a) Film or plate negative;

(b) Film or plate positive;

(c) Film designed to be projected on a screen for exhibition;

(d) Films, glass slides or transparencies, either in negative or positive form, designed for exhibition by projection on a screen;

(e) Video tape or any other medium used to electronically reproduce images on a screen.

(6) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(7) "Place" includes, but is not limited to, any building, structure or places, or any separate part or portion thereof, whether permanent or not, or the ground itself, but excluding a private dwelling place not used for a profit.

(8) "Publication" shall include any book, magazine, pamphlet, illustration, photograph, picture, sound recording, or a motion picture film which is offered for sale or exhibited in a coin-operated machine.

(9) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer or possession of, lewd matter. (1977, c. 819, s. 3.)

§ 19-1.2. Types of nuisances. — The following are declared to be nuisances wherein obscene or lewd matter or other conduct prohibited in G.S. 19-1(a) is involved:

(1) Any and every place in the State where lewd films are publicly exhibited as a predominant and regular course of business, or possessed for the purpose of such exhibition;

(2) Any and every place in the State where a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition;
(3) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a nuisance under this Article;
(4) Any and every place of business in the State in which lewd publications constitute a principal or substantial part of the stock in trade;
(5) Any and every lewd publication possessed at a place which is a nuisance under this Article;
(6) Every place which, as a regular course of business, is used for the purposes of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or prostitution, and every such place in or upon which acts of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or prostitution, are held or occur. (1977, c. 819, s. 3.)

§ 19-1.3. Personal property as a nuisance; knowledge of nuisance. — The following are also declared to be nuisances, as personal property used in conducting and maintaining a nuisance under this Chapter:
(1) All moneys paid as admission price to the exhibition of any lewd film found to be a nuisance;
(2) All valuable consideration received for the sale of any lewd publication which is found to be a nuisance;
(3) All money or other valuable consideration received or used in gambling, prostitution, the illegal sale of intoxicating liquors or the illegal sale of substances proscribed under the North Carolina Controlled Substances Act, as well as the furniture and movable contents of a place used in connection with such prohibited conduct.

From and after service of a copy of the notice of hearing of the application for a preliminary injunction, provided for in G.S. 19-2.4 upon the place, or its manager, or acting manager, or person then in charge, all such parties are deemed to have knowledge of the contents of the restraining order and the use of the place occurring thereafter. Where the circumstantial proof warrants a determination that a person had knowledge of the nuisance prior to such service of process, the court may make such finding. (1977, c. 819, s. 3.)

§ 19-1.4. Liability of successive owners for continuing nuisance. — After notice of a temporary restraining order, preliminary injunction, or permanent injunction, every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property, created by a former owner, is liable therefor in the same manner as the one who first created it. (1977, c. 819, s. 3.)

§ 19-1.5. Abatement does not preclude action. — The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence. (1977, c. 819, s. 3.)

§ 19-2: Repealed by Session Laws 1977, c. 819, s. 4, effective August 1, 1977.

Cross Reference. — For present provisions covering the subject matter of the repealed section, see §§ 19-2.1 to 19-2.5.

§ 19-2.1. Action for abatement; injunction. — Wherever a nuisance is kept, maintained, or exists, as defined in this Article, the Attorney General, district attorney, or any private citizen of the county may maintain a civil action in the

name of the State of North Carolina to abate a nuisance under this Chapter, perpetually to enjoin all persons from maintaining the same, and to enjoin the use of any structure or thing adjudged to be a nuisance under this Chapter; provided, however, that no private citizen may maintain such action where the alleged nuisance involves the illegal possession or sale of obscene or lewd matter.

If an action is instituted by a private person, the complainant shall execute a bond prior to the issuance of a restraining order or a temporary injunction, with good and sufficient surety to be approved by the court or clerk thereof, in the sum of not less than one thousand dollars ($1,000), to secure to the party enjoined the damages he may sustain if such action is wrongfully brought, not prosecuted to final judgment, or is dismissed, or is not maintained, or if it is finally decided that the temporary restraining order or preliminary injunction ought not to have been granted. The party enjoined shall have recourse against said bond for all damages suffered, including damages to his property, person, or character and including reasonable attorney's fees incurred by him in making defense to said action. No bond shall be required of the prosecuting attorney or the Attorney General, and no action shall be maintained against the public official for his official action. (1977, c. 819, s. 4.)

Editor's Note. — The annotations set out below are from cases decided under former § 19-2.

An action to abate a public nuisance by injunction or otherwise must be maintained in the name of the State, and this section designates with particularity those who may become relators and prosecute the cause in the name of the State. Dare County v. Mater, 235 N.C. 179, 69 S.E.2d 244 (1952).

While the members of a county board of commissioners may, as individuals, become relators under this section, they may not prosecute this action in the name of the county. Dare County v. Mater, 235 N.C. 179, 69 S.E.2d 244 (1952).

Procedure Cannot Be Invoked against Alcoholic Control Board. — It was never intended that the procedure here invoked to abate a nuisance should be applied against the alcoholic control board set up under color of legislative authority, or against one who rents a building to such a board for the purpose of operating a liquor control store. State ex rel. Amick v. Lancaster, 228 N.C. 157, 44 S.E.2d 733 (1947).

The proceeding by a citizen in the name of the State for injunction, the closing of a place of business and the seizure and sale of the personal property used therewith, must be based upon allegation and proof of one or more of the specific acts denounced by § 19-1. State ex rel. Dickey v. Alverson, 225 N.C. 29, 33 S.E.2d 135 (1945).

Allegation of Direct Injury to Citizen Bringing Action Not Required. — While ordinarily a resident and citizen may not enjoin public officials from putting into effect the provisions of a legislative enactment on the ground that the act is unconstitutional unless he alleges and proves that he will suffer direct injury, such allegation is not necessary in an action in the name of the State under this section to enjoin the maintenance of a gambling nuisance. State ex rel. Summrell v. Carolina-Virginia Racing Ass'n, 239 N.C. 591, 80 S.E.2d 638 (1954).

Evidence Supporting Abatement. — The evidence disclosed that defendant operated a tourist camp with filling station, dining room and dance hall in front, and cabins in the rear, that the camp was on highway in a thickly settled rural community, that whiskey and contraceptives were sold, that drunken men and women were seen nightly at the place, and seen to go in the cabins in pairs and stay for a short time, that the community was constantly awakened at night by loud and boisterous conduct and profanity, that fighting occurred between drunken men and women, with many of both sexes nude or indecently clad, and that the general reputation of the place was bad, is held amply sufficient to be submitted to the jury upon the issue of whether the place constituted a nuisance against public morals as defined by § 19-1, and to support a judgment for its abatement in accordance with this section in an action brought by the solicitor as relator. Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938).

Lease Is Made in Contemplation of Section. — A lease contract will be held to have been made in contemplation of the statute in effect at the time of the execution of the lease, providing for the abatement of nuisance against public morals, and the lessor is subject to the rights of the State to padlock the premises in accordance with the statute if they are used in operating a nuisance as defined by the act. Barker v. Palmer, 217 N.C. 519, 8 S.E.2d 610 (1940).

§ 19-2.2. Pleadings; jurisdiction; venue; application for preliminary injunction. — The action, provided for in this Chapter, shall be brought in the superior court of the county in which the property is located. Such action shall be commenced by the filing of a verified complaint alleging the facts constituting the nuisance. After the filing of said complaint, application for a preliminary injunction may be made to the court in which the action is filed which court shall grant a hearing within 10 days after the filing of said application. (1977, c. 819, s. 4.)

§ 19-2.3. Temporary order restraining removal of personal property from premises; service; punishment. — Where such application for a preliminary injunction is made, the court may, on application of the complainant showing good cause, issue an ex parte temporary restraining order in accordance with G.S. 1A-1, Rule 65(b), preserving the status quo and restraining the defendant and all other persons from removing or in any manner interfering with any evidence specifically described, or in any manner removing or interfering with the personal property and contents of the place where such nuisance is alleged to exist, until the decision of the court granting or refusing such preliminary injunction and until further order of the court thereon. Nothing herein shall be interpreted to allow the prior restraint of the distribution of any matter or the sale of the stock in trade, but an inventory and full accounting of all business transactions involving alleged obscene or lewd matter thereafter shall be required.

Any person, firm, or corporation enjoined pursuant to this section may file with the court a motion to dissolve any temporary restraining order. Such a motion shall be heard within 24 hours of the time a copy of the motion is served on the complaining party, or on the next day the superior courts are open in the district, whichever is later. At such hearing the complaining party shall have the burden of showing why the restraining order should be continued.

In the event a temporary restraining order is issued, it may be served in accordance with the provisions of G.S. 1A-1, Rule 4, or may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such place, or by such service under said Rule 4, delivery and posting. The officer serving such temporary restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance.

Any violation of such temporary restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof, while the same remains in force, is a contempt of court, provided such posted order contains therein a notice to that effect. (1977, c. 819, s. 4.)

§ 19-2.4. Notice of hearing on preliminary injunction; consolidation. — A copy of the complaint, together with a notice of the time and place of the hearing of the application for a preliminary injunction, shall be served upon the defendant at least five days before such hearing. The place may also be served by posting such papers in the same manner as is provided for in G.S. 19-2.3 in the case of a temporary restraining order. If the hearing is then continued at the instance of any defendant, the temporary restraining order may be continued as a matter of course until the hearing.

Before or after the commencement of the hearing of an application for a preliminary injunction, the court, on application of either of the parties or on its own motion, may order the trial of the action on the merits to be advanced and consolidated with the hearing on the application for the preliminary injunction; provided, however, the defendant shall be entitled to a jury trial if requested. (1977, c. 819, s. 4.)

§ 19-2.5. Hearing on the preliminary injunction; issuance. — If upon hearing, the allegations of the complaint are sustained to the satisfaction of the court, the court shall issue a preliminary injunction restraining the defendant and any other person from continuing the nuisance and effectually enjoining its use thereafter for the purpose of conducting any such nuisance. (1977, c. 819, s. 4.)

§ 19-3. Priority of action; evidence. — (a) The action provided for in this Chapter shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions.

(b) In such action, an admission or finding of guilt of any person under the criminal laws against lewdness, assignation, prostitution, gambling, the illegal possession or sale of intoxicating liquors, or the illegal possession or sale of substances proscribed by the North Carolina Controlled Substances Act, at any such place, is admissible for the purpose of proving the existence of said nuisance, and is evidence of such nuisance and of knowledge of, and of acquiescence and participation therein, on the part of the person charged with maintaining said nuisance.

(c) At all hearings upon the merits, evidence of the general reputation of the building or place constituting the alleged nuisance, of the inmates thereof, and of those resorting thereto, is admissible for the purpose of proving the existence of such nuisance. (Pub. Loc. 1913, c. 761, s. 27; 1919, c. 288; C. S., s. 3182; 1971, c. 528, s. 6; 1973, c. 47, s. 2; 1977, c. 819, s. 5.)

Cross Reference. — As to certain evidence relative to keeping disorderly houses admissible in criminal proceedings, see § 14-188.

Editor's Note. — The 1977 amendment rewrote this section.

Evidence of the general reputation of the place in question is competent in an action to abate a public nuisance. Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938).

This section, which makes evidence of the general reputation of the place admissible for the purpose of proving a nuisance, is not applicable where the defendant is not charged with maintaining a nuisance. State v. Tessnear, 265 N.C. 319, 144 S.E.2d 43 (1965).

Hence, evidence of the general reputation of defendant's premises is inadmissible in prosecutions for liquor-law violations involving a charge of unlawful sale or possession of intoxicants at particular premises. State v. Tessnear, 265 N.C. 319, 144 S.E.2d 43 (1965).

§ 19-4. Violation of injunction; punishment. — In case of the violation of any injunction granted under the provisions of this Chapter, the court, or, in vacation, a judge thereof, may summarily try and punish the offender. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred ($200.00) or more than one thousand dollars ($1,000), or by imprisonment in the county jail not less than three or more than six months, or by both fine and imprisonment. (Pub. Loc. 1913, c. 761, s. 28; 1919, c. 288; C. S., s. 3183.)

Cited in Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938).

§ 19-5. Content of final judgment and order. — If the existence of a nuisance is admitted or established in an action as provided for in this Chapter an order of abatement shall be entered as a part of the judgment in the case, which judgment and order shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of, and the defendant from maintaining such nuisance elsewhere within the jurisdiction of this State. Lewd matter, illegal intoxicating liquors, gambling paraphernalia, or substances proscribed under the North Carolina Controlled Substances Act shall be destroyed and not be sold.

Such order may also require the effectual closing of the place against its use thereafter for the purpose of conducting any such nuisance.

The provisions of this Article, relating to the closing of a place with respect to obscene or lewd matter, shall not apply in any order of the court to any theatre or motion picture establishment which does not, in the regular, predominant, and ordinary course of its business, show or demonstrate lewd films or motion pictures, as defined in this Article, but any such establishment may be permanently enjoined from showing such film judicially determined to be obscene hereunder and such film or motion picture shall be destroyed and all proceeds and moneys received therefrom, after the issuance of a preliminary injunction, forfeited. (Pub. Loc. 1913, c. 761, s. 29; 1919, c. 288; C. S., s. 3184; 1977, c. 819, s. 6.)

Editor's Note. — The 1977 amendment rewrote this section.

§ 19-6. Civil penalty; forfeiture; accounting; lien as to expenses of abatement; invalidation of lease. — Lewd matter is contraband, and there are no property rights therein. All personal property, including all money and other considerations, declared to be a nuisance under the provisions of G.S. 19-1.3 and other sections of this Article, are subject to forfeiture to the local government and are recoverable as damages in the county wherein such matter is sold, exhibited or otherwise used. Such property including moneys may be traced to and shall be recoverable from persons who, under G.S. 19-2.4, have knowledge of the nuisance at the time such moneys are received by them.

Upon judgment against the defendant or defendants in legal proceedings brought pursuant to this Article, an accounting shall be made by such defendant or defendants of all moneys received by them which have been declared to be a nuisance under this Article. An amount equal to the sum of all moneys estimated to have been taken in as gross income from such unlawful commercial activity shall be forfeited to the general funds of the city and county governments wherein such activity took place, to be shared equally, as a forfeiture of the fruits of an unlawful enterprise, and as partial restitution for damages done to the public welfare; provided, however, that no provision of this Article shall authorize the recovery of any moneys or gross income received from the sale of any book, magazine, or exhibition of any motion picture prior to the issuance of a preliminary injunction. Where the action is brought pursuant to this Article, special injury need not be proven, and the costs of abatement are a lien on both the real and personal property used in maintaining the nuisance. Costs of abatement include, but are not limited to, reasonable attorney's fees and court costs.

If it is judicially found after an adversary hearing pursuant to this Article that a tenant or occupant of a building or tenement, under a lawful title, uses such place for the purposes of lewdness, assignation, prostitution, gambling, sale or possession of illegal intoxicating liquors or substances proscribed under the North Carolina Controlled Substances Act, such use makes void the lease or other title under which he holds, at the option of the owner, and, without any act of the owner, causes the right of possession to revert and vest in such owner. (Pub. Loc. 1913, c. 761, s. 30; 1919, c. 288; C. S., s. 3185; 1977, c. 819, s. 7.)

Editor's Note. — The 1977 amendment, effective Aug. 1, 1977, rewrote this section.

Local Modification. — McDowell: 1959, c. 590, s. 3.

Applied in State ex rel. Bowman v. Fipps, 266 N.C. 535, 146 S.E.2d 395 (1966).

Cited in Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938); State ex rel. Taylor v. Carolina Racing Ass'n, 241 N.C. 80, 84 S.E.2d 390 (1954).

§ 19-7. How order of abatement may be canceled. — If the owner appears and pays all cost of the proceeding and files a bond, with sureties to be approved by the clerk, in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk of the superior court, conditioned that he will immediately abate said nuisance, and prevent the same from being established or kept within a period of one year thereafter, the court may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to said owner, and said order of abatement canceled so far as same may relate to said property; and if the proceeding be a civil action, and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law. (Pub. Loc. 1913, c. 761, s. 31; 1919, c. 288; C. S., s. 3186.)

Stated in State ex rel. Taylor v. Carolina Racing Ass'n, 241 N.C. 80, 84 S.E.2d 390 (1954).

Cited in Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938).

§ 19-8. Costs. — The prevailing party shall be entitled to his costs. The court shall tax as part of the costs in any action brought hereunder such fee for the attorney prosecuting or defending the action or proceedings as may in the court's discretion be reasonable remuneration for the services performed by such attorney. (Pub. Loc. 1913, c. 761, s. 32; 1919, c. 288; C. S., s. 3187; 1977, c. 819, s. 8.)

Local Modification. — McDowell: 1959, c. 590, s. 4.

Editor's Note. — The 1977 amendment added the present first sentence and inserted "or defending" in the present second sentence.

Fee Discretionary. — The allowance of a fee is a matter in the discretion of the trial judge. State ex rel. Bowman v. Fipps, 266 N.C. 535, 146 S.E.2d 395 (1966).

Cited in Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938); State v. Murphy, 235 N.C. 503, 70 S.E.2d 498 (1952).

§ 19-8.1. Immunity. — The provisions of any criminal statutes with respect to the exhibition of, or the possession with the intent to exhibit, any obscene film shall not apply to a motion picture projectionist, usher, or ticket taker acting within the scope of his employment, provided that such projectionist, usher, or ticket taker: (i) Has no financial interest in the place wherein he is so employed, and (ii) freely and willingly gives testimony regarding such employment in any judicial proceedings brought under this Chapter, including pretrial discovery proceedings incident thereto, when and if such is requested, and upon being granted immunity by the trial judge sitting in such matters. (1977, c. 819, s. 9.)

§ 19-8.2. Right of entry. — Authorized representatives of the Commission for Health Services, any local health department or the Department of Human Resources, upon presenting appropriate credentials to the owner, operator, or agent in charge of a place described in G.S. 19-1.2, are authorized to enter without delay and at any reasonable time any such place in order to inspect and investigate during the regular hours of operation of such place. (1977, c. 819, s. 9.)

§ 19-8.3. Severability. — If any section, subsection, sentence, or clause of this Article is adjudged to be unconstitutional or invalid, such adjudication shall not affect the validity of the remaining portion of this Article. It is hereby declared that this Article would have been passed, and each section, sentence, or clause thereof, irrespective of the fact that any one or more sections, subsections, sentences or clauses might be adjudged to be unconstitutional, or for any other reason invalid. (1977, c. 819, s. 10.)

ARTICLE 2.

Civil Remedy for Sales of Harmful Materials to Minors.

§ 19-9. Title. — This Article shall be known and cited as the North Carolina Law on the Protection of Minors from Harmful Materials. (1969, c. 1215, s. 1.)

Cross Reference. — As to obscene literature and exhibitions, see §§ 14-190.1 through 14-190.8.

Editor's Note. — For comment on requirement and techniques for holding adversary hearing prior to seizure of obscene material, see 48 N.C.L. Rev. 830 (1970).

§ 19-10. Purposes. — The purposes of this Article are to provide district attorneys with a speedy civil remedy for obtaining a judicial determination of the character and contents of publications, and with an effective power to enjoin promptly the sale of harmful materials to minors. (1969, c. 1215, s. 1; 1971, c. 528, s. 7; 1973, c. 47, s. 2.)

§ 19-11. Public policy. — The public policy of this State requires that all proceedings prescribed in this Article shall be examined, heard and disposed of with the maximum promptness and dispatch commensurate with constitutional requirements, including due process, freedom of the press and freedom of speech. (1969, c. 1215, s. 1.)

§ 19-12. Definitions. — As used within this Article, the following definitions shall apply:

(1) "Harmful Material".—
   a. Any picture, photograph, drawing, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sadomasochistic abuse, and which is harmful to minors, or
   b. Any book, pamphlet, magazine, or printed matter however reproduced which contains any matter enumerated in subparagraph a of this subdivision or which contains explicit or detailed verbal descriptions or accounts of sexual excitement, sexual conduct or sadomasochistic abuse, and which, taken as a whole, is harmful to minors.

(2) "Harmful to minors". — That quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:
   a. Predominantly appeals to the prurient, shameful or morbid interest of minors, and
   b. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable materials for minors, and
   c. Is utterly without redeeming social importance for minors.

(3) "Knowledge of the Minor's Age".—
   a. Knowledge or information that the person is a minor, or
   b. Reason to know, or a belief or ground for belief which warrants further inspection or inquiry as to, the age of the minor.

(4) "Knowledge of the Nature of the Material".—
   a. Knowledge of the character and content of any material described herein, or
   b. Knowledge or information that the material described herein has been adjudged to be harmful to minors in a proceeding instituted pursuant to this Article, or is the subject of a pending proceeding instituted pursuant to this Article.

(5) "Minor".—Any person under the age of 18 years.

(6) "Nudity".—The showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a full opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(7) "Person".—Any individual, partnership, firm, association, corporation or other legal entity.

(8) "Sadomasochistic abuse".—Flagellation or torture by or upon a person clad in undergarments, a mask or a bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(9) "Sexual conduct".—Acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(10) "Sexual excitement".—The condition of human male or female genitals when in a state of sexual stimulation or arousal. (1969, c. 1215, s. 1.)

§ 19-13. Commencement of civil proceeding. — (a) Whenever the district attorney for any judicial district has reasonable cause to believe that any person is engaged in selling, distributing or disseminating in any manner harmful material to minors or may become engaged in selling, distributing or disseminating in any manner harmful material to minors, the district attorney for the judicial district in which such material [is] so offered for sale shall institute an action in the district court for that district for adjudication of the question of whether such material is harmful to minors.

(b) The provisions of the Rules of Civil Procedure and all existing and future amendments of said Rules shall apply to all proceedings herein, except as otherwise provided in this Article. (1969, c. 1215, s. 1; 1971, c. 528, s. 8; 1973, c. 47, s. 2.)

Editor's Note. — The Rules of Civil Procedure are found in § 1A-1.

For comment on requirement and techniques for holding adversary hearing prior to seizure of obscene material, see 48 N.C.L. Rev. 830 (1970).

§ 19-14. Filing and form of complaint. — The action authorized by this Article shall be commenced by the filing of a complaint to which shall be attached, as an exhibit, a true copy of the allegedly harmful material. The complaint shall:

(1) Be directed against such material by name, description, volume, and issue, as appropriate;

(2) Allege that such material is harmful to minors;

(3) Designate as respondents, and list the names and all known addresses of any person in this State preparing, selling, offering, commercially distributing or disseminating in any manner such material to minors, or possessing such material with the apparent intent to offer to sell or commercially distribute or disseminate in any manner such material to minors;

(4) Seek an adjudication that such material is harmful to minors; and

(5) Seek a permanent injunction against any respondent prohibiting him from selling, commercially distributing, or disseminating in any manner such material to minors or from permitting minors to inspect such material. (1969, c. 1215, s. 1.)

§ 19-15. Examination by the court; probable cause; service of summons. — (a) Upon the filing of a complaint pursuant to this Article, the district attorney shall present the same, together with attached exhibits, as soon as practicable to the court for its examination and reading.

(b) If, after such examination and reading, the court finds no probable cause to believe such material to be harmful to minors, the court shall cause an endorsement to that effect to be placed and dated upon the complaint and shall thereupon dismiss the action.

(c) If, after such examination and reading, the court finds probable cause to believe such material to be harmful to minors, the court shall enter an order to that effect whereupon it shall be the responsibility of the district attorney promptly to cause the clerk of the superior court to issue summonses together with copies of said order and said complaint as are needed for the service of the same upon respondents. Service of such summons, order and complaint shall be made upon each respondent thereto in any manner provided by law for the service of civil process. (1969, c. 1215, s. 1; 1971, c. 528, s. 8; 1973, c. 47, s. 2.)

§ 19-16. Appearance and answer; default judgment. — (a) On or before the return date specified in the summons issued pursuant to this Article, or within 15 days after the service of such summons, or within 15 days after receiving actual notice of the issuance of such summons, the author, publisher or any person interested in sending or causing to be sent, bringing or causing to be brought, into this State for sale or distribution or disseminating in any manner, or any person in this State preparing, selling, offering, exhibiting or commercially distributing, or disseminating in any manner or possessing with intent to sell, offer or commercially distribute or exhibit or disseminate in any manner the material attached as an exhibit to the endorsed complaint, may appear and may intervene as a respondent and file an answer.

(b) If, after service of summons has been effected upon all respondents, no person appears and files an answer on or before the return date specified in the summons, the court may forthwith adjudge whether the material so exhibited to the endorsed complaint is harmful to minors and enter an appropriate final judgment. (1969, c. 1215, s. 1.)

§ 19-17. Trial. — (a) Upon the expiration of the time for filing answers by all respondents, but not later than the return date specified in the summons, the court shall, upon its own motion, or upon the application of any party who has appeared and filed an answer, set a date for the trial of the issues joined.

(b) Any respondent named in the complaint, or any person who becomes a respondent by virtue of intervention pursuant to this Article, shall be entitled to a trial of the issues within one day after joinder of issue. A decision shall be rendered by the court or jury, as the case may be, within two days of the conclusion of the trial.

(c) Every person appearing and answering as a respondent shall be entitled, upon request, to a trial of any issue by a jury. If a jury is not requested by any such respondent, the issues shall be tried by the court without a jury. (1969, c. 1215, s. 1.)

§ 19-18. Judgment; limitation to district. — (a) In the event that the court or jury, as the case may be, fails to find the material attached as an exhibit to the complaint to be harmful to minors, the court shall enter judgment accordingly and shall dismiss the complaint.

(b) In the event that the court or jury, as the case may be, finds the material attached as an exhibit to the complaint to be harmful to minors, the court shall enter judgment to such effect and may, in such judgment or in subsequent orders of enforcement thereof, enter a permanent injunction against any respondent prohibiting him from selling, commercially distributing, or giving away such material to minors or from permitting minors to inspect such material.

(c) No interlocutory order, judgment, or subsequent order of enforcement thereof, entered pursuant to the provisions of this Article, shall be of any force and effect outside the judicial district in which entered; and no such order or

judgment shall be res judicata in any proceeding in any other judicial district. (1969, c. 1215, s. 1.)

§ 19-19. Injunctions. — (a) If the court finds probable cause to believe the exhibited material to be harmful to minors, and so enters an order, the court may, upon the motion of the district attorney, issue a temporary restraining order against any respondent prohibiting him from offering, selling, commercially distributing or disseminating in any manner such material to minors or from permitting minors to inspect such material. No temporary restraining order shall be granted without notice to the respondents unless it clearly appears from specific facts shown by affidavit or by the verified complaint that one or more of the respondents are engaged in the sale, distribution or dissemination of harmful material to minors and that immediate and irreparable injury to the morals and general welfare of minors in this State will result before notice can be served and a hearing had thereon.

(b) Every temporary restraining order shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its own terms within such time after entry, not to exceed three days, as the court fixes unless within the time so fixed the respondent against whom the order is directed consents that it may be extended for a longer period.

(c) In the event that a temporary restraining order is granted without notice, a motion for a preliminary injunction shall be set down for hearing within two days after the granting of such order and shall take precedence over all matters except older matters of the same character; and when the motion comes on for hearing, the district attorney shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the restraining order.

(d) No preliminary injunction shall be issued without at least two days' notice to the respondents. (1969, c. 1215, s. 1; 1971, c. 528, s. 8; 1973, c. 47, s. 2.)

§ 19-20. Contempt; defenses; extradition. — (a) Any respondent, or any officer, agent, servant, employee or attorney of such respondent, or any person in active concert or participation by contract or arrangement with such respondent, who receives actual notice by personal service or otherwise of any restraining order or injunction entered pursuant to this Article, and who shall disobey any of the provisions thereof, shall be guilty of contempt of court and upon conviction after notice and hearing shall be sentenced as provided by law.

(b) No person shall be guilty of contempt pursuant to this section:

(1) For any sale, distribution or dissemination to a minor where such person had reasonable cause to believe that the minor involved was 18 years old or more, and such minor exhibited to such person a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was 18 years old or more;

(2) For any sale, distribution or dissemination where a minor is accompanied by a parent or guardian, or accompanied by an adult and such person has no reason to suspect that the adult accompanying the minor is not the minor's parent or guardian;

(3) Where such person is a bona fide school, museum or public library or is acting in his capacity as an employee of such organization or as a retail outlet affiliated with and serving the educational purposes of such organization.

(c) In the event that any person found guilty of contempt pursuant to this section cannot be found within this State, the executive authority of this State

shall, unless such person shall have appealed from the judgment of contempt and such appeal has not been finally determined, demand his extradition from the executive authority of the state in which such person may be found, pursuant to the law of this State. (1969, c. 1215, s. 1.)

§ 19-21: Repealed by Session Laws 1971, c. 528, s. 9.

Chapter 19A.

Protection of Animals.

Article 1.

Civil Remedy for Protection of Animals.

Sec.
19A-1. Definitions.
19A-2. Purpose.
19A-3. Preliminary injunction or restraining order.
19A-4. Permanent injunction.
19A-5 to 19A-9. [Reserved.]

Article 2.

Protection of Black Bears.

19A-10. Unlawful to buy, sell or enclose (except as provided) black bear.
19A-11. Inapplicable to bona fide zoos, etc.
19A-12. Possession of black bear on July 1, 1975; surrender of bear; modification of facilities; forfeiture.
19A-13. Violation of Article.
19A-14. Enforcement of Article.

Article 1.

Civil Remedy for Protection of Animals.

§ 19A-1. Definitions. — For the purposes of this Chapter [Article] the following definition of terms shall be applicable:

(1) The terms "animals" and "dumb animals" shall be held to include every useful living creature.

(2) The term "cruelty" shall be held to include every act, omission or neglect whereby unjustifiable physical pain, suffering or death is caused or permitted; but such term shall not be construed to prohibit lawful taking or attempting to take game animals or birds as allowed by law, provided further that such term shall not include activities sponsored by agencies or institutions conducting biomedical research or training or for sport as provided by the laws of North Carolina.

(3) The term "person" as used herein shall be held to include any persons, firm or corporation, including any nonprofit corporation, such as a society for the prevention of cruelty to animals. (1969, c. 831.)

Editor's Note. — Pursuant to Session Laws 1975, c. 56, effective July 1, 1975, the former provisions of Chapter 19A have been designated Article 1 of that Chapter. The definitions in the above section are applicable only to Article 1.

§ 19A-2. Purpose. — It shall be the purpose of this Chapter [Article] to provide a civil remedy for the protection and humane treatment of animals in addition to any criminal remedies that are available and it shall be proper in any action to combine causes of action against one or more defendants for the protection of one or more animals. A real party in interest as plaintiff shall be held to include any "person" as hereinbefore defined even though such person does not have a possessory or ownership right in an animal; a real party in interest as defendant shall include any person who owns or has possession of an animal. (1969, c. 831.)

§ 19A-3. Preliminary injunction or restraining order. — Upon the filing of a verified complaint in superior court in the county in which cruelty to an animal has allegedly occurred, and upon petition for a preliminary injunction or temporary restraining order, the resident judge or any judge holding a regular or special session of court may in the court's discretion issue such preliminary injunction or temporary restraining order, the duration of which shall be 20 days. Such injunction or restraining order may in the discretion of the court issue without prior notice to any person named as a defendant in the verified complaint

if service of process cannot be obtained, and such injunction may issue immediately and as soon as practicable be served upon every person named as a defendant. Every such preliminary injunction or restraining order, if the petition or complaint so requests, may in the discretion of the court give plaintiff the right to temporarily correct the condition giving rise to the cruel treatment of an animal; and if it shall appear upon the face of the complaint or verified petition that the condition giving rise to the cruel treatment of an animal requires that plaintiff take custody of an animal, then it shall be proper for the court in its discretion in the order to allow plaintiff to take possession of the animal. (1969, c. 831; 1971, c. 528, s. 10.)

§ 19A-4. Permanent injunction. — On the date specified in a preliminary injunction or temporary restraining order, which date shall not be later than 20 days from the issuance thereof, a resident superior court judge or a superior court judge holding a regular or special session of superior court in the county in which the action is brought shall determine the merits of the action by trial without jury, and upon hearing such evidence as may be presented, shall enter orders as he deems appropriate, including the issuance of a permanent injunction or final determination of the custody of the animal where appropriate. (1969, c. 831; 1971, c. 528, s. 10.)

§§ 19A-5 to 19A-9: Reserved for future codification purposes.

ARTICLE 2.

Protection of Black Bears.

§ 19A-10. Unlawful to buy, sell or enclose (except as provided) black bear. — Except as otherwise provided in applicable statutes, it shall be unlawful for any person to buy or sell black bears or for any person, firm or corporation to possess or keep any black bear (*Ursus americanus*) in any enclosure, pen, cage, or other place or means of captivity except as hereinafter provided. (1975, c. 56, s. 1.)

Local Modification. — Carteret: 1977, c. 565.

Purpose of Section. — The purpose of this section is to provide for the protection of bears and to require that, when they are kept in captivity, adequate standards for their care and comfort be maintained. Cannady v. North Carolina Wildlife Resources Comm'n, 30 N.C. App. 247, 226 S.E.2d 678, appeal dismissed, 290 N.C. 775, 229 S.E.2d 31 (1976), cert. denied, 430 U.S. 965, 97 S. Ct. 1645, 52 L. Ed. 2d 356 (1977).

§ 19A-11. Inapplicable to bona fide zoos, etc. — The provisions of this Article shall not apply to bona fide zoos which are operated by federal, State, or local governmental agencies, or to educational institutions in which black bears are kept or exhibited as part of a bona fide course of training or research in the natural sciences, or to black bears held without caging under conditions simulating a natural habitat, the development of which is in accord with plans and specifications developed by the holder and approved by the Wildlife Resources Commission. (1975, c. 56, s. 2.)

Constitutionality. — There is a rational basis for excepting bona fide zoos operated by governmental agencies from the provisions of the act so as to preclude a claim that the act denies plaintiff equal protection of the laws. Cannady v. North Carolina Wildlife Resources Comm'n, 30 N.C. App. 247, 226 S.E.2d 678, appeal dismissed, 290 N.C. 775, 229 S.E.2d 31 (1976), cert. denied, 430 U.S. 965, 97 S. Ct. 1645, 52 L. Ed. 2d 356 (1977).

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§ 19A-12. Possession of black bear on July 1, 1975; surrender of bear; modification of facilities; forfeiture. — Any person, firm or corporation in possession of a black bear on July 1, 1975, under an existing permit issued by the Wildlife Resources Commission, where the conditions under which such black bear is held are in violation of this Article, may immediately surrender such black bear and such permit to the Wildlife Resources Commission which shall compensate such person, firm or corporation in the amount actually paid for such bear not to exceed the sum of one hundred dollars ($100.00) for any one bear. In lieu of surrendering such black bear and such permit, any such person, firm or corporation may give immediately written notice to the Wildlife Resources Commission that plans and specifications for facilities to hold such bear without caging under conditions simulating a natural habitat will be submitted to the Commission for approval within 30 days thereafter. In the event such plans and specifications are not submitted within the time thus limited, or they are disapproved by the Commission, or the facilities are not completed in accordance therewith within 60 days after approval by the Commission, continued possession of a black bear by such person, firm or corporation after any of such events shall constitute a violation of the provisions of this Article, and any such black bear shall be forfeited to the Wildlife Resources Commission without compensation. (1975, c. 56, s. 3.)

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§ 19A-13. Violation of Article. — Violation of the provisions of this Article shall constitute a misdemeanor punishable by a fine of not less than five hundred dollars ($500.00) or by imprisonment for not less than 90 days. (1975, c. 56, s. 4.)

Quoted in Cannady v. North Carolina Wildlife Resources Comm'n, 30 N.C. App. 247, 226 S.E.2d 678 (1976).

§ 19A-14. Enforcement of Article. — Law-enforcement officers of the Wildlife Resources Commission and all other peace officers are authorized and empowered to enforce the provisions of this Article. (1975, c. 56, s. 5.)

Quoted in Cannady v. North Carolina Wildlife Resources Comm'n, 30 N.C. App. 247, 226 S.E.2d 678 (1976).

Chapter 20.

Motor Vehicles.

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20-219.1. [Repealed.]
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Article 8A.

Issuance of New Licenses to Persons Adjudged Habitual Offenders.

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Article 9A.

Motor Vehicle Safety and Financial Responsibility Act of 1953.

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Article 10.

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Sec.
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ARTICLE 1.

Division of Motor Vehicles.

§ 20-1. Division of Motor Vehicles of the Department of Transportation; powers and duties. — The Department of Motor Vehicles is hereby redesignated the Division of Motor Vehicles of the Department of Transportation. The Division of Motor Vehicles shall have the same powers and duties as were held by the Department of Motor Vehicles except as otherwise provided in this Article. All powers, duties and functions relating to the collection of motor fuel taxes and the collection of the gasoline and oil inspection taxes shall continue to be vested in and exercised by the Secretary of Revenue, and wherever it is

now provided by law that reports shall be filed with the Secretary of Revenue, or Department of Revenue, as a basis for collecting the motor fuel or gasoline and oil inspection taxes, or enforcing any of the laws regarding the motor fuel or gasoline and oil inspection taxes, such reports shall continue to be made to the Department of Revenue and the Commissioner of Motor Vehicles shall make available to the Secretary of Revenue all information from files of the Division of Motor Vehicles which the Secretary of Revenue may request to enable him to better enforce the law with respect to the collection of such taxes. Nothing in this Article shall deprive the Utilities Commission of any of the duties or powers now vested in it with regard to the regulation of motor vehicle carriers.

Articles 2 and 3 of Chapter 150A shall not apply to the Board of Transportation, the Division of Highways, and Division of Motor Vehicles. (1941, c. 36, s. 1; 1949, c. 1167; 1973, c. 476, s. 193; 1975, c. 716, s. 5; c. 863.)

Cross Reference. — As to North Carolina Traffic Safety Authority, see §§ 143-392 to 143-395.

Editor's Note. — The first 1975 amendment rewrote this section so as to change the former Department of Motor Vehicles to the Division of Motor Vehicles of the Department of Transportation.

The second 1975 amendment added the second paragraph.

For acts relating to parking meters not affected by this Chapter, see Session Laws 1947, c. 54 (city of Shelby); c. 66 (town of Laurinburg); c. 675 (city of Statesville); c. 1035 (Cabarrus County). And see Session Laws 1949, c. 573, relating to city of Statesville.

§ 20-2. Commissioner of Motor Vehicles. — The Division of Motor Vehicles shall be administered by the Commissioner of Motor Vehicles, who shall be appointed by and serve at the pleasure of the Secretary of the Department of Transportation. The Commissioner shall be paid an annual salary to be fixed by the Governor, with the approval of the Advisory Budget Commission and allowed his traveling expenses as allowed by law.

In any action proceeding, or matter of any kind, to which the Commissioner of Motor Vehicles is a party or in which he may have an interest, all pleadings, legal notices, proof of claim, warrants for collection, certificates of tax liability, executions, and other legal documents, may be signed and verified on behalf of the Commissioner of Motor Vehicles by the Assistant Commissioner of Motor Vehicles or by any director or assistant director of any section of the Division of Motor Vehicles or by any other agent or employee of the Division so authorized by the Commissioner of Motor Vehicles. (1941, c. 36, s. 2; 1945, c. 527; 1955, c. 472; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment rewrote the first sentence of the first paragraph so as to provide for the appointment of the Commissioner by the Secretary of the Department of Transportation rather than by the Governor, substituted "and allowed his traveling expenses as allowed by law" for "payable in monthly installments, and shall likewise be allowed his traveling expenses when away from Raleigh on official business" at the end of the second sentence of the first paragraph and, in the second paragraph, inserted "of Motor Vehicles" following "Commissioner" in two places and substituted "section of the Division" for "Division of the Department of Motor Vehicles" and "employee of the Division" for "employee of the Department" near the end of the paragraph.

§ 20-3. Organization of Division. — The Commissioner, subject to the approval of the Secretary of the Department of Transportation, shall organize and administer the Division in such manner as he may deem necessary to conduct the work of the Division. (1941, c. 36, s. 3; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment rewrote this section.

§ 20-3.1. Purchase of additional airplanes. — The Division of Motor Vehicles shall not purchase additional airplanes without the express authorization of the General Assembly. (1963, c. 911, s. 1½; 1971, c. 198; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

§ 20-4. Clarification of conflicts as to transfer of functions. — In the event that there shall arise any conflict as to the transfer of any functions from the Department of Revenue to the Division of Motor Vehicles, the Governor of the State is hereby authorized to issue an executive order clarifying and making certain the issue thus arising. (1941, c. 36, s. 5; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

§ 20-4.01. Definitions. — Unless the context otherwise requires, the following words and phrases, for the purpose of this Chapter, shall have the following meanings:

(1) Business District. — The territory prescribed as such by ordinance of the Board of Transportation.

(2) Canceled. — As applied to operators' and chauffeurs' licenses and permits, a declaration that a license or permit which was issued through error or fraud is void and terminated.

(3) Chauffeur. — Every person who is employed by another for the principal purpose of driving a motor vehicle and every person who drives any motor vehicle when in use for the transportation of persons or property for compensation and the driver, other than the owner of a private hauler, of any property-hauling vehicle or combination of vehicles licensed for more than 30,000 pounds gross weight and the driver of any passenger-carrying vehicle of over nine-passenger capacity except the driver of a church bus, farm bus, school bus, or an activity bus for a nonprofit organization when such bus is being operated for a nonprofit purpose, who holds a valid operator's license. Those under 20 years of age must be certified and licensed to operate a North Carolina school bus.

(4) Commissioner. — The Commissioner of Motor Vehicles.

(5) Dealer. — Every person engaged in the business of buying, selling, distributing, or exchanging motor vehicles, trailers or semitrailers in this State, having an established place of business in this State and being subject to the tax levied by G.S. 105-89.

The terms "motor vehicle dealer," "new motor vehicle dealer," and "used motor vehicle dealer" shall have the meaning set forth in G.S. 20-286.

(6) Division. — The Division of Motor Vehicles acting directly or through its duly authorized officers and agents.

(7) Driver. — The operator of a vehicle.

(8) Essential Parts. — All integral and body parts of a vehicle of any type required to be registered hereunder, the removal, alteration, or substitution of which would tend to conceal the identity of the vehicle or substantially alter its appearance, model, type, or mode of operation.

(9) Established Place of Business. — Except as provided in G.S. 20-286, the place actually occupied by a dealer or manufacturer at which a permanent business of bargaining, trading, and selling motor vehicles

is or will be carried on and at which the books, records, and files necessary and incident to the conduct of the business of automobile dealers or manufacturers shall be kept and maintained.

(10) Explosives. — Any chemical compound or mechanical mixture that is commonly used or intended for the purpose of producing an explosion and which contains any oxidizing and combustive units or other ingredients in such proportions, quantities, or packing that an ignition by fire, by friction, by concussion, by percussion, or by detonator of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the resultant gaseous presses [pressures] are capable of producing destructible effects on contiguous objects or of destroying life or limb.

(11) Farm Tractor. — Every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry.

(12) Foreign Vehicle. — Every vehicle of a type required to be registered hereunder brought into this State from another state, territory, or country, other than in the ordinary course of business, by or through a manufacturer or dealer and not registered in this State.

(13) Highway or Street. — The entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic. The terms "highway" or "street" or a combination of the two terms shall be used synonymously.

(14) House Trailer. — Any trailer or semitrailer designed and equipped to provide living or sleeping facilities and drawn by a motor vehicle.

(15) Implement of Husbandry. — Every vehicle which is designed for agricultural purposes and used exclusively in the conduct of agricultural operations.

(16) Intersection. — The area embraced within the prolongation of the lateral curblines or, if none, then the lateral edge of roadway lines of two or more highways which join one another at any angle whether or not one such highway crosses the other.

Where a highway includes two roadways 30 feet or more apart, then every crossing of each roadway of such divided highway by an intersecting highway shall be regarded as a separate intersection. In the event that such intersecting highway also includes two roadways 30 feet or more apart, then every crossing of two roadways of such highways shall be regarded as a separate intersection.

(17) License. — Any driver's license or any other license or permit to operate a motor vehicle issued under or granted by the laws of this State including:

a. Any temporary license or learner's permit;

b. The privilege of any person to drive a motor vehicle whether or not such person holds a valid license; and

c. Any nonresident's operating privilege.

(18) Local Authorities. — Every county, municipality, or other territorial district with a local board or body having authority to adopt local police regulations under the Constitution and laws of this State.

(19) Manufacturer. — Every person, resident, or nonresident of this State, who manufactures or assembles motor vehicles.

(20) Manufacturer's Certificate. — A certification on a form approved by the Division, signed by the manufacturer, indicating the name of the person or dealer to whom the therein-described vehicle is transferred, the date of transfer and that such vehicle is the first transfer of such vehicle in ordinary trade and commerce. The description of the vehicle

shall include the make, model, year, type of body, identification number or numbers, and such other information as the Division may require.

(21) Metal Tire. — Every tire the surface of which in contact with the highway is wholly or partly of metal or other hard, nonresilient material.

(22) Motorcycle. — A type of passenger vehicle as defined in G.S. 20-4.01(27).

(23) Motor Vehicle. — Every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle. This shall not include bicycles with helper motors rated less than one brake horsepower which produce only ordinary pedaling speeds up to a maximum of 20 miles per hour.

(24) Nonresident. — Any person whose legal residence is in some state, territory, or jurisdiction other than North Carolina or in a foreign country.

(25) Operator. — A person in actual physical control of a vehicle which is in motion or which has the engine running.

(26) Owner. — A person holding the legal title to a vehicle, or in the event a vehicle is the subject of a chattel mortgage or an agreement for the conditional sale or lease thereof or other like agreement, with the right of purchase upon performance of the conditions stated in the agreement, and with the immediate right of possession vested in the mortgagor, conditional vendee or lessee, said mortgagor, conditional vendee or lessee shall be deemed the owner for the purpose of this Chapter. For the purposes of this Chapter, the lessee of a vehicle owned by the government of the United States shall be considered the owner of said vehicle.

(27) Passenger Vehicles. —

a. Excursion passenger vehicles. — Vehicles transporting persons on sight-seeing or travel tours.

b. For-hire passenger vehicles. — Vehicles transporting persons for compensation. This classification shall not include vehicles operated as ambulances; vehicles (except those with wheelbases of 140 inches or more) operated by the owner where the cost of operation is shared by the passengers; vehicles (except those with wheelbases of 140 inches or more) operated by any bona fide employee for the transportation of other bona fide employees and himself to and from the place(s) of their regular employment and operated for compensation only for one round trip per day to and from the work location(s); vehicles transporting students for the public school system under contract with the State Board of Education; or vehicles leased to the United States of America or any of its agencies on a nonprofit basis.

c. Common carriers of passengers. — Vehicles operated under a franchise certificate issued by the Utilities Commission for operation on the highways of this State between fixed termini or over a regular route for the transportation of persons or property for compensation.

d. Motorcycles. — Vehicles having a saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground, including motor scooters and motor-driven bicycles, but excluding tractors and utility vehicles equipped with an additional form of device designed to transport property, three-wheeled vehicles while being used by law-enforcement agencies and bicycles with helper motors rated less than one brake horsepower which produce only ordinary pedaling speeds up to a maximum of 20 miles per hour.

e. U-drive-it passenger vehicles. — Vehicles rented or leased to be operated by the lessee. This shall not include vehicles of nine-passenger capacity or less which are leased for a term of one year or more to the same person or vehicles leased or rented to public school authorities for driver-training instruction.

f. Ambulances. — Vehicles equipped for transporting wounded, injured, or sick persons.

g. Private passenger vehicles. — All other passenger vehicles not included in the above definitions.

(28) Person. — Every individual, firm, partnership, association, corporation, governmental agency, or combination thereof of whatsoever form or character.

(29) Pneumatic Tire. — Every tire in which compressed air is designed to support the load.

(30) Private Road or Driveway. — Every road or driveway not open to the use of the public as a matter of right for the purpose of vehicular traffic.

(31) Property-Hauling Vehicles. —

a. Exempt for-hire vehicles. — Vehicles used for the transportation of property for hire but not licensed as common carriers or contract carriers of property under franchise certificates or permits issued by the Utilities Commission or by the Interstate Commerce Commission; provided, that the term "for hire" shall include every arrangement by which the owner of a vehicle uses, or permits such vehicle to be used, for the transportation of the property of another for compensation, subject to the following exemptions:

1. The transportation of farm crops or products, including logs, bark, pulp, and tannic acid wood delivered from farms and forest to the first or primary market, and the transportation of wood chips from the place where wood has been converted into chips to their first or primary market.
2. The transportation of perishable foods which are still owned by the grower while being delivered to the first or primary market by an operator who has not more than one truck, truck-tractor, or trailer in a for-hire operation.
3. The transportation of merchandise hauled for neighborhood farmers incidentally and not as a regular business in going to and from farms and primary markets.
4. The transportation of T.V.A. or A.A.A. phosphate and/or agricultural limestone in bulk which is furnished as a grant of aid under the United States Agricultural Adjustment Administration.
5. The transportation of fuel for the exclusive use of the public schools of the State.
6. Vehicles whose sole operation in carrying the property of others is limited to the transportation of the United States mail pursuant to a contract, or the extension or renewal of such contract.
7. Vehicles leased for a term of one year or more to the same person when used exclusively by such person in transporting his own property.

b. Common carrier of property vehicles. — Vehicles used for the transportation of property certified by the Utilities Commission or the Interstate Commerce Commission as common carriers.

c. Private hauler vehicles. — Vehicles used for the transportation of

property not falling within one of the above-defined classifications; provided, self-propelled vehicles equipped with permanent living and sleeping facilities used exclusively for camping activities shall be classified as private passenger vehicles.

d. Semitrailers. — Vehicles without motive power designed for carrying property or persons and for being drawn by a motor vehicle, and so constructed that part of their weight or their load rests upon or is carried by the pulling vehicle.

e. Trailers. — Vehicles without motive power designed for carrying property or persons wholly on their own structure and to be drawn by a motor vehicle, including "pole trailers" or a pair of wheels used primarily to balance a load rather than for purposes of transportation.

f. Contract carrier of property vehicles. — Vehicles used for the transportation of property under a franchise permit of a regulated contract carrier issued by the Utilities Commission or the Interstate Commerce Commission.

(32) Public Vehicular Area. — Any drive, driveway, road, roadway, street, or alley upon the grounds and premises of any public or private hospital, college, university, school, orphanage, church, or any of the institutions maintained and supported by the State of North Carolina, or any of its subdivisions or upon the grounds and premises of any service station, drive-in theater, supermarket, store, restaurant or office building, or any other business, residential, or municipal establishment providing parking space for customers, patrons, or the public.

(33) Reconstructed Vehicles. — Vehicles of a type required to be registered hereunder materially altered from their original construction by the removal, addition, or substitution of essential parts.

(34) Resident. — Any person who resides within this State for other than a temporary or transitory purpose for more than six months shall be presumed to be a resident of this State; but absence from the State for more than six months shall raise no presumption that the person is not a resident of this State.

(35) Residential District. — The territory prescribed as such by ordinance of the Department of Transportation.

(36) Revocation or Suspension. — Termination of a licensee's or permittee's privilege to drive or termination of the registration of a vehicle for a period of time stated in an order of revocation or suspension. The terms "revocation" or "suspension" or a combination of both terms shall be used synonymously.

(37) Road Tractors. — Vehicles designed and used for drawing other vehicles upon the highway and not so constructed as to carry any part of the load, either independently or as a part of the weight of the vehicle so drawn.

(38) Roadway. — That portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the shoulder. In the event a highway includes two or more separate roadways the term "roadway" as used herein shall refer to any such roadway separately but not to all such roadways collectively.

(39) Safety Zone. — Traffic island or other space officially set aside within a highway for the exclusive use of pedestrians and which is so plainly marked or indicated by proper signs as to be plainly visible at all times while set apart as a safety zone.

(40) Security Agreement. — Written agreement which reserves or creates a security interest.

(41) Security Interest. — An interest in a vehicle reserved or created by

agreement and which secures payments or performance of an obligation. The term includes but is not limited to the interest of a chattel morgagee, the interest of a vendor under a conditional sales contract, the interest of a trustee under a chattel deed of trust, and the interest of a lessor under a lease intended as security. A security interest is "perfected" when it is valid against third parties generally.

(42) Solid Tire. — Every tire or rubber or other resilient material which does not depend upon compressed air for the support of the load.

(43) Specially Constructed Vehicles. — Vehicles of a type required to be registered hereunder not originally constructed under a distinctive name, make, model, or type by a generally recognized manufacturer of vehicles and not materially altered from their original construction.

(44) Special Mobile Equipment. — Every truck, truck-tractor, industrial truck, trailer, or semitrailer on which have been permanently attached cranes, mills, well-boring apparatus, ditch-digging apparatus, air compressors, electric welders, or any similar type apparatus or which have been converted into living or office quarters, or other self-propelled vehicles which were originally constructed in a similar manner which are operated on the highway only for the purpose of getting to and from a nonhighway job and not for the transportation of persons or property or for hire. This shall also include trucks on which special equipment has been mounted and used by American Legion or Shrine Temples for parade purposes, trucks or vehicles privately owned on which fire-fighting equipment has been mounted and which are used only for fire-fighting purposes, and vehicles on which are permanently mounted feed mixers, grinders, and mills although there is also transported on the vehicle molasses or other similar type feed additives for use in connection with the feed-mixing, grinding, or milling process.

(45) State. — A state, territory, or possession of the United States, District of Columbia, Commonwealth of Puerto Rico, or a province of Canada.

(46) Street. — The entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic. The terms "highway" or "street" or a combination of the two terms shall be used synonymously.

(47) Suspension. — Termination of a licensee's or permittee's privilege to drive or termination of the registration of a vehicle for a period of time stated in an order of revocation or suspension. The terms "revocation" or "suspension" or a combination of both terms shall be used synonymously.

(48) Truck Tractors. — Vehicles designed and used primarily for drawing other vehicles and not so constructed as to carry any load independent of the vehicle so drawn.

(49) Vehicle. — Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon fixed rails or tracks; provided, that for the purposes of this Chapter bicycles shall be deemed vehicles and every rider of a bicycle upon a highway shall be subject to the provisions of this Chapter applicable to the driver of a vehicle except those which by their nature can have no application.

(50) Wreckers. — Vehicles with permanently attached cranes used to move other vehicles; provided, that said wreckers shall be equipped with adequate brakes for units being towed. (1973, c. 1330, s. 1; 1975, cc. 94, 208; c. 716, s. 5; c. 743; c. 859, s. 1; 1977, c. 313; c. 464, s. 34.)

Editor's Note. — The first 1975 amendment, in subdivision (27), deleted "and" preceding "three-wheeled vehicles" in paragraph d and added at the end of paragraph d the language beginning "and bicycles with helper motors."

The second 1975 amendment substituted "30,000" for "26,000" near the middle of the first sentence of subdivision (3).

The third 1975 amendment substituted "Division" for "Department" in subdivisions (6) and (20).

The fourth 1975 amendment inserted "industrial truck" near the beginning of the first section in subdivision (44).

The fifth 1975 amendment added the second sentence in subdivision (23).

The first 1977 amendment rewrote paragraph b of subdivision (27).

The second 1977 amendment substituted "Department of Transportation" for "Board of Transportation" in subsection (35).

Opinions of Attorney General. — Mr. Blaine M. Madison, Commissioner, Board of Juvenile Correction, 40 N.C.A.G. 394 (1969); Major John Laws, N.C. State Highway Patrol, 40 N.C.A.G. 403 (1969).

Business District. — As to what constituted a business district within the meaning of subdivision (1) of former § 20-38, see Mitchell v. Melts, 220 N.C. 793, 18 S.E.2d 406 (1942); Hinson v. Dawson, 241 N.C. 714, 86 S.E.2d 585 (1955); Black v. Penland, 255 N.C. 691, 122 S.E.2d 504 (1961).

Farm Tractor. — Construing the definitions of "farm tractor" and "vehicle" together in pari materia, it is apparent that the General Assembly intended that while farm tractors are motor implements of husbandry, they are vehicles within the meaning of § 20-138 when operated upon a highway by one under the influence of intoxicating liquor or narcotic drugs. State v. Green, 251 N.C. 141, 110 S.E.2d 805 (1959).

Farm tractors are not to be considered motor vehicles within the provisions of the Uniform Driver's License Act or the Motor Vehicle Safety and Financial Responsibility Act. Brown v. Fidelity & Cas. Co., 241 N.C. 666, 86 S.E.2d 433 (1955), decided under repealed § 20-226.

Portion of Sidewalk as Highway. — The portion of a sidewalk between a street and a filling station, open to the use of the public as a matter of right for the purposes of vehicular traffic, is a "highway" within the meaning of § 20-138, prohibiting drunken driving. State v. Perry, 230 N.C. 361, 53 S.E.2d 288 (1949).

Intersection. — With reference to the right-of-way as between two vehicles approaching and entering an intersection, the law of this State makes no distinction between a "T" intersection and one at which the two highways cross each other completely. Dawson v. Jennette, 278 N.C. 438, 180 S.E.2d 121 (1971).

Where one public highway joins another, but does not cross it, the point where they join is an intersection of public highways. Goss v. Williams, 196 N.C. 213, 145 S.E. 169 (1928).

When the failure to explain the law so the jury could apply it to the facts is specifically called to the court's attention by a juror's request for information, it should tell the jury how to find the intersection of the streets as fixed by statute, and how, when the motorist reaches the intersection, he is required to drive in making a left turn. Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

Motorcycle. — The definition of the term "motorcycle" in former § 20-38 did not describe the "mailster," a class of motor vehicle generally known as a "motor scooter." LeCroy v. Nationwide Mut. Ins. Co., 251 N.C. 19, 110 S.E.2d 463 (1959).

The statutory definition of the term "motorcycle" has no application in an action based on an insurance contract's interpretation of the word "automobile." LeCroy v. Nationwide Mut. Ins. Co., 251 N.C. 19, 110 S.E.2d 463 (1959).

Statutory definition cited in Anderson v. Life & Cas. Ins. Co., 197 N.C. 72, 147 S.E. 693 (1929), holding that the expression "motor-driven car" in an insurance policy excluded a motorcycle.

A mobile home is a motor vehicle and is subject to the mandatory provisions of the statutes relating to the registration of motor vehicles in this State. King Homes, Inc. v. Bryson, 273 N.C. 84, 159 S.E.2d 329 (1968).

Operator includes a person in the driver's seat of a motor vehicle when the engine is running. State v. Carter, 15 N.C. App. 391, 190 S.E.2d 241 (1972).

In a prosecution for driving under the influence and driving while license was revoked, evidence that defendant was seated behind the wheel of a car which had the motor running was sufficient to prove that defendant was the operator of the car under subdivision (25). State v. Turner, 29 N.C. App. 163, 223 S.E.2d 530 (1976).

Owner. — A defendant who advanced money for the purchase of a used car as security took a title-retaining contract on the vehicle and permitted its delivery to the purchasers, one of whom was operating it when an accident occurred, could not be liable to the persons injured, since a conditional vendee, lessee, or mortgagor of a motor vehicle is deemed to be the owner, and liability on the part of the defendant could arise only by application of the doctrine of respondeat superior. Such facts do not show the necessary relationship. High Point Sav. & Trust Co. v. King, 253 N.C. 571, 117 S.E.2d 421 (1960).

Where the owner of trucks leased them to another corporation under an agreement requiring lessor to carry insurance and maintain the vehicles and giving lessee control over the operation of the trucks with right to use same

exclusively for the transportation and delivery of lessee's goods, the lessor was not a contract carrier within the meaning of the statutes as they stood in 1949, since the lessor merely leased its vehicles and was not a carrier of any kind, and lessee was solely a private carrier, and therefore lessor was not liable for additional assessment at the "for-hire" rates under the statute. Equipment Fin. Corp. v. Scheidt, 249 N.C. 334, 106 S.E.2d 555 (1959).

This section defines "owner" and former § 20-279.1 defined "owner" essentially the same way. Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970).

Period of Revocation. — The contention that a revocation remains in effect not only throughout the period stated in the order of revocation but also until the person whose license was revoked applies for a restoration of his license and pays the restoration fee required is contrary to the definition of "revocation" in this section. Ennis v. Garrett, 279 N.C. 612, 184 S.E.2d 246 (1971).

"Public vehicular area" includes streets leading into privately owned trailer parks which rent, lease and sell individual lots. See opinion of Attorney General to Mr. Henry A. Harkey, Assistant District Attorney, 45 N.C.A.G. 284 (1976).

Residential District. — For cases construing earlier statutory definitions of "residential district," see Reid v. City Coach Co., 215 N.C. 469, 2 S.E.2d 578, 123 A.L.R. 140 (1939); Mitchell v. Melts, 220 N.C. 793, 18 S.E.2d 406 (1942); Goddard v. Williams, 251 N.C. 128, 110 S.E.2d 820 (1959).

A bicycle is a vehicle and its rider is a driver within the meaning of the Motor Vehicle Law. Lowe v. Futrell, 271 N.C. 550, 157 S.E.2d 92 (1967); Sadler v. Purser, 12 N.C. App. 206, 182 S.E.2d 850 (1971); Townsend v. Frye, 30 N.C. App. 634, 228 S.E.2d 56, cert. denied, 291 N.C. 178, 229 S.E.2d 689 (1976).

The operation of a bicycle upon a public highway is governed by the rules governing motor vehicles insofar as the nature of the vehicle permits. Webb v. Felton, 266 N.C. 707, 147 S.E.2d 219 (1966).

A bicycle is deemed a vehicle, and the rider of a bicycle upon the highway is subject to the applicable provisions of the statutes relating to motor vehicles. Van Dyke v. Atlantic Greyhound Corp. 218 N.C. 283, 10 S.E.2d 727 (1940).

A bicycle is a vehicle and is subject to the provisions of Article 3 of this Chapter, except those which by their nature can have no application. Tarrant v. Pepsi-Cola Bottling Co., 221 N.C. 390, 20 S.E.2d 565 (1942); Oxendine v. Lowry, 260 N.C. 709, 133 S.E.2d 687 (1963).

Handcart Not Vehicle. — A handcart, being moved solely by human power, is excluded from the category of vehicles defined in subdivision (38) of former § 20-38 (now subdivision (49) of this section). Lewis v. Watson, 229 N.C. 20, 47 S.E.2d 484 (1948).

Applied in State v. Springs, 26 N.C. App. 757, 217 S.E.2d 200 (1975); State v. Lesley, 29 N.C. App. 169, 223 S.E.2d 532 (1976); Williams v. Wachovia Bank & Trust Co., 292 N.C. 416, 233 S.E.2d 589 (1977); Smith v. Powell, 32 N.C. App. 563, 232 S.E.2d 863 (1977).

Quoted in State v. Bradley, 32 N.C. App. 666, 233 S.E.2d 603 (1977).

ARTICLE 1A.

Reciprocity Agreements as to Registration and Licensing.

§ 20-4.1. Declaration of policy. — It is the policy of this State to promote and encourage the fullest possible use of its highway system by authorizing the making and execution of motor vehicle reciprocal registration agreements, arrangements and declarations with other states, provinces, territories and countries with respect to vehicles registered in this and such other states, provinces, territories and countries thus contributing to the economic and social development and growth of this State. (1961, c. 642, s. 1.)

§ 20-4.2. Definitions. — As used in this Article:

(1) "Commercial vehicle" means any vehicle which is operated interstate in furtherance of any commercial enterprise.

(2) "Commissioner" means the Commissioner of Motor Vehicles of North Carolina.

(3) "Division" means the Division of Motor Vehicles of North Carolina.

(4) "Jurisdiction" means and includes a state, district, territory or possession of the United States, a foreign country and a state or province of a foreign country.

(5) "Properly registered," as applied to place of registration, means:

a. The jurisdiction where the person registering the vehicle has his legal residence, or

b. In the case of a commercial vehicle, including a leased vehicle, the jurisdiction in which it is registered if the commercial enterprise in which such vehicle is used has a place of business therein, and, if the vehicle is most frequently dispatched, garaged, serviced, maintained, operated or otherwise controlled in or from such place of business, and, the vehicle has been assigned to such place of business, or

c. In the case of a commercial vehicle, including leased vehicles, the jurisdiction where, because of an agreement or arrangement between two or more jurisdictions, or pursuant to a declaration, the vehicle has been registered as required by said jurisdiction.

d. In case of doubt or dispute as to the proper place of registration of a vehicle, the Division shall make the final determination, but in making such determination, may confer with departments of the other jurisdictions affected. (1961, c. 642, s. 1; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subdivision (3) and in paragraph d of subdivision (5).

Applied in Cox v. Miller, 26 N.C. App. 749, 217 S.E.2d 198 (1975).

§ 20-4.3. Commissioner may make reciprocity agreements, arrangements or declarations. — The Commissioner of Motor Vehicles shall have the authority to execute or make agreements, arrangements or declarations to carry out the provisions of this Article. (1961, c. 642, s. 1.)

§ 20-4.4. Authority for reciprocity agreements; provisions; reciprocity standards. — (a) The Commissioner may enter into an agreement or arrangement for interstate or intrastate operations with the duly authorized representatives of another jurisdiction, granting to vehicles or to owners of vehicles which are properly registered or licensed in such jurisdiction and for which evidence of compliance is supplied, benefits, privileges and exemptions from the payment, wholly or partially, of any taxes, fees, or other charges imposed upon such vehicles or owners with respect to the operation or ownership of such vehicles under the laws of this State. Such an agreement or arrangement shall provide that vehicles properly registered or licensed in this State when operated upon highways of such other jurisdiction shall receive exemptions, benefits and privileges of a similar kind or to a similar degree as are extended to vehicles properly registered or licensed in such jurisdiction when operated in this State. Each such agreement or arrangement shall, in the judgment of the Commissioner, be in the best interest of this State and the citizens thereof and shall be fair and equitable to this State and the citizens thereof, and all of the same shall be determined on the basis and recognition of the benefits which accrue to the economy of this State from the uninterrupted flow of commerce.

(b) When the Commissioner enters into a reciprocal registration agreement or arrangement with another jurisdiction which has a motor vehicle tax, license or fee which is not subject to waiver by a reciprocity agreement, the Commissioner is empowered and authorized to provide as a condition of the agreement or arrangement that owners of vehicles licensed in such other jurisdiction shall pay some equalizing tax or fee to the Division. The failure of any owner or operator of a vehicle to pay the taxes or fees provided in the agreement or arrangement shall prohibit them from receiving any benefits therefrom and they shall be required to register their vehicles and pay taxes as if there was no agreement or arrangement. (1961, c. 642, s. 1; 1971, c. 588; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment, effective July 1, 1975, substituted "Division" for "Department" at the end of the first sentence of subsection (b).

§ 20-4.5. Base-state registration reciprocity. — An agreement or arrangement entered into, or a declaration issued under the authority of this Article may contain provisions authorizing the registration or licensing in another jurisdiction of vehicles located in or operated from a base in such other jurisdiction which vehicles otherwise would be required to be registered or licensed in some other state; and in such event the exemptions, benefits and privileges extended by such agreement, arrangement or declaration shall apply to such vehicles, when properly licensed or registered in such base jurisdiction. (1961, c. 642, s. 1.)

§ 20-4.6. Declarations of extent of reciprocity, when; deferral period for registration of vehicles owned by new residents. — In the absence of an agreement or arrangement with another jurisdiction, the Commissioner may examine the laws and requirements of such jurisdiction and declare the extent and nature of exemptions, benefits and privileges to be extended to vehicles properly registered or licensed in such other jurisdiction, or to the owners of such vehicles, which shall, in the judgment of the Commissioner, be in the best interest of this State and the citizens thereof and which shall be fair and equitable to this State and the citizens thereof, and all of the same shall be determined on the basis and recognition of the benefits which accrue to the economy of this State from the uninterrupted flow of commerce.

It is hereby provided that the owner of a private passenger vehicle who takes up residence in North Carolina on a permanent or temporary basis shall be exempt from the provisions of registration for a period of 30 days from the date that either permanent or temporary residence is established in North Carolina provided that his vehicle is properly licensed in the jurisdiction of which he is a resident or a former resident. (1961, c. 642, s. 1; 1967, c. 1166.)

§ 20-4.7. Extension of reciprocal privileges to lessees authorized. — An agreement or arrangement entered into, or a declaration issued under the authority of this Article, may contain provisions under which a leased vehicle properly registered by the lessor thereof may be entitled, subject to terms and conditions stated therein, to the exemptions, benefits and privileges extended by such agreement, arrangement or declaration. (1961, c. 642, s. 1.)

§ 20-4.8. Automatic reciprocity, when. — On and after July 1, 1961, if no agreement, arrangement or declaration is in effect with respect to another jurisdiction as authorized by this Article, any vehicle properly registered or licensed in such other jurisdiction and for which evidence of compliance supplied shall receive, when operated in this State, the same exemptions, benefits and privileges granted by such other jurisdiction to vehicles properly registered in this State. Reciprocity extended under this section shall apply to commercial vehicles only when engaged exclusively in interstate operations. (1961, c. 642, s. 1.)

§ 20-4.9. Suspension of reciprocity benefits. — Agreements, arrangements or declarations made under the authority of this Article may include provisions authorizing the Division to suspend or cancel the exemptions, benefits or privileges granted thereunder to a vehicle which is in violation of any of the conditions or terms of such agreements, arrangements or declarations or is in violation of the laws of this State relating to motor vehicles or rules and regulations lawfully promulgated thereunder. (1961, c. 642, s. 1; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

§ 20-4.10. Agreements to be written, filed and available for distribution. — All agreements, arrangements or declarations or amendments thereto shall be in writing and shall be filed in the office of the Commissioner. Copies thereof shall be made available by the Commissioner upon request and upon payment of a fee therefor in an amount necessary to defray the costs of reproduction thereof. (1961, c. 642, s. 1.)

§ 20-4.11. Reciprocity agreements in effect at time of Article. — All reciprocity registration agreements, arrangements and declarations relating to vehicles in force and effect July 1, 1961, shall continue in force and effect until specifically amended or revoked as provided by law or by such agreements or arrangements. (1961, c. 642, s. 1.)

§ 20-4.12. Article part of and supplemental to motor vehicle registration law. — This Article shall be, and construed as, a part of and supplemental to the motor vehicle registration law of this State. (1961, c. 642, s. 1.)

§§ 20-4.13 to 20-4.17: Reserved for future codification purposes.

ARTICLE 1B.

Reciprocal Provisions as to Arrest of Nonresidents.

§ 20-4.18. Definitions. — Unless the context otherwise requires, the following words and phrases, for the purpose of this Article, shall have the following meanings:

(1) Citation. — Any citation, summons, ticket, or other document issued by a law-enforcement officer for the violation of a traffic law, ordinance, rule or regulation.

(2) Collateral or Bond. — Any cash or other security deposited to secure an appearance following a citation by a law-enforcement officer.

(3) License. — Any operator's or chauffeur's license or any other license, permit, or privilege to operate a motor vehicle.

(4) Nonresident. — A person who is a resident of or holds a license issued by a reciprocating state.

(5) Personal Recognizance. — A signed agreement by a nonresident that he will comply with the terms of the citation issued to him.

(6) Reciprocating State. — Any state or other jurisdiction which extends by its laws to residents of North Carolina substantially the rights and privileges provided by this Article.

(7) State. — The State of North Carolina. (1973, c. 736.)

§ 20-4.19. Issuance of citation to nonresident; officer to report noncompliance. — (a) Notwithstanding other provisions of this Chapter, a law-enforcement officer observing a violation of this Chapter or other traffic regulation by a nonresident shall issue a citation as appropriate and shall not, subject to the provisions of subsection (b) of this section, require such nonresident to post collateral or bond to secure appearance for trial, but shall accept such nonresident's personal recognizance; provided, however, that the nonresident shall have the right upon request to post collateral or bond in a manner provided by law and in such case the provisions of this Article shall not apply.

(b) No nonresident shall be entitled to be released on his personal recognizance if the offense is one which would result in the suspension or revocation of a person's license under the laws of this State.

(c) Upon the failure of the nonresident to comply with the citation, the law-enforcement officer shall obtain a warrant for his arrest and shall report the noncompliance to the Division. The report of noncompliance shall clearly identify the nonresident; describe the violation, specifying the section of the statute, code, or ordinance violated; indicate the location and date of offense; identify the vehicle involved; bear the signature of the law-enforcement officer; and contain a copy of the personal recognizance signed by the nonresident. (1973, c. 736; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" at the end of the first sentence of subsection (c).

§ 20-4.20. Division to transmit report to reciprocating state; suspension of license for noncompliance with citation issued by reciprocating state. — (a) Upon receipt of a report of noncompliance, the Division shall transmit a certified copy of such report to the official in charge of the issuance of licenses in the reciprocating state in which the nonresident resides or by which he is licensed.

(b) When the licensing authority of a reciprocating state reports that a person holding a North Carolina license has failed to comply with a citation issued in such state, the Commissioner shall forthwith suspend such person's license. The order of suspension shall indicate the reason for the order, and shall notify the person that his license shall remain suspended until he has furnished evidence satisfactory to the Commissioner that he has complied with the terms of the citation which was the basis for the suspension order by appearing before the tribunal to which he was cited and complying with any order entered by said tribunal.

(c) A copy of any suspension order issued hereunder shall be furnished to the licensing authority of the reciprocating state.

(d) The Commissioner shall maintain a current listing of reciprocating states hereunder. Such lists shall from time to time be disseminated among the appropriate departments, divisions, bureaus, and agencies of this State; the principal law-enforcement officers of the several counties, cities, and towns of this State; and the licensing authorities in reciprocating states.

(e) The Commissioner shall have the authority to execute or make agreements, arrangements, or declarations to carry out the provisions of this Article. (1973, c. 736; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsection (a).

ARTICLE 2.

Uniform Driver's License Act.

§ 20-5. Title of Article. — This Article may be cited as the Uniform Driver's License Act. (1935, c. 52, s. 31.)

Legislative Purpose. — This Article was designed under the police power in furtherance of the safety of the users of the State's highways. Harrell v. Scheidt, 243 N.C. 735, 92 S.E.2d 182 (1956).

And Authority. — The General Assembly has full authority to prescribe the conditions upon which licenses to operate automobiles are issued, and to designate the agency through which, and the conditions upon which licenses, when issued shall be suspended or revoked. Honeycutt v. Scheidt, 254 N.C. 607, 119 S.E.2d 777 (1961).

Division Given Exclusive Power to Issue, Suspend and Revoke Licenses. — This Article vests exclusively in the State Department (now

Division) of Motor Vehicles the issuance, suspension and revocation of licenses to operate motor vehicles. Honeycutt v. Scheidt, 254 N.C. 607, 119 S.E.2d 777 (1961); Gibson v. Scheidt, 259 N.C. 339, 130 S.E.2d 679 (1963).

§ 20-6: Repealed by Session Laws 1973, c. 1330, s. 39.

Cross Reference. — For definitions applicable throughout this Chapter, see § 20-4.01.

§ 20-7. Operators' and chauffeurs' licenses; expiration; examinations; fees. — (a) Except as otherwise provided in G.S. 20-8, no person shall act as or operate a motor vehicle over any highway in this State as a chauffeur unless such person has first been licensed as a chauffeur by the Division under the provisions of this Article. Except as otherwise provided in G.S. 20-8, no person shall operate a motor vehicle over any highway in this State unless such person has first been licensed as an operator or a chauffeur by the Division under the provisions of this Article. Any person who takes up residence in this State on a permanent basis shall be exempt from the provisions of this subsection for a period of 30 days from the date that residence is established, provided he is properly licensed in the jurisdiction of which he is a former resident.

(a1) No operator's or chauffeur's license issued on or after January 1, 1978, shall authorize the licensee to operate a motorcycle unless the license has been appropriately endorsed by the Division to indicate that the licensee has passed special road and written (or oral) tests demonstrating competence to operate a motorcycle. Any person licensed prior to January 1, 1978, who has operated a motorcycle for at least two years prior to that date, will be exempt from the provisions of this subsection upon filing with the Division of Motor Vehicles an affidavit attesting to said two years' experience. This section shall not apply to motorcycles which are rated at 190 cc (cubic centimeter) or less.

(b) Every application for an operator's or chauffeur's license shall be made upon the approved form furnished by the Division.

(c) No person shall hereafter be issued an operator's license until it is determined that such person is physically and mentally capable of safely operating motor vehicles over the highways of the State. In determining whether or not a person is physically and mentally capable of safely operating motor vehicles over the highways of the State, the Division shall require such person to demonstrate his capability by passing an examination, which may include road tests, oral and in the case of literate applicants written tests, and tests of vision, as the Division may require. Provided, however, that persons 60 years of age and over, when being examined as herein provided, shall not be required to parallel park a motor vehicle as part of any such examination.

(d) The Division shall cause each person who has heretofore been issued an operator's license to be examined or reexamined, as the case may be, to determine whether or not such person is physically and mentally capable of safely operating motor vehicles over the highways of the State. Those persons found, as a result of such examination or reexamination, to be capable of safely operating motor vehicles over the highways of the State shall be reissued operators' licenses; and those persons found to be incapable of safely operating motor vehicles over the highways of the State shall not be reissued operators' licenses. The examination required by this subsection may include such road tests, oral and in the case of literate applicants written tests, and tests of vision, as the Division may require and shall include such test as is necessary to assure that applicants recognize the "international symbol of access" for the handicapped (sign D9-6, Manual on Uniform Traffic Control Devices) and devices relative to handicapped drivers as set forth in Article 2A of this Chapter. The Division may once reissue operators' licenses without examination to licensed

operators who have passed an operator's examination given by the Division subsequent to July 1, 1945, and prior to July 1, 1947. Provided, however, that persons 60 years of age and over, when being examined as herein provided, shall not be required to parallel park a motor vehicle as part of any such examination.

(e) The Division is hereby authorized to grant unlimited licenses or licenses containing such limitations as it may deem advisable. Such limitation or limitations shall be noted on the face of the license, and it shall be unlawful for the holder of a license so limited to operate a motor vehicle without complying with the limitations, and the operation of a motor vehicle without complying with the limitations by a person holding a license with such limitations shall be the equivalent of operating a motor vehicle without a chauffeur's or operator's license. If any applicant shall suffer from any physical defect or disease which affects his or her operation of a motor vehicle, the Division may require to be filed with it a certificate of such applicant's condition signed by some medical authority of the applicant's community designated by the Division. This certificate shall in all cases be treated as confidential. Nothing in this subsection shall be construed to prevent the Division from refusing to issue a license, either limited or unlimited, to any person deemed to be incapable of operating a motor vehicle with safety to himself and to the public: Provided, that nothing herein shall prohibit deaf persons from operating motor vehicles who in every other way meet the requirements of this section.

(f) The operators' licenses issued under this section shall automatically expire on the birthday of the licensee in the fourth year following the year of issuance; and no new license shall be issued to any operator after the expiration of his license until such operator has again passed the examination specified in this section. Any operator may at any time within 60 days prior to the expiration of his license apply for a new license and if the applicant meets the requirements of this Article, the Division shall issue a new license to him. A new license issued within 60 days prior to the expiration of an applicant's old license or within 12 months thereafter shall automatically expire four years from the date of the expiration of the applicant's old license.

Any person serving in the armed forces of the United States on active duty and holding a valid operator's license properly issued under this section and stationed outside the State of North Carolina may renew his license by making application to the Division by mail. Any other person, except a nonresident as defined in this Article, who holds a valid operator's license issued under this section and who is temporarily residing outside North Carolina, may also renew by making application to the Division by mail. For purposes of this section "temporarily" shall mean not less than 30 days continuous absence from North Carolina. In either case, the Division may waive the examination and color photograph ordinarily required for the renewal of an operator's license, and may impose in lieu thereof such conditions as it may deem appropriate to each particular application; provided that such license shall expire 30 days after licensee returns to North Carolina, and such license shall be designated as temporary.

Provided further, that no person who applies for the renewal of his operator's license shall be required to take a written examination or road test as a part of any such examination unless such person has been convicted of a traffic violation or had prayer for judgment continued with respect to any traffic violation within a four-year period immediately preceding the date of such person's renewal application or unless such person suffers from a mental or physical condition which impairs his ability to operate a motor vehicle.

(g) Every chauffeur's license issued under this section shall automatically expire on the birthday of the licensee in the second year following the year of issuance and chauffeurs shall renew their licenses every two years after an examination which may include road tests, oral and, in the case of literate

applicants, written tests, and tests of vision as the Division may require: Provided, that the Commissioner may, in proper cases, waive the examination required by this subsection: Provided, further, that no chauffeur's license issued hereunder shall expire in less than six months from the date of issuance.

Provided further, that no person who applies for the renewal of his chauffeur's license shall be required to take a written examination or road test as a part of any such examination unless such person has been convicted of a traffic violation or had prayer for judgment continued with respect to any traffic violation within a four-year period immediately preceding the date of such person's renewal application or unless such person suffers from a mental or physical condition which impairs his ability to operate a motor vehicle.

(h) Upon receipt of information that the physical or mental condition of any person has changed since his or her examination for an operator's or chauffeur's license and before a new examination is required by this section, the Division may, after 10 days' written notice, require such person to take another examination to determine his or her capability to operate safely motor vehicles over the highways of the State. If such person is found to be capable of safely operating vehicles over the highways of the State, license shall be reissued to him or her and no fee shall be collected by the Division for such examination and reissuance of license. If such person is found to be incapable of safely operating vehicles over the highways of the State, no license shall be issued or reissued to him or her unless such person shall subsequently pass an examination given by the Division.

(i) The fee for issuance or reissuance of an operator's license shall be four dollars ($4.00) and the fee for issuance or reissuance of a chauffeur's license shall be five dollars ($5.00).

(i1) Any person whose operator's or chauffeur's license or other privilege to operate a motor vehicle in this State has been suspended, canceled or revoked pursuant to the provisions of this Chapter shall pay a restoration fee of fifteen dollars ($15.00) to the Division prior to the issuance to such person of a new operator's or chauffeur's license or the restoration of such operator's or chauffeur's license or privilege; such restoration fee shall be paid to the Division in addition to any and all fees which may be provided by law.

(j) The fees collected under this section and G.S. 20-14 shall be placed in the Highway Fund.

(k) Any person operating a motor vehicle in violation of this section shall be guilty of a misdemeanor and upon conviction shall be punished as provided in this section.

(l) Any person who except for lack of instruction in operating a motor vehicle would be qualified to obtain an operator's license under this Article may apply for a temporary learner's permit, and the Division shall issue such permit, entitling the applicant, while having such permit in his immediate possession, to drive a motor vehicle upon the highways for a period of 18 months. The fee for issuance of a temporary learner's permit shall be two dollars ($2.00). Any such learner's permit may be renewed, or a second learner's permit may be issued, for an additional period of 18 months. Such person must, while operating a motor vehicle over the highways, be accompanied by a licensed operator or chauffeur who is actually occupying a seat beside the driver.

The fee for the issuance of a renewal or a second temporary learner's permit shall be three dollars and twenty-five cents ($3.25).

(l-1) The Division upon receiving proper application may in its discretion issue a restricted instruction permit effective for a school year or a lesser period to an applicant who is enrolled in a driver training program as provided for in G.S. 20-88.1 even though the applicant has not yet reached the legal age to be eligible for an operator's license. Such instruction permit shall entitle the permittee when he has such permit in his immediate possession to operate a motor vehicle

subject to the restrictions imposed by the Division. The restrictions which the Division may impose on such permits include but are not limited to restrictions to designated areas and highways and restrictions prohibiting operation except when an approved instructor is occupying a seat beside the permittee.

(m) The Division upon receiving proper application may in its discretion issue a restricted instruction permit effective for a school year or a lesser period to an applicant who is enrolled in a driver-training program approved by the State Superintendent of Public Instruction even though the applicant has not yet reached the legal age to be eligible for an operator's license. Such instruction permit shall entitle the permittee when he has such permit in his immediate possession to operate a motor vehicle subject to the restrictions imposed by the Division. The restrictions which the Division may impose on such permits include but are not limited to restrictions to designated areas and highways and restrictions prohibiting operation except when an approved instructor is occupying a seat beside the permittee.

(n) Every operator's or chauffeur's license issued by the Division shall bear thereon the distinguishing number assigned to the licensee and color photograph of the licensee of a size approved by the Commissioner and shall contain the name, age, residence address and a brief description of the licensee, who, for the purpose of identification and as a condition precedent to the validity of the license, immediately upon receipt thereof, shall endorse his or her regular signature in ink upon the same in the space provided for that purpose unless a facsimile of his or her signature appears thereon; provided the requirement that a color photograph of the licensee appear on the license may be waived by the Commissioner upon satisfactory proof that the taking of such photograph violates the religious convictions of the licensee. Such license shall be carried by the licensee at all times while engaged in the operation of a motor vehicle. However, no person charged with failing to so carry such license shall be convicted, if he produces in court an operator's or chauffeur's license theretofore issued to him and valid at the time of his arrest.

(o) Any person convicted of violating any provision of this section shall be guilty of a misdemeanor and punished in the discretion of the court: Provided, that no person shall be convicted of operating a motor vehicle without an operator's or chauffeur's license if he produces in court at the time of his trial upon such charge an expired operator's or chauffeur's license and a renewal operator's or chauffeur's license issued to him within 30 days of the expiration date of the expired license and which would have been a defense to the charge had it been issued prior to the time of the alleged offense. (1935, c. 52, s. 2; 1943, c. 649, s. 1; c. 787, s. 1; 1947, c. 1067, s. 10; 1949, c. 583, ss. 9, 10; c. 826, ss. 1, 2; 1951, c. 542, ss. 1, 2; c. 1196, ss. 1-3; 1953, cc. 839, 1284, 1311; 1955, c. 1187, ss. 2-6; 1957, c. 1225; 1963, cc. 754, 1007, 1022; 1965, c. 410, s. 5; 1967, c. 509; 1969, c. 183; c. 783, s. 1; c. 865; 1971, c. 158; 1973, cc. 73, 705; c. 1057, s. 1; 1975, c. 162, s. 1; c. 295; c. 296, ss. 1, 2; c. 684; c. 716, s. 5; c. 841; c. 875, s. 4; c. 879, s. 46; 1977, c. 340, s. 3; c. 865, ss. 1, 3.)

Cross Reference. — As to jurisdiction of prosecution under this section, see notes to §§ 7A-271 and 7A-272.

Editor's Note. — The first 1975 amendment added the second paragraph of subsection (g). The first 1975 amendatory act originally provided that the act should expire June 1, 1977. It was amended by Session Laws 1977, c. 354, so as to delete the provision for expiration.

The second 1975 amendment increased the restoration fee in subsection (i1) from $10.00 to $15.00.

The third 1975 amendment substituted "18 months" for "six months" at the end of the first and present third sentences of subsection (l), inserted the present second sentence of subsection (l), and substituted "second learner's" for "new" and inserted "may be" in

the present third sentence of subsection (l). The amendment also added the second paragraphs of subsections (l) and (m).

The fourth 1975 amendment increased the operator's and chauffeur's license fees in subsection (i) from $3.25 to $4.00 and from $4.75 to $5.00 respectively.

The fifth 1975 amendment substituted "Division" for "Department" throughout the section.

The sixth 1975 amendment deleted in subsection (m) the second paragraph, which had been added by the third 1975 amendment and which read: "The fee for the issuance of a restricted instruction permit shall be two dollars ($2.00)."

The seventh 1975 amendment rewrote subsection (j), which formerly provided that the fees should be placed in the "Operators' and Chauffeurs' License Fund" to be used for the administration of this section.

The eighth 1975 amendment substituted "Secretary of Administration" for "Assistant Director of the Budget" in subsection (j).

The first 1977 amendment added the language beginning "and shall include such test as is necessary" to the end of the third sentence of subsection (d).

The second 1977 amendment added subsection (a1).

Session Laws 1975, c. 162, s. 2, provides: "The Department of Motor Vehicles shall monitor the occurrence of traffic violations within the State and submit yearly reports to the General Assembly. The effect of this act on the violation statistics of North Carolina drivers as of January 1, 1976, and each year thereafter shall be included in the yearly report to allow the objective evaluation of this act and its effect on North Carolina drivers."

Session Laws 1977, c. 6, amends Session Laws 1973, c. 1057, s. 3, so as to make the third 1973 amendment to this section permanent. Session Laws 1973, c. 1057, s. 3, as originally enacted provided that the act should expire June 1, 1977.

For comment on the 1953 amendments, see 31 N.C.L. Rev. 412 (1953).

This section and § 20-35, being in pari materia, must be construed together, and, if possible, they must be reconciled and harmonized. State v. Tolley, 271 N.C. 459, 156 S.E.2d 858 (1967).

Firemen classified as "drivers" and other city employees operating motor vehicles, not exempt pursuant to § 20-8, should obtain a chauffeur's license. See opinion of Attorney General to Mr. W. A. Watts, Charlotte Deputy City Attorney, 45 N.C.A.G. 192 (1976).

Subsection (i1) of this section does not expressly extend the period of a suspension, cancellation or revocation; it merely provides for the payment of a fee for an administrative act by the Department (now Division). Ennis v. Garrett, 279 N.C. 612, 184 S.E.2d 246 (1971).

The contention that a revocation remains in effect not only throughout the period stated in the order of revocation but also until the person whose license was revoked applies for a restoration of his license and pays the restoration fee required by subsection (i1) of this section is contrary to the definition of "revocation" in former § 20-6 [now in § 20-4.01(36)]. Ennis v. Garrett, 279 N.C. 612, 184 S.E.2d 246 (1971).

Penalty. — Any person convicted of operating a motor vehicle over any highway in this State without having first been licensed as such operator, in violation of subsection (a) of this section, is guilty of a misdemeanor; and, under subsection (n) and § 20-35 (b), is subject to punishment by imprisonment for a term of not more than six months. The superior court, even if it has jurisdiction in other respects, has no authority to pronounce judgment imposing a prison sentence of two years for this criminal offense. State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

Driving without License, Lesser Included Offense of Driving While License Suspended or Revoked. — See opinion of Attorney General to Mr. Charles B. Winberry, Chief District Prosecutor, Seventh Judicial District, 40 N.C.A.G. 427 (1970).

Driving without a License Is Negligence Per Se. — Under this section it is negligence per se for one to drive a motor vehicle without a license, but such negligence must be the proximate cause of injury in order to be actionable. Hoke v. Atlantic Greyhound Corp., 226 N.C. 692, 40 S.E.2d 345 (1946).

Applied in State v. Green, 266 N.C. 785, 147 S.E.2d 377 (1966); State v. White, 18 N.C. App. 31, 195 S.E.2d 576 (1973); In re Frye, 32 N.C. App. 384, 232 S.E.2d 301 (1977).

Cited in State v. Payne, 213 N.C. 719, 197 S.E. 573 (1938); Brown v. Fidelity & Cas. Co., 241 N.C. 666, 86 S.E.2d 433 (1955); Beaver v. Scheidt, 251 N.C. 671, 111 S.E.2d 881 (1960); Parks v. Washington, 255 N.C. 478, 122 S.E.2d 70 (1961); State v. White, 3 N.C. App. 31, 164 S.E.2d 36 (1968); State v. Newborn, 11 N.C. App. 292, 181 S.E.2d 214 (1971); State v. Baxley, 15 N.C. App. 544, 190 S.E.2d 401 (1972); Williams v. Wachovia Bank & Trust Co., 292 N.C. 416, 233 S.E.2d 589 (1977).

§ 20-7.1. Notification of change of address. — Whenever the holder of a license issued under the provisions of G.S. 20-7 changes his or her address as shown on such license, he or she shall notify the Division of Motor Vehicles of such change within 60 days after such address has been changed. (1975, c. 223, s. 1.)

License Must Show Current Address. — See opinion of Attorney General to Mr. Edward Powell, Commissioner of Motor Vehicles, 45 N.C.A.G. 194 (1976).

Cited in State v. Atwood, 290 N.C. 266, 225 S.E.2d 543 (1976).

§ 20-8. Persons exempt from license. — The following are exempt from license hereunder:

(1) Any person while operating a motor vehicle the property of, and in the service of the armed forces of the United States. This shall not be construed to exempt any chauffeurs or operators of the United States Civilian Conservation Corps motor vehicles;

(2) Any person while driving or operating any road machine, farm tractor, or implement of husbandry temporarily operated or moved on a highway;

(3) A nonresident who is at least 16 years of age and who has in his immediate possession a valid operator's license issued to him in his home state or country, may operate a motor vehicle in this State only as an operator;

(4) A nonresident who is at least 18 years of age and who has in his immediate possession a valid chauffeur's license issued to him in his home state or country may operate a motor vehicle in this State either as an operator or chauffeur;

(5) Any nonresident who is at least 18 years of age, whose home state or country does not require the licensing of operators may operate a motor vehicle as an operator only, for a period of not more than 90 days in any calendar year if the motor vehicle so operated is duly registered in the home state or country of such nonresident;

(6) Any nonresident who is at least 18 years of age, whose home state or country does not require the licensing of chauffeurs may operate a motor vehicle as a chauffeur for a period of not more than 10 days in any calendar year if the motor vehicle so operated is duly registered in the home state or country of such nonresident.

(7) Any person who is at least 16 years of age and while operating a bicycle with a helper motor rated less than one brake horsepower which produces only ordinary pedaling speeds up to a maximum of 20 miles per hour. (1935, c. 52, s. 3; 1963, c. 1175; 1973, c. 1017; 1975, c. 859, s. 2.)

Editor's Note. — The 1975 amendment added subdivision (7).

Exemption for One Driving Farm Tractor Applies Only to One Actually Engaged in Farming Operations. — See opinion of Attorney General to LTC Charles B. Pierce, N.C. State Highway Patrol, 41 N.C.A.G. 832 (1972).

Quoted, as to subdivision (2), in Brown v. Fidelity & Cas. Co., 241 N.C. 666, 86 S.E.2d 433 (1955).

§ 20-9. What persons shall not be licensed. — (a) An operator's license shall not be issued to any person under the age of 16 years, and no chauffeur's license shall be issued to any person under the age of 18 years.

(b) The Division shall not issue an operator's or chauffeur's license to any person whose license, either as operator or chauffeur, has been suspended or revoked during the period for which the license was suspended or revoked.

(c) The Division shall not issue an operator's or chauffeur's license to any person who is an habitual drunkard or is an habitual user of narcotic drugs or barbiturates, whether or not such use be in accordance with the prescription of a physician.

(d) No operator's or chauffeur's license shall be issued to any applicant who has been previously adjudged insane or an idiot, imbecile, or feebleminded, and who has not at the time of such application been restored to competency by judicial decree or released from a hospital for the insane or feebleminded upon a certificate of the superintendent that such person is competent, nor then unless the Division is satisfied that such person is competent to operate a motor vehicle with safety to persons and property.

(e) The Division shall not issue an operator's or chauffeur's license to any person when in the opinion of the Division such person is afflicted with or suffering from such physical or mental disability or disease as will serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways, nor shall a license be issued to any person who is unable to understand highway warnings or direction signs.

(f) The Division shall not issue an operator's or chauffeur's license to any person whose license or driving privilege is in a state of suspension or revocation in any jurisdiction, if the acts or things upon which the suspension or revocation in such other jurisdiction was based would constitute lawful grounds for suspension or revocation in this State had those acts or things been done or committed in this State.

(g) The Division may issue an operator's or chauffeur's license to any applicant covered by subsection (e) of this section under the following conditions:

(1) The Division may issue a license to any person who is afflicted with or suffering from physical or mental disability set out in subsection (e) of this section who is otherwise qualified to obtain a license, provided such person submits to the Division a certificate in the form prescribed in subdivision (2). Unless sooner revoked, suspended or cancelled, such license continues in force as long as the licensee presents to the Division one year from the date of issuance of such license and at yearly intervals thereafter a certificate in the form prescribed in subdivision (2), provided the Commissioner may require the submission of such certificate at six months intervals where in his opinion public safety demands. In no event shall a license issued pursuant to this section be valid beyond the birthday of the licensee in the fourth year following the year of issuance, at which time the license is subject to renewal.

(2) The Division shall not issue a license pursuant to this section unless the applicant has submitted to a physical examination by a physician or surgeon duly licensed to practice medicine in this State and unless such examining physician or surgeon has completed and signed the certificate required by subdivision (1). Such certificate shall be devised by the Commissioner with the advice of qualified experts in the field of diagnosing and treating physical and mental disorders as he may select to assist him and shall be designed to elicit the maximum medical information necessary to aid in determining whether or not it would be a hazard to public safety to permit the applicant to operate a motor vehicle, including, if such is the fact, the examining physician's

statement that the applicant is under medication and treatment and that such person's physical or mental disability is controlled. The certificate shall contain a waiver of privilege and the recommendation of the examining physician to the Commissioner as to whether a license should be issued to the applicant.

(3) The Commissioner is not bound by the recommendation of the examining physician but shall give fair consideration to such recommendation in exercising his discretion in acting upon the application, the criterion being whether or not, upon all the evidence, it appears that it is safe to permit the applicant to operate a motor vehicle. The burden of proof of such fact is upon the applicant. In deciding whether to issue or deny a license, the Commissioner may be guided by opinion of experts in the field of diagnosing and treating the specific physical or mental disorder suffered by an applicant and such experts may be compensated for their services on an equitable basis. The Commissioner may also take into consideration any other factors which bear on the issue of public safety.

(4) Whenever a license is denied by the Commissioner, such denial may be reviewed by a reviewing board upon written request of the applicant filed with the Division within 10 days after receipt of such denial. The reviewing board shall consist of the Commissioner or his authorized representative and four persons designated by the chairman of the Commission for Health Services. The persons designated by the chairman of the Commission for Health Services shall be either members of the Commission for Health Services or physicians duly licensed to practice medicine in this State. The members so designated by the chairman of the Commission for Health Services shall receive the same per diem and expenses as provided by law for members of the Commission for Health Services, which per diem and expenses shall be charged to the same appropriation as per diems and expenses for members of the Commission for Health Services. The Commissioner or his authorized representative, plus any two of the members designated by the chairman of the Commission for Health Services, constitute a quorum. The procedure for hearings authorized by this section shall be as follows:

a. Applicants shall be afforded an opportunity for hearing, after reasonable notice of not less than 10 days, before the review board established by subdivision (4). The notice shall be in writing and shall be delivered to the applicant in person or sent by certified mail, with return receipt requested. The notice shall state the time, place, and subject of the hearing.

b. The review board may compel the attendance of witnesses and the production of such books, records and papers as it desires at a hearing authorized by the section. Upon request of an applicant, a subpoena to compel the attendance of any witness or a subpoena duces tecum to compel the production of any books, records, or papers shall be issued by the board. Subpoenas shall be directed to the sheriff of the county where the witness resides or is found and shall be served and returned in the same manner as a subpoena in a criminal case. Fees of the sheriff and witnesses shall be the same as that allowed in the district court in cases before that court and shall be paid in the same manner as other expenses of the Division of Motor Vehicles are paid. In any case of disobedience or neglect of any subpoena served on any person, or the refusal of any witness to testify to any matters regarding which he may be lawfully interrogated, the district court or superior court where such disobedience, neglect or refusal occurs, or any judge thereof,

on application by the board, shall compel obedience or punish as for contempt.

c. A hearing may be continued upon motion of the applicant for good cause shown with approval of the board or upon order of the board.

d. The board shall pass upon the admissibility of evidence at a hearing but the applicant affected may at the time object to the board's ruling, and, if evidence offered by an applicant is rejected the party may proffer the evidence, and such proffer shall be made a part of the record. The board shall not be bound by common law or statutory rules of evidence which prevail in courts of law or equity and may admit and give probative value to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. They may exclude incompetent, immaterial, irrelevant and unduly repetitious evidence. Uncontested facts may be stipulated by agreement between an applicant and the board and evidence relating thereto may be excluded. All evidence, including records and documents in the possession of the Division of Motor Vehicles or the board, of which the board desires to avail itself shall be made a part of the record. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. The board shall prepare an official record, which shall include testimony and exhibits. A record of the testimony and other evidence submitted shall be taken, but it shall not be necessary to transcribe shorthand notes or electronic recordings unless requested for purposes of court review.

e. Every decision and order adverse to an applicant shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the board's conclusions on each contested issue of fact. Counsel for applicant, or applicant, if he has no counsel, shall be notified of the board's decision in person or by registered mail with return receipt requested. A copy of the board's decision with accompanying findings and conclusions shall be delivered or mailed upon request to applicant's attorney of record or to applicant, if he has no attorney.

f. Actions of the reviewing board are subject to judicial review as provided under Chapter 150[A] of the General Statutes.

g. Repealed by Session Laws 1977, c. 840.

h. All records and evidence collected and compiled by the Division and the reviewing board shall not be considered public records within the meaning of Chapter [section] 132-1, and following, of the General Statutes of North Carolina and may be made available to the public only upon an order of a court of competent jurisdiction. All information furnished by or on behalf of an applicant under this section shall be without prejudice and shall be for the use of the Division, the reviewing board or the court in administering this section and shall not be used in any manner as evidence, or for any other purposes in any trial, civil or criminal.

(h) The Division shall not issue an operator's or chauffeur's license to an applicant who is the holder of any license to drive issued by another state, district or territory of the United States and currently in force, unless the applicant surrenders such license or licenses; provided, this section shall not apply to nonresident military personnel or members of their household. (1935, c. 52, s. 4; 1951, c. 542, s. 3; 1953, c. 773; 1955, c. 1187, s. 7; 1967, cc. 961, 966; 1971, c. 152; c. 528, s. 11; 1973, cc. 135, 441; c. 476, s. 128; c. 1331, s. 3; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout the section.

The 1977 amendment repealed paragraph (g)(4)g, which read "An applicant or licensee who has been denied a license pursuant to a hearing before the board may not file a new application until the expiration of two years after the date of such denial by the board."

For note on reporting patients for review of driver's license, see 48 N.C.L. Rev. 1003 (1970).

Epilepsy. — Prior to 1967, subsection (d) of this section prohibited the licensing of anyone who had been diagnosed as having grand mal epilepsy. In 1967 this section was amended to delete the words "grand mal epileptic." Ormond v. Garrett, 8 N.C. App. 662, 175 S.E.2d 371 (1970).

Where the Medical Review Board found as a fact that the petitioner had been suffering from epilepsy since 1951 but that his condition was controlled medically, and then proceeded to deny him driving privileges without making a finding that the petitioner is afflicted with or suffering from "such physical or mental disability or disease as will serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways," the Board was without authority to deny the petitioner his driving privileges. Ormond v. Garrett, 8 N.C. App. 662, 175 S.E.2d 371 (1970).

Out-of-State Suspension as Basis for Revocation. — Under this section the Department (now Division) of Motor Vehicles must apply the period of revocation of the other state, since the person was a resident of the other state and was subject to and controlled by the laws of that state at the time the offense was committed. Parks v. Howland, 4 N.C. App. 197, 166 S.E.2d 701 (1969).

A petitioner seeking judicial review of a decision of the North Carolina Driver License Medical Review Board must file such petition in the Superior Court of Wake County pursuant to § 150A-45 and may not obtain a hearing under § 20-25 in the superior court of the county in which he resides. Cox v. Miller, 26 N.C. App. 749, 217 S.E.2d 198 (1975).

Applied in In re Frye, 32 N.C. App. 384, 232 S.E.2d 301 (1977).

Cited in Hoke v. Atlantic Greyhound Corp., 226 N.C. 692, 40 S.E.2d 345 (1946).

§ 20-10. Age limits for drivers of public passenger-carrying vehicles. — It shall be unlawful for any person, whether licensed under this Article or not, who is under the age of 18 years to drive a motor vehicle while in use as a public passenger-carrying vehicle. For purposes of this section, an ambulance when operated for the purpose of transporting persons who are sick, injured, or otherwise incapacitated shall not be treated as a public passenger-carrying vehicle.

No person 14 years of age or under, whether licensed under this Article or not, shall operate any road machine, farm tractor or motor driven implement of husbandry on any highway within this State. Provided any person may operate a road machine, farm tractor, or motor driven implement of husbandry upon a highway adjacent to or running in front of the land upon which such person lives when said person is actually engaged in farming operations. (1935, c. 52, s. 5; 1951, c. 764; 1967, c. 343, s. 4; 1971, c. 1231, s. 1.)

Local Modification. — Cumberland: 1965, c. 1152, s. 3.

§ 20-11. Application of minors. — (a) The Division shall not grant the application of any minor between the ages of 16 and 18 years for an operator's license or a learner's permit unless such application is signed both by the applicant and by the parent, guardian, husband, wife or employer of the applicant, or, if the applicant has no parent, guardian, husband, wife or employer residing in this State, by some other responsible adult person. It shall be unlawful for any person to sign the application of a minor under the provisions of this section when such application misstates the age of the minor and any person knowingly violating this provision shall be guilty of a misdemeanor.

The Division shall not grant the application of any minor between the ages

of 16 and 18 years for an operator's license unless such minor presents evidence of having satisfactorily completed the driver training and safety education courses offered at the public high schools as provided in G.S. 20-88.1 or upon having satisfactorily completed a course of driving instruction offered at a licensed commercial driver training school or an approved nonpublic secondary school, provided instruction offered in such schools shall be approved by the State Commissioner of Motor Vehicles and the State Superintendent of Public Instruction and all expenses for such instruction shall be paid by the persons enrolling in such courses and/or by the schools offering them.

(b) The Division may grant an application for a limited learner's permit of any minor under the age of 16, who otherwise meets the requirements of licensing under this section, when such application is signed by both the applicant and his or her parent or guardian or some other responsible adult with whom the applicant resides and is approved by the Division of Motor Vehicles. Such limited learner's permit shall entitle the applicant, while having such permit in his immediate possession, to drive a motor vehicle upon the highways for a period of six months, while such minor is accompanied by a parent, guardian, or other person approved by the Division, who is licensed under this Chapter to operate a motor vehicle and who is actually occupying a seat beside the driver. Provided, however, a limited learner's permit as herein provided shall be issued only to those applicants who have reached the age of 15 years. In the event a minor who has been issued a limited learner's permit under this subsection operates a motor vehicle in violation of any provision herein, the permit shall be cancelled.

Provided a driver who holds a learner's permit only shall not be deemed a male operator under age 25 for the purpose of determining the insurance premium rate for persons insured under automobile property damage and bodily injury liability insurance policies.

(c) The Division may, upon satisfactory proof that a minor between the ages of 16 and 18 years has become a resident of North Carolina and holds a valid motor vehicle operator's license from his prior state of residence but has not completed a course in driver education which meets the requirements of this State, grant to such minor a temporary operator's permit under such terms and conditions as shall be deemed necessary by the Division to allow the minor to operate a motor vehicle in this State in order to obtain the driver education courses necessary for operator's license in North Carolina. Every application for a temporary operator's permit shall be made upon the approved form furnished by the Division. A temporary operator's permit issued pursuant to this section shall be subject to all provisions of law relating to operator's license. (1935, c. 52, s. 6; 1953, c. 355; 1955, c. 1187, s. 8; 1963, c. 968, ss. 2, 2A; 1965, c. 410, s. 3; c. 1171; 1967, c. 694; 1969, c. 37; 1973, c. 191, ss. 1, 2; c. 664, ss. 1, 2; 1975, c. 79; c. 716, s. 5.)

Editor's Note. — The first 1975 amendment added subsection (c).

The second 1975 amendment substituted "Division" for "Department" throughout the section.

§ 20-11.1: Repealed by Session Laws 1965, c. 410, s. 4.

§ 20-12. Instruction. — Any licensed operator or chauffeur may instruct a person who is 16 or more years of age in the operation of a motor vehicle. Any person so instructing another shall be seated as to be within reach of the controls of the motor vehicle and shall be responsible for the operation thereof. (1935, c. 52, s. 7; 1953, c. 356.)

§ 20-12.1. Giving instruction while under influence of alcohol or drugs. — (a) It shall be unlawful for any person who is under the influence of intoxicating

liquor or who is under the influence of drugs to accompany or instruct another person as provided in G.S. 20-11 and G.S. 20-12 of this Article.

(b) Any person accompanying and instructing another person as provided in G.S. 20-11 and G.S. 20-12 of this Article shall be subject to the provisions of G.S. 20-16.2 to the same intent and in the same manner as persons who drive or operate a motor vehicle and in addition shall be subject to the provisions of G.S. 20-17(2). (1977, c. 116, ss. 1, 2.)

§ 20-13. Mandatory revocation of license of provisional licensee. — (a) The operator's license of any person shall be suspended by the Division without preliminary hearing upon notice to the Division of such person's conviction of a motor vehicle moving violation, as specified in subsection (b), committed while such person was still a provisional licensee. A provisional licensee is any licensee who has not attained his eighteenth birthday. A motor vehicle moving violation, as used herein, does not include any of those offenses for which no points under the point system may be assessed by specific reference in G.S. 20-16(c), nor does the term include those equipment violations specified in Part 9 of Article 3 of this Chapter.

(b) The basis for departmental action, and the period of suspension, shall be as follows:

(1) For conviction of a second motor vehicle moving violation, in any 12-month period, 30 days;
(2) For conviction of a third such violation, in any 12-month period, three months;
(3) For conviction of a fourth such violation, in any 12-month period, one year.

After the expiration of six months of any suspension hereunder, the parent or someone standing in loco parentis of the provisional licensee may request a hearing for the purpose of obtaining a license upon a probationary status.

If such provisional licensee demonstrates to the Division that his conduct and attitude is such as to entitle him to favorable consideration, the Division may rescind the remainder of the suspension and allow such provisional licensee to operate motor vehicles under his provisional license in a probationary status. Such provisional licensee must agree in writing to accept such terms and conditions as the Division may see fit to impose during the term of probation.

(c) In the event of conviction of two or more motor vehicle moving offenses committed on a single occasion, a licensee shall be charged, for purposes of this section, with only one moving offense.

(d) The suspension provided for in this section shall be in addition to any other remedies which the Division may have against a licensee under other provisions of law; however, when the license of any person is subject to suspension under this section and at the same time is also subject to suspension or revocation under other provisions of law, such suspensions or revocations shall run concurrently.

(e) For the purpose of this section the word "conviction" shall include a plea of guilty or nolo contendere, or a determination of guilty by a jury or by a court, and it includes a forfeiture of bail or collateral deposited to secure appearance in court of the defendant, unless the forfeiture has been vacated. The provisions of this section shall not apply if prayer for judgment is continued upon conviction.

(f) Upon receipt of notice on conviction of a licensee's first motor vehicle moving offense, committed while such licensee was a provisional licensee, the Division shall mail to the licensee at his last known address a letter of warning,

but failure of the licensee to receive such letter of warning shall not prevent the suspension of his license under this section.

(g) Operators whose licenses have been suspended under the provisions of this section shall not be required to maintain proof of financial responsibility upon reissuance of the license solely because of suspension pursuant to this section, except as provided under Article 13 of this Chapter. The registered owner's liability insurance policy shall insure said licensee who is a member of said registered owner's household or anyone who is in lawful possession of said automobile. (1963, c. 968, s. 1; 1965, c. 897; 1967, c. 295, s. 1; 1971, c. 120, ss. 1, 2; 1973, c. 439; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsections (a), (b), (d) and (f).

Revocation under this section is mandatory and not subject to court review. Wing v. Godwin, 271 N.C. 426, 156 S.E.2d 683 (1967).

Operation of Vehicle with Improper Taillights Is a Moving Violation. — See opinion of Attorney General to Mr. Henry M. Whitesides, Fourteenth Solicitorial District, 41 N.C.A.G. 211 (1971).

§ 20-13.1. Revocation of license of provisional licensee upon conviction of moving violation in connection with accident resulting in personal injury or property damage. — The operator's license of a provisional licensee as defined in G.S. 20-13 may be suspended by the Division for a period of 60 days upon notice of such licensee's conviction of one motor vehicle moving violation in connection with a motor vehicle accident resulting in personal injury or property damage of more than three hundred dollars ($300.00). Upon suspending any license as herein provided, the Division shall immediately notify the licensee, in writing, and, upon the request of the licensee's parent or guardian or someone standing in loco parentis to the child, afford him an opportunity for a hearing as early as practical within 20 days after receipt of the request in the county wherein the licensee resides or at some other place mutually agreed upon. Upon such hearing, the duly authorized agents of the Division may administer oaths and issue subpoenas for the attendance of witnesses and the production of relevant documents and may require reexamination. Upon such hearing, the Division may rescind, modify or affirm its order of suspension. (1967, c. 295, s. 2; 1971, c. 437; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout the section.

§ 20-14. Duplicate licenses. — In the event that an operator's or chauffeur's license is lost or destroyed, or if it is necessary to change the name or address thereon, the person to whom the license is issued may, upon payment of a fee of one dollar ($1.00) and upon furnishing proof satisfactory to the Division that the license has been lost or destroyed, or that the person's name or address has been changed, obtain a duplicate or substitute license. (1935, c. 52, s. 9; 1943, c. 649, s. 2; 1969, c. 783, s. 2; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

Quoted in State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

§ 20-15. Authority of Division to cancel license. — (a) The Division shall have authority to cancel any operator's or chauffeur's license upon determining that the licensee was not entitled to the issuance thereof hereunder, or that said

licensee failed to give the required or correct information in his application, or committed fraud in making such application.

(b) Upon such cancellation, the licensee must surrender the license so cancelled to the Division. (1935, c. 52, s. 10; 1943, c. 649, s. 3; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in two places.

Quoted in Parks v. Howland, 4 N.C. App. 197, 166 S.E.2d 701 (1969).

§ 20-16. Authority of Division to suspend license. — (a) The Division shall have authority to suspend the license of any operator or chauffeur with or without preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee:

(1) Has committed an offense for which mandatory revocation of license is required upon conviction;

(2) Has been involved as a driver in any accident resulting in the death or personal injury of another or serious property damage, which accident is obviously the result of the negligence of such driver, and where such property damage has not been compensated for;

(3) Is an habitually reckless or negligent driver of a motor vehicle;

(4) Is incompetent to drive a motor vehicle;

(5) Has, under the provisions of subsection (c) of this section, within a three-year period, accumulated 12 or more points, or eight or more points in the three-year period immediately following the reinstatement of a license which has been suspended or revoked because of a conviction for one or more traffic offenses;

(6) Has made or permitted an unlawful or fraudulent use of such license or a learner's permit, or has displayed or represented as his own, a license or learner's permit not issued to him;

(7) Has committed an offense in another state, which if committed in this State would be grounds for suspension or revocation;

(8) Has been convicted of illegal transportation of intoxicating liquors;

(9) Has, within a period of 12 months, been convicted of two or more charges of speeding in excess of 55 and not more than 80 miles per hour, or of one or more charges of reckless driving and one or more charges of speeding in excess of 55 and not more than 80 miles per hour;

(10) Has been convicted of operating a motor vehicle at a speed in excess of 75 miles per hour on a public road or highway where the maximum speed is less than 70 miles per hour;

(10a) Has been convicted of operating a motor vehicle at a speed in excess of 80 miles per hour on a public highway where the maximum speed is 70 miles per hour; or

(11) Has been sentenced by a court of record and all or a part of the sentence has been suspended and a condition of suspension of the sentence is that the operator or chauffeur not operate a motor vehicle for a period of time.

(b) Pending an appeal from a conviction of any violation of the motor vehicle laws of this State, no driver's or chauffeur's license shall be suspended by the Division of Motor Vehicles because of such conviction or because of evidence of the commission of the offense for which the conviction has been had.

(c) The Division shall maintain a record of convictions of every person licensed or required to be licensed under the provisions of this Article as an operator or chauffeur and shall enter therein records of all convictions of such persons for

any violation of the motor vehicle laws of this State and shall assign to the record of such person, as of the date of commission for the offense, a number of points for every such conviction in accordance with the following schedule of convictions and points, except that points shall not be assessed for convictions resulting in suspensions or revocations under other provisions of laws: Further, any points heretofore charged for violation of the motor vehicle inspection laws shall not be considered by the Division of Motor Vehicles as a basis for suspension or revocation of operator's or chauffeur's license:

Schedule of Point Values

Passing stopped school bus	5
Reckless driving	4
Hit and run, property damage only	4
Following too close	4
Driving on wrong side of road	4
Illegal passing	4
Running through stop sign	3
Speeding in excess of 55 miles per hour	3
Failing to yield right-of-way	3
Running through red light	3
No operator's license or license expired more than one year	3
Failure to stop for siren	3
Driving through safety zone	3
No liability insurance	3
Failure to report accident where such report is required	3
Speeding in a school zone in excess of the posted school zone speed limit	3
All other moving violations	2

The [above] provisions of this subsection shall only apply to violations and convictions which take place within the State of North Carolina.

No points shall be assessed for conviction of the following offenses:

Overloads
Over length
Over width
Over height
Illegal parking
Carrying concealed weapon
Improper plates
Improper registration
Improper muffler
Public drunk within a vehicle
Possession of liquor
Improper display of license plates or dealers' tags
Unlawful display of emblems and insignia
Failure to display current inspection certificate.

In case of the conviction of a licensee of two or more traffic offenses committed on a single occasion, such licensee shall be assessed points for one offense only and if the offenses involved have a different point value, such licensee shall be assessed for the offense having the greater point value.

Upon the restoration of the license or driving privilege of such person whose license or driving privilege has been suspended or revoked because of conviction for a traffic offense, any points that might previously have been accumulated in the driver's record shall be cancelled.

Whenever a licensee accumulates as many as four points hereunder, the Division shall mail a letter of warning to the licensee at his last known address,

but failure to receive such warning letter shall not prevent a suspension under this subsection. Whenever any licensee accumulates as many as seven points or accumulates as many as four points during a three-year period immediately following reinstatement of his license after a period of suspension or revocation, the Division may request the licensee to attend a conference regarding such licensee's driving record. The Division may also afford any licensee who has accumulated as many as seven points or any licensee who has accumulated as many as four points within a three-year period immediately following reinstatement of his license after a period of suspension or revocation an opportunity to attend a driver improvement clinic operated by the Division and, upon the successful completion of the course taken at the clinic, three points shall be deducted from the licensee's conviction record; provided, that only one deduction of points shall be made on behalf of any licensee within any 10-year period.

When a license is suspended under the point system provided for herein, the first such suspension shall be for not more than 60 days; the second such suspension shall not exceed six months and any subsequent suspension shall not exceed one year.

Whenever the operator's or chauffeur's license of any person is subject to suspension under this subsection and at the same time also subject to suspension or revocation under other provisions of laws, such suspensions or revocations shall run concurrently.

In the discretion of the Division, a period of probation not to exceed one year may be substituted for suspension or for any unexpired period of suspension under subsections (a)(1) through (a)(10a) of this section. Any violation of probation during the probation period shall result in a suspension for the unexpired remainder of the suspension period. Any accumulation of three or more points under this subsection during a period of probation shall constitute a violation of the condition of probation.

(d) Upon suspending the license of any person as hereinbefore in this section authorized, the Division shall immediately notify the licensee in writing and upon his request shall afford him an opportunity for a hearing, unless a preliminary hearing was held before his license was suspended, as early as practical within not to exceed 20 days after receipt of such request in the county wherein the licensee resides unless the Division and the licensee agree that such hearing may be held in some other county, and such notice shall contain the provisions of this section printed thereon. Upon such hearing the duly authorized agents of the Division may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may require a reexamination of the licensee. Upon such hearing the Division shall either rescind its order of suspension, or good cause appearing therefor, may extend the suspension of such license. Provided further upon such hearing, preliminary or otherwise, involving subsections (a)(1) through (a)(10a) of this section, the Division may for good cause appearing in its discretion substitute a period of probation not to exceed one year for the suspension or for any unexpired period of suspension. Probation shall mean any written agreement between the suspended driver and a duly authorized respresentative of the Division and such period of probation shall not exceed one year, and any violation of the probation agreement during the probation period shall result in a suspension for the unexpired remainder of the suspension period. The authorized agents of the Division shall have the same powers in connection with a preliminary hearing prior to suspension as this subsection provided in connection with hearings held after suspension. (1935, c. 52, s. 11; 1947, c. 893, ss. 1, 2; c. 1067, s. 13; 1949, c. 373, ss. 1, 2; c. 1032, s. 2; 1953, c. 450; 1955, c. 1152, s. 15; c. 1187, ss. 9-12; 1957, c. 499, s. 1; 1959, c. 1242, ss. 1-2; 1961, c. 460, ss. 1, 2(a); 1963, c. 1115; 1965, c. 130; 1967, c. 16; 1971, c. 234, ss. 1, 2; c. 793, ss. 1, 2; c. 1198, ss. 1, 2; 1973, c. 16; c. 17, ss. 1, 2; 1975, c. 716, s. 5; 1977, c. 902, s. 1.)

I. In General.
II. Specific Offenses.
III. Judicial Proceedings.
IV. Administrative Proceedings.

I. IN GENERAL.

Cross References. — As to period of suspension or revocation, see § 20-19. And see note to § 20-17.

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout the section.

The 1977 amendment added the listing for speeding in a school zone in excess of the posted school zone speed limit to the schedule of point value in subsection (c).

For brief discussion of the 1949 amendments, see 27 N.C.L. Rev. 371, 372. For article on administrative hearing for suspension of driver's license, see 30 N.C.L. Rev. 27 (1951).

Former Subdivision (a)(5) Unconstitutional. — Before its amendment in 1959, subdivision (a)(5) of this section provided for suspension of the license of a driver who was "an habitual violator of the traffic laws." This provision was held to be an unconstitutional grant of legislative power to the Department (now Division) of Motor Vehicles, since it did not contain any fixed standard or guide to which the Department (now Division) must conform but on the contrary left it to the sole discretion of the Commissioner of the Department (now Division) to determine when a driver was an habitual violator of the traffic laws. Harvel v. Scheidt, 249 N.C. 699, 107 S.E.2d 549 (1959), holding also that a point system set up and used by the Department (now Division) did not furnish an adequate standard or guide.

Provisions of Subsection (d) and Other Statutes Satisfy Requirements of Due Process. — The provisions of § 20-48, together with the provisions of subsection (d) of this section, relating to the right of review, and the provisions of § 20-25, relating to the right of appeal, satisfy the requirements of procedural due process. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970); State v. Atwood, 27 N.C. App. 445, 219 S.E.2d 521 (1975), rev'd on other grounds, 290 N.C. 266, 225 S.E.2d 543 (1976).

Operation of Motor Vehicle on Highway Is a Personal Privilege. — A license to operate motor vehicles on the public highways of North Carolina is a personal privilege and property right which may not be denied a citizen of this State who is qualified therefor under its statutes. In re Donnelly, 260 N.C. 375, 132 S.E.2d 904 (1963).

Albeit a Conditional One. — The right of a citizen to travel upon the public highways is a common right, but the exercise of that right may be regulated or controlled in the interest of public safety under the police power of the State. The operation of a motor vehicle on such highways is not a natural right. It is a conditional privilege, which may be suspended or revoked under the police power. Honeycutt v. Scheidt, 254 N.C. 607, 119 S.E.2d 777 (1961).

And Licensee May Not Be Deprived of Such Privilege except as Provided by Statutes. — A license to operate a motor vehicle may be suspended or revoked only in accordance with statutory provisions as they are written and construed in this jurisdiction. In re Donnelly, 260 N.C. 375, 132 S.E.2d 904 (1963).

A license to operate a motor vehicle is a privilege in the nature of a right of which the licensee may not be deprived save in the manner and upon the conditions prescribed by statute. Gibson v. Scheidt, 259 N.C. 339, 130 S.E.2d 679 (1963).

Power to suspend or revoke a driver's license is exclusively in the Department (now Division) of Motor Vehicles, subject to review by the superior court. State v. Warren, 230 N.C. 299, 52 S.E.2d 879 (1949).

When a person is convicted of a criminal offense, the court has no authority to pronounce judgment suspending or revoking his operator's license or prohibiting him from operating a motor vehicle during a specified period. State v. Cole, 241 N.C. 576, 86 S.E.2d 203 (1955).

Discretionary suspensions and revocations of licenses by the Department (now Division) of Motor Vehicles are reviewable under § 20-25, but mandatory revocations under § 20-17 are not so reviewable. In re Wright, 228 N.C. 584, 46 S.E.2d 696 (1948). See State v. Cooper, 224 N.C. 100, 29 S.E.2d 18 (1944); Winesett v. Scheidt, 239 N.C. 190, 79 S.E.2d 501 (1954); Fox v. Scheidt, 241 N.C. 31, 84 S.E.2d 259 (1954); State v. Cole, 241 N.E. 576, 86 S.E.2d 203 (1955); Harrell v. Scheidt, 243 N.C. 735, 92 S.E.2d 182 (1956).

Where the facts as found by the trial court are in exact conformity with the suspension provisions of subdivision (a)(5), the Department (now Division) has complete authority by law to suspend petitioner's license, and the superior court judge has no authority to substitute his discretion for that of the Department. In re Grubbs, 25 N.C. App. 232, 212 S.E.2d 414 (1975).

II. SPECIFIC OFFENSES.

Enumerated Offenses Are "Moving Violations". — The legislature considered the enumerated offenses in this section, including "no operator's license," to be moving violations. Underwood v. Howland, 274 N.C. 473, 164 S.E.2d 2 (1968).

Revocation or Suspension Not Mandatory

for Reckless Driving. — The offense of reckless driving in violation of § 20-140 is not an offense for which, upon conviction, the revocation or suspension of an operator's license is mandatory. In re Bratton, 263 N.C. 70, 138 S.E.2d 809 (1964).

Subsection (a)(9) of This Section Did Not Repeal by Implication § 20-17(6). — Section 20-17(6) authorizing the mandatory revocation of a driver's license upon two convictions of reckless driving within a 12-month period was not repealed by implication by the subsequent enactment of subsection (a)(9) of this section authorizing the discretionary suspension of a driver's license upon one or more convictions of reckless driving and one or more convictions of speeding in excess of 44 (now 55) mph and not more than 75 (now 80) mph, within a 12-month period. Person v. Garrett, 280 N.C. 163, 184 S.E.2d 873 (1971).

Effect of Point System on Subdivision (a)(9). — The provisions of the 1959 amendment, establishing the point system, do not purport to repeal, modify or change in any manner the provisions of subdivision (a)(9) of this section. Honeycutt v. Scheidt, 254 N.C. 607, 119 S.E.2d 777 (1961).

Hence, in canceling the points accumulated over the period stipulated in subsection (c) of this section, upon which a suspension may be ordered, such cancellation does not cancel or change the number of convictions upon which a license may be suspended under the provisions of subdivision (a)(9). Honeycutt v. Scheidt, 254 N.C. 607, 119 S.E.2d 777 (1961).

The Department (now Division) of Motor Vehicles properly suspends a motor vehicle operator's license upon proof that the licensee had been convicted of speeding 60 miles per hour in a 50-mile-per-hour zone on two separate occasions within a 12-month period, even though one of the occasions had theretofore been used as the basis for a prior suspension of the license. Honeycutt v. Scheidt, 254 N.C. 607, 119 S.E.2d 777 (1961).

Operation of Vehicle with Improper Taillights Carries Two Points as a Moving Violation. — See opinion of Attorney General to Mr. Henry M. Whitesides, Fourteenth Solicitorial District, 41 N.C.A.G. 211 (1971).

Conviction of Drunken Driving in Another State. — Upon a receipt of notification from the highway department of another state that a resident of this State had there been convicted of drunken driving, the Department (now Division) of Motor Vehicles has the right to suspend the driving license of such person. In re Wright, 228 N.C. 301, 45 S.E.2d 370 (1947).

III. JUDICIAL PROCEEDINGS.

Judgment in Excess of Jurisdiction of Court. — A judgment of the superior court requiring a defendant to surrender his license to drive a motor vehicle and prohibiting him from operating such vehicles for a specified period is in excess of the jurisdiction of such court and is void. State v. Cooper, 224 N.C. 100, 29 S.E.2d 18 (1944).

A provision in a judgment in a prosecution for violation of a statutory provision regulating the operation of motor vehicles, that defendant's license be surrendered and that defendant not operate a motor vehicle on the public highways for a stipulated period, is void and will be stricken on appeal. State v. Warren, 230 N.C. 299, 52 S.E.2d 879 (1949).

Court May Make Surrender of License a Condition to Suspension of Sentence. — While the Department (now Division) of Motor Vehicles is given the exclusive authority to suspend or revoke a driver's license, a court, either upon a plea of guilty or nolo contendere, may make the surrender of defendant's driver's license a condition upon which prison sentence or other penalty is suspended. Winesett v. Scheidt, 239 N.C. 190, 79 S.E.2d 501 (1954).

Conviction Must Be Followed by Appealable Judgment. — In view of the provision in § 20-24(c) to the effect that a "conviction," when used in this Article, shall mean a final conviction, it would seem that before a license may be revoked pursuant to the provisions of this section, there must be a conviction of two or more offenses enumerated in subdivision (a)(9) of this section, followed by a judgment from which an appeal might have been or may be taken. Barbour v. Scheidt, 246 N.C. 169, 97 S.E.2d 855 (1957).

Conviction Is Not Final Where Prayer for Judgment Is Continued on Payment of Costs. — Where, in prosecutions for speeding, prayer for judgment is continued upon payment of the costs, there are no final convictions within the purview of § 20-24(c), and defendant's license to drive may not be revoked pursuant to this section. Barbour v. Scheidt, 246 N.C. 169, 97 S.E.2d 855 (1957).

IV. ADMINISTRATIVE PROCEEDINGS.

Suspension of License a Civil Proceeding. — A proceeding to suspend an operator's license under this section is civil and not criminal in its nature. Honeycutt v. Scheidt, 254 N.C. 607, 119 S.E.2d 777 (1961).

Extraterritorial Jurisdiction Not Conferred. — The words "other satisfactory evidence" in this section refer to the form of notice of conviction in another state, and confer no extraterritorial jurisdiction of the offense itself. In re Donnelly, 260 N.C. 375, 132 S.E.2d 904 (1963).

This section and § 20-23 do not contemplate a suspension or revocation of license by reason of a conviction in North Carolina of an alleged offense committed beyond its borders. In re Donnelly, 260 N.C. 375, 132 S.E.2d 904 (1963).

But Evidence Relative to Offenses outside State May Be Considered. — It is proper for the Department's (now Division's) hearing agent to hear and consider evidence bearing on guilt and innocence, among other things, relative to offenses outside the State, as assist him in reaching a decision in the exercise of discretionary authority. In re Donnelly, 260 N.C. 375, 132 S.E.2d 904 (1963).

Construed with § 20-23. — This section and § 20-23 are parts of the same statute relating to the same subject matter and must be construed in pari materia. In re Wright, 228 N.C. 584, 46 S.E.2d 696 (1948).

This section is the real source of authority. Section 20-23 prescribes a rule of evidence and adds the power of revocation, when this section is the basis of action. In re Wright, 228 N.C. 584, 46 S.E.2d 696 (1948).

Effect of Conviction or Plea of Nolo Contendere to Offense Requiring Mandatory Revocation. — Where the Department (now Division) of Motor Vehicles suspends or revokes a driver's license under the provisions of this section, the Department (now Division) must notify the licensee, and upon request afford him a hearing which is de novo, with right of appeal as prescribed by this section, and where the Department (now Division) elects to proceed under this section, it may not contend that the licensee has no right of appeal because of a conviction of or a plea of nolo contendere to an offense requiring mandatory revocation of license. Winesett v. Scheidt, 239 N.C. 190, 79 S.E.2d 501 (1954).

For note as to effect of plea of nolo contendere, see 32 N.C.L. Rev. 549 (1954).

Requirement of Notice Applies Also to Suspension under § 20-29.1. — A requirement for notice is made by subsection (d) of this section in all cases in which a license is suspended under the authority of this section. Even though a similar requirement for notice does not appear in § 20-29.1, a reading of this Chapter, in which both sections appear, makes it clear that the legislature intended that notice be given to the licensee when the Commissioner suspends a license under § 20-29.1 as well as when suspension is made under the authority of this section. State v. Hughes, 6 N.C. App. 287, 170 S.E.2d 78 (1969).

Division Not Required to Have Valid Warrant or Valid Judgment in Files. — This section authorizes the Department (now Division) to suspend the license of any operator or chauffeur with or without preliminary hearing upon a showing by its records that the licensee has committed an enumerated offense. It does not require the Department (now Division) to have in its files a "valid warrant" nor a "valid judgment" before it is authorized to take action. Tilley v. Garrett, 8 N.C. App. 556, 174 S.E.2d 617 (1970).

"Satisfactory Evidence". — This section uses the phrase "satisfactory evidence." Satisfactory evidence is such as a reasonable mind might accept as adequate to support a conclusion. It is equivalent to sufficient evidence, which is defined to be such evidence as in amount is adequate to justify the court or jury in adopting the conclusion in support of which it was adduced. Winesett v. Scheidt, 239 N.C. 190, 79 S.E.2d 501 (1954).

Admissibility of Division Records. — The records of the Department (now Division) of Motor Vehicles, properly authenticated, are competent for the purpose of establishing the status of a person's operator's license and driving privilege. State v. Rhodes, 10 N.C. App. 154, 177 S.E.2d 754 (1970).

A defendant is entitled to have the contents of the official record of the status of his driver's license limited, if he so requests, to the formal parts thereof, including the certification and seal, plus the fact that under official action of the Department (now Division) of Motor Vehicles the defendant's license was in a state of revocation or suspension on the date he is charged with committing the offense under § 20-28. State v. Rhodes, 10 N.C. App. 154, 177 S.E.2d 754 (1970).

Burden of Proof. — In the administrative hearing under subsection (d) of this section the burden of proof is upon the Department (now Division) to show "good cause" for extending the suspension of petitioner's license. Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971).

Upon the hearing held under subsection (d) of this section the burden is upon the Department (now Division) to show that petitioner has willfully refused to take the test. Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971).

Right of Licensee to Be Confronted by and Cross-Examine Adverse Witness. — At the administrative hearing, under subsection (d) of this section, the licensee has the right to be confronted by any witness whose testimony is used against him and to cross-examine the witness if he so desires. However, this is a right which the licensee waives if he does not assert it in apt time. Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971).

When Licensee Entitled to Review. — A licensee is entitled to a review whenever the suspension, cancellation, or revocation of a license is made in the discretion of the Department (now Division) of Motor Vehicles, whether under this section, or § 20-23, or any other provision of the statute. Carmichael v. Scheidt, 249 N.C. 472, 106 S.E.2d 685 (1959).

Remedy for Improper Deprivation of License. — If a person has been improperly deprived of his license by the Department (now Division) of Motor Vehicles due to mistake in law or fact, his remedy is to apply for a hearing as provided by subsection (d) of this section, or by

petitioning the superior court pursuant to § 20-25. At a hearing under either of these statutory provisions, he would be permitted to show that the suspension was erroneous. One cannot contemptuously ignore the quasi-judicial determinations made by the Department (now Division) of Motor Vehicles. Beaver v. Scheidt, 251 N.C. 671, 111 S.E.2d 881 (1960).

§ 20-16.1. Mandatory suspension of driver's license upon conviction of excessive speeding; limited driving permits for first offenders. — (a) Notwithstanding any other provisions of this Article, the Division shall suspend for a period of 30 days the license of any operator or chauffeur without preliminary hearing on receiving a record of such operator's or chauffeur's conviction of exceeding by more than 15 miles per hour the speed limit, either within or outside the corporate limits of a municipality, if such person was also driving at a speed in excess of 55 miles per hour at the time of the offense.

(b) (1) Upon a first conviction only of violating subsection (a), the trial judge may when feasible allow a limited driving privilege or license to the person convicted for proper purposes reasonably connected with the health, education and welfare of the person convicted and his family. For purposes of determining whether conviction is a first conviction, no prior offense occurring more than 10 years before the date of the current offense shall be considered. The judge may impose upon such limited driving privilege any restrictions as in his discretion are deemed advisable including, but not limited to, conditions of days, hours, types of vehicles, routes, geographical boundaries and specific purposes for which limited driving privilege is allowed. Any such limited driving privilege allowed and restrictions imposed thereon shall be specifically recorded in a written judgment which shall be as near as practical to that hereinafter set forth and shall be signed by the trial judge and shall be affixed with the seal of the court and shall be made a part of the records of the said court. A copy of said judgment shall be transmitted to the Division of Motor Vehicles along with any operator's or chauffeur's license in the possession of the person convicted and a notice of the conviction. Such permit issued hereunder shall be valid for such length of time as shall be set forth in the judgment of the trial judge. Such permit shall constitute a valid license to operate motor vehicles upon the streets and highways of this or any other state in accordance with the restrictions noted thereon and shall be subject to all provisions of law relating to operator's or chauffeur's license, not by their nature, rendered inapplicable.

(2) The judgment issued by the trial judge as herein permitted shall as near as practical be in form and content as follows:

	IN THE GENERAL COURT
STATE OF NORTH CAROLINA	OF JUSTICE
COUNTY OF	RESTRICTED DRIVING PRIVILEGES

This cause coming on to be heard and being heard before the Honorable ....., Judge presiding, and it appearing to the court that the defendant, ..., has been convicted of the offense of excessive speeding in violation of G.S. 20-16.1(a), and it further appearing to the court that the defendant should be issued a restrictive driving license and is entitled to the issuance of a restrictive driving privilege under and by the authority of G.S. 20-16.1(b);

Now, therefore, it is ordered, adjudged and decreed that the defendant be allowed to operate a motor vehicle under the following conditions and under no other circumstances.

Name: .....

Race: ..... Sex: .....

Height: . . . . . Weight: . . . . . .
Color of Hair: . . . . . Color of Eyes: . . . . . .
Birth Date: . . . . . .
Driver's License Number: . . . . . .
Signature of Licensee: . . . . . .
Conditions of Restriction: . . . . . .
Type of Vehicle: . . . . . .
Geographic Restrictions: . . . . . .
Hours of Restriction: . . . . . .
Other Restrictions: . . . . . .
This limited license shall be effective from . . . . . to . . . . . subject to further orders as the court in its discretion may deem necessary and proper.
This the . . . . . day of . . . . . ., 19. . . .

. . . . . .
(Judge Presiding)

(3) Upon conviction of such offense outside the jurisdiction of this State the person so convicted may apply to the resident judge of the superior court of the district in which he resides for limited driving privileges hereinbefore defined. Upon such application the judge shall have the authority to issue such limited driving privileges in the same manner as if he were the trial judge.

(4) Any violation of the restrictive driving privileges as set forth in the judgment of the trial judge allowing such privileges shall constitute the offense of driving while license has been suspended as set forth in G.S. 20-28. Whenever a person is charged with operating a motor vehicle in violation of the restrictions, the limited driving privilege shall be suspended pending the final disposition of the charge.

(5) This section is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina.

(c) Upon conviction of a similar second or subsequent offense which offense occurs within one year of the first or prior offense, the license of such operator or chauffeur shall be suspended for 60 days, provided such first or prior offense occurs subsequent to July 1, 1953.

(d) Notwithstanding any other provisions of this Article, the Division shall suspend for a period of 60 days the license of any operator or chauffeur without preliminary hearing on receiving a record of such operator's or chauffeur's conviction of having violated the laws against speeding described in subsection (a) and of having violated the laws against reckless driving on the same occasion as the speeding offense occurred.

(e) The provisions of this section shall not prevent the suspension or revocation of a license for a longer period of time where the same may be authorized by other provisions of law.

(f) Operators or chauffeurs whose licenses have been suspended under the provisions of this section shall not be required to maintain proof of financial responsibility upon reissuance of the license solely because of suspension pursuant to this section. (1953, c. 1223; 1955, c. 1187, s. 15; 1959, c. 1264, s. 4; 1965, c. 133; 1975, c. 716, s. 5; c. 763.)

Cross Reference. — As to mandatory revocation of license for refusal to submit to chemical test to determine alcoholic content of blood, see § 20-16.2.

Editor's Note. — Session Laws 1975, c. 763, designated the former four paragraphs of this section as subsections (a), (d), (e) and (f) and added subsections (b) and (c).

Pursuant to Session Laws 1975, c. 716, s. 5, "Division" has been substituted for "Department" in subdivisions (a), (b) and (d) of this section as amended by Session Laws 1975, c. 763.

The operation of a motor vehicle on a public highway is not a natural right. It is a conditional privilege which the State in the

interest of public safety acting under its police power may regulate or control, and the State may suspend or revoke the driver's license. Shue v. Scheidt, 252 N.C. 561, 114 S.E.2d 237 (1960).

This section was enacted to promote highway safety by providing for the mandatory suspension of a driver's license upon conviction of excessive speeding and reckless driving. Shue v. Scheidt, 252 N.C. 561, 114 S.E.2d 237 (1960).

And Not to Punish Licensee. — The suspension or revocation of a driver's license is no part of the punishment for the violation or violations of traffic laws. The purpose of the suspension or revocation of a driver's license is to protect the public and not to punish the licensee. Shue v. Scheidt, 252 N.C. 561, 114 S.E.2d 237 (1960).

It Applies to Violation of § 20-141(d). — This section applies where a driver is convicted of driving his passenger automobile at a speed of 75 miles per hour on a public highway in a 45-mile-per-hour speed zone established under subsection (d) of § 20-141. Shue v. Scheidt, 252 N.C. 561, 114 S.E.2d 237 (1960).

Allowance of Limited Driving Privilege. — Session Laws 1975, c. 763 applies to offenses committed before July 1, 1975, in which trial is held after July 1, 1975, and such defendants are eligible to receive a limited driving privilege if the trial judge, in his discretion, determines to allow it. Session Laws 1975, c. 763 does not apply to cases in which the offense occurred and final judgment was entered before July 1, 1975, with no appeal being taken and such persons are not eligible to receive a limited driving privilege. Session Laws 1975, c. 763 applies to offenses committed and tried in the inferior court prior to July 2, 1975, but which are pending appeal to the superior court on July 1, 1975, and such persons are eligible to receive a limited driving privilege if the superior court judge in his discretion, determines to allow it. Opinion of Attorney General to Honorable William H. McMillan, 45 N.C.A.G. 19 (1975).

Limited Driving Privilege May Not Be Extended to Cover Discretionary Revocation by Division. — Subsection (b) applies to offenses of speeding 71 mph through 75 mph, speeds in excess of 75 mph, and speeds in excess of 80 mph. When a limited permit is issued pursuant to G.S. 20-16.1(b) by the court upon conviction or a plea of guilty to a speeding charge requiring a mandatory 30 day revocation and such speed is such as to give rise to a discretionary revocation by the Division of Motor Vehicles for a greater period, the limited driving privilege issued by the court may not be extended to cover the revocation by the Division of Motor Vehicles. Opinion of Attorney General to Mr. E. Burt Aycock, Jr., Assistant District Attorney, 45 N.C.A.G. 112 (1975).

Nolo Contendere Has Same Effect as Conviction. — As a basis for suspension or revocation of an operator's license, a plea of nolo contendere has the same effect as a conviction or plea of guilty of such offense. Gibson v. Scheidt, 259 N.C. 339, 130 S.E.2d 679 (1963).

Cited in Underwood v. Howland, 274 N.C. 473, 164 S.E.2d 2 (1968).

§ 20-16.2. Mandatory revocation of license in event of refusal to submit to chemical tests; right of driver to request test. — (a) Any person who drives or operates a motor vehicle upon any highway or any public vehicular area shall be deemed to have given consent, subject to the provisions of G.S. 20-139.1, to a chemical test or tests of his breath or blood for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving or operating a motor vehicle while under the influence of intoxicating liquor. The test or tests shall be administered at the request of a law-enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle on a highway or public vehicular area while under the influence of intoxicating liquor. The law-enforcement officer shall designate which of the aforesaid tests shall be administered. The person arrested shall forthwith be taken before a person authorized to administer a chemical test and this person shall inform the person arrested both verbally and in writing and shall furnish the person a signed document setting out:

(1) That he has a right to refuse to take the test;

(2) That refusal to take the test will result in revocation of his driving privilege for six months;

(3) That he may have a physician, qualified technician, chemist, registered nurse or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of the law-enforcement officer; and

(4) That he has the right to call an attorney and select a witness to view for him the testing procedures; but that the test shall not be delayed for this purpose for a period in excess of 30 minutes from the time he is notified of his rights.

(b) Any person who is unconscious or who is otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn the consent provided by subsection (a) of this section and the test or tests may be administered, subject to the provisions of G.S. 20-139.1.

(c) The arresting officer, in the presence of the person authorized to administer a chemical test, shall request that the person arrested submit to a test described in subsection (a). If the person arrested willfully refuses to submit to the chemical test designated by the arresting officer, none shall be given. However, upon the receipt of a sworn report of the arresting officer and the person authorized to administer a chemical test that the person arrested, after being advised of his rights as set forth in subsection (a), willfully refused to submit to the test upon the request of the officer, the Division shall revoke the driving privilege of the person arrested for a period of six months.

(d) Upon receipt of the sworn report required by G.S. 20-16.2(c) the Division shall immediately notify the arrested person that his license to drive is revoked immediately unless said person requests in writing within three days of receipt of notice of revocation a hearing. If at least three days prior to hearing, the licensee shall so request of the hearing officer, the hearing officer shall subpoena the arresting officer and any other witnesses requested by the licensee to personally appear and give testimony at the hearing. If such person requests in writing a hearing, he shall retain his license until after the hearing. The hearing shall be conducted in the county where the arrest was made under the same conditions as hearings are conducted under the provisions of G.S. 20-16(d) except that the scope of such hearing for the purpose of this section shall cover the issues of whether the law-enforcement officer had reasonable grounds to believe the person had been driving or operating a motor vehicle upon a highway or public vehicular area while under the influence of intoxicating liquor, whether the person was placed under arrest, and whether he willfully refused to submit to the test upon the request of the officer. Whether the person was informed of his rights under the provision of G.S. 20-16.2(a)(1), (2), (3), (4) shall be an issue. The Division shall order that the revocation either be rescinded or sustained. If the revocation is sustained, the person shall surrender his license immediately upon notification.

(e) If the revocation is sustained after such a hearing, the person whose driving privilege has been revoked, under the provisions of this section, shall have the right to file a petition in the superior court for a hearing de novo to review the action of the Division in the same manner and under the same conditions as is provided in G.S. 20-25.

(f) When it has been finally determined under the procedures of this section that a nonresident's privilege to operate a motor vehicle in this State has been revoked, the Division shall give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which he has a license.

(g) Repealed by Session Laws 1973, c. 914.

(h) As used in this section, the term "public vehicular area" shall mean and include any drive, driveway, road, roadway, street, or alley upon the grounds and premises of any public or private hospital, college, university, school, orphanage, church, or any of the institutions maintained and supported by the State of North Carolina, or any of its subdivisions, or upon the grounds and premises of any service station, drive-in theater, supermarket, store, restaurant or office building, or any other business or municipal establishment providing parking space for customers, patrons, or the public.

(i) Notwithstanding any other provision of this Chapter, a person, who is stopped, detained or questioned by a law-enforcement officer having reasonable grounds to believe that the person has been driving or operating a motor vehicle on a highway or public vehicular area while under the influence of intoxicating liquor, may request and the law-enforcement officer shall cause the administration of the chemical tests provided for in this section prior to the person's arrest for violating any provision of G.S. 20-138. Prior to the administration of chemical tests under this subsection, the person who is stopped, detained or questioned shall sign a form, to be supplied by the Division, confirming his request. The tests provided for in this subsection shall be administered under the same conditions as are provided in this section for the administration of chemical tests after arrest. The results of the tests administered under this subsection may be used in evidence in the trial of a charge arising out of the occurrence. (1963, c. 966, s. 1; 1965, c. 1165; 1969, c. 1074, s. 1; 1971, c. 619, ss. 3-6; 1973, c. 206, ss. 1, 2; cc. 824, 914; 1975, c. 716, s. 5; 1977, c. 812.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsections (c), (d), (e) and (f).

The 1977 amendment added subsection (i).

For comment on chemical tests and implied consent, see 42 N.C.L. Rev. 841 (1964). For article on tests for intoxication, see 45 N.C.L. Rev. 34 (1966).

Opinions of Attorney General. — Major John Laws, N.C. State Highway Patrol, 40 N.C.A.G. 403 (1969).

Consent Deemed Given. — Anyone who operates a motor vehicle upon the highways of the State is deemed to have given consent to a breathalyzer test. State v. Allen, 14 N.C. App. 485, 188 S.E.2d 568 (1972).

The word "refuse" as used in this section means the declination of a request or demand, or the omission to comply with some requirement of law, as the result of a positive intention to disobey. Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971).

Advising Accused of Rights. — See opinion of Attorney General to Robert Powell, 41 N.C.A.G. 326 (1971).

Request Made by Officer to Technician. — That portion of this section which provides that "the test or tests shall be administered upon request of a law-enforcement officer having reasonable grounds to believe the person to have been driving a motor vehicle upon the public highways of this State ... while under the influence of intoxicating liquor," refers to the request being made by the officer to the technician who will give the test, rather than being directed to the suspect. State v. Randolph, 273 N.C. 120, 159 S.E.2d 324 (1968), decided prior to the 1969 amendment.

Person authorized to administer a chemical test is a breathalyzer operator who holds a permit issued by the Commission for Health Services (now Department of Human Resources) pursuant to § 20-139.1(b). Opinion of Attorney General to Dr. Arthur J. McBay, Office, Chief Medical Examiner, 42 N.C.A.G. 326 (1973).

Administration of the breathalyzer test is not dependent upon the legality of the arrest but hinges solely upon the law-enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle on a highway or public vehicular area while under the influence of intoxicating liquor. State v. Eubanks, 283 N.C. 556, 196 S.E.2d 706 (1973); State v. Stewardson, 32 N.C. App. 344, 232 S.E.2d 308 (1977).

Refusal May Not Be Used as Assumption of Guilt. — This section does not say that if a person refuses to submit to the test, it will be used as an assumption of guilt in court. State v. Mobley, 273 N.C. 471, 160 S.E.2d 334 (1968), decided prior to the 1969 amendment.

Accused Need Not Be Warned That Results May Be Used against Him. — An accused subjected to a blood or breath test need not be warned that the results may be used against him. State v. Sykes, 20 N.C. App. 467, 201 S.E.2d 544, aff'd, 285 N.C. 202, 203 S.E.2d 849 (1974).

Failure by officers to advise defendant of his right to refuse to take a breathalyzer test does not render the result of the test inadmissible in evidence, defendant having impliedly consented to the test by virtue of driving an automobile on the public highways of the State, and the test having been administered after arrest and without the use of force or violence. State v. McCabe, 1 N.C. App. 237, 161 S.E.2d 42 (1968), decided prior to the 1969 amendment.

Under this section, failure to advise a defendant of his right to refuse the breathalyzer test does not render the results of the test inadmissible in court. State v. Allen, 14 N.C. App. 485, 188 S.E.2d 568 (1972).

But before the test is administered, an accused must be permitted to call an attorney

and to select a witness to observe testing procedures. State v. Sykes, 20 N.C. App. 467, 201 S.E.2d 544, aff'd, 285 N.C. 202, 203 S.E.2d 849 (1974).

Delay After Being Informed of Rights Held Refusal to Submit to Test. — Where the breathalyzer operator once fully informed petitioner of his rights with regard to the breath test, there was no obligation upon him to remind petitioner of the effect of his refusal to submit to the test, and petitioner's delay in taking the breathalyzer test, was at his own peril even though he stated that he was awaiting his attorney. Therefore, the trial court could properly find, that defendant had refused to submit to the breathalyzer test. Creech v. Alexander, 32 N.C. App. 139, 231 S.E.2d 36 (1977).

Officer's Sworn Report Is Not Prima Facie Evidence of Refusal to Submit to Breathalyzer Test. — This section does not make the law-enforcement officer's sworn report prima facie evidence that the arrested person willfully refused to submit to the breathalyzer test. Therefore, if he objects to its introduction, the report cannot be used as evidence against him. Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971).

In the absence of a timely objection as to its introduction, the officer's sworn report was sufficient evidence to sustain the Department's (now Division's) suspension of petitioner's license. Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971).

Results of Test Are Not Evidence within Privilege against Self-Incrimination. — The taking of a breath sample from an accused for the purpose of test is not evidence of a testimonial or communicative nature within the privilege against self-incrimination, and for that reason the requirements of Miranda are inapplicable to a breathalyzer test administered pursuant to the statutes. State v. Sykes, 285 N.C. 202, 203 S.E.2d 849 (1974).

Results of the breathalyzer test were admissible even though defendant's initial "commitment" to take the test was obtained before he was advised of his statutory rights embodied in subsection (a). State v. Sykes, 285 N.C. 202, 203 S.E.2d 849 (1974).

Admission of Test Results Held Prejudicial Error. — Where the State offered no evidence upon the question of whether defendant had been notified of his right to call an attorney and to select a witness to view breathalyzer testing procedures in accordance with subsection (a), results of the test were inadmissible, and admission of the results over defendant's objection constituted prejudicial error. State v. Shadding, 17 N.C. App. 279, 194 S.E.2d 55 (1973).

The failure of the State to establish that defendant was accorded the statutory right to have another test, in addition to the others which he was properly accorded, renders the results of the breathalyzer test inadmissible in evidence. State v. Fuller, 24 N.C. App. 38, 209 S.E.2d 805 (1974).

Suspensions of License Distinguished. — The suspension of a license for refusal to submit to a chemical test at the time of an arrest for drunken driving and a suspension which results from a plea of guilty or a conviction of that charge are separate and distinct revocations. Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971); Vuncannon v. Garrett, 17 N.C. App. 440, 194 S.E.2d 364 (1973); Creech v. Alexander, 32 N.C. App. 139, 231 S.E.2d 36 (1977).

The suspension of a license which results from a plea of guilty or a conviction for drunken driving in no way exempts the licensee from the mandatory effects of the 60-day suspension of his license if he willfully refused to take a chemical test. Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971); Creech v. Alexander, 32 N.C. App. 139, 231 S.E.2d 36 (1977).

Revocation for Refusal to Submit to Test Is Contingent upon First Having Been Arrested for Driving under Influence. — See opinion of Attorney General to Lt. M. S. Niven, 43 N.C.A.G. 81 (1973).

Department (now Division) of Motor Vehicles May Revoke Limited Driving Privilege Granted by a Court. — See opinion of Attorney General to Mr. Joe W. Garrett, Commissioner, N.C. Department of Motor Vehicles, 40 N.C.A.G. 414 (1970).

The Department (now Division) of Motor Vehicles had authority to suspend for 60 days the limited driving privilege granted a defendant convicted of drunken driving for defendant's willful refusal to take a breathalyzer test at the time of his arrest for drunken driving. Vuncannon v. Garrett, 17 N.C. App. 440, 194 S.E.2d 364 (1973).

Acquittal of Drunken Driving Charge Restores License. — Subsection (c) of this section constitutes an exception to the general rule (that a licensee's subsequent acquittal of a drunken driving charge has no bearing upon a proceeding to revoke his license because of his refusal to submit to the chemical test at the time of his arrest) by providing that any person arrested for drunken driving who refuses to submit to a chemical test to determine the alcoholic content of his blood and who is thereafter acquitted of the charge shall have his driver's license restored immediately. Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971).

Running of 30 Minutes prior to Testing Defendant. — See opinion of Attorney General to LTC Charles B. Pierce, N.C. State Highway Patrol, 41 N.C.A.G. 242 (1971).

Defendant's Rights Not Denied. — Where defendant was fully and completely advised of his rights before a breathalyzer test was administered to him, the officer's error in stating

that defendant could have a physician, registered nurse or a qualified technician or qualified person of his own choosing to administer the test under the direction of a law officer instead of stating that defendant could have a qualified person of his own choosing to administer a test or tests in addition to any administered at the direction of the law-enforcement officer did not deny defendant his rights. State v. Green, 27 N.C. App. 491, 219 S.E.2d 529 (1975).

Right to Full De Novo Review. — Any person whose driver's license has been suspended under subsection (d) of this section has the right to a full de novo review by a superior court judge. This means the court must hear the matter on its merits from beginning to end as if no trial or hearing had been held by the Department (now Division) and without any presumption in favor of its decision. Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971).

§ 20-16.3. Preliminary breath test. — Any law-enforcement officer having reasonable grounds to believe that a person has been driving or operating a vehicle on a highway or public vehicular area while under the influence of intoxicating liquor may, without making an arrest, request that such person submit to a preliminary chemical breath test to be administered by the officer. The results of this test shall not be admissible in evidence and failure to submit to the test shall not constitute a violation of this Chapter. Nothing contained in this section shall be construed to prevent or require a subsequent chemical test pursuant to G.S. 20-16.2. The law-enforcement officer requesting the test shall advise orally and in writing the person to be tested that his failure to take the test or his taking of the test shall not be construed to prevent or require a subsequent chemical test pursuant to G.S. 20-16.2.

No device may be used to give a chemical test under the provisions of this section unless it has been approved as to type and make by the Department of Human Resources. (1973, c. 312, s. 1; c. 476, s. 128.)

§ 20-17. Mandatory revocation of license by Division. — The Division shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction for any of the following offenses when such conviction has become final:

(1) Manslaughter (or negligent homicide) resulting from the operation of a motor vehicle.
(2) Driving or operating a vehicle within this State while under the influence of intoxicating liquor or while under the influence of an impairing drug as defined in G.S. 20-19(h); or driving or operating a vehicle within this State with a blood alcohol level of 0.10 percent or more.
(3) Any felony in the commission of which a motor vehicle is used.
(4) Failure to stop and render aid as required under the laws of this State in the event of a motor vehicle accident.
(5) Perjury or the making of a false affidavit or statement under oath to the Division under this Article or under any other law relating to the ownership of motor vehicles.
(6) Conviction, or forfeiture of bail not vacated, upon two charges of reckless driving committed within a period of 12 months.
(7) Conviction, or forfeiture of bail not vacated, upon one charge of reckless driving while engaged in the illegal transportation of intoxicants for the purpose of sale.
(8) Conviction of using a false or fictitious name or giving a false or fictitious address in any application for an operator's or chauffeur's license, or learner's permit, or any renewal or duplicate thereof, or knowingly making a false statement or knowingly concealing a material fact or otherwise committing a fraud in any such application or procuring or knowingly permitting or allowing another to commit any of the foregoing acts.
(9) Death by vehicle as defined in G.S. 20-141.4.
(10) Speeding in excess of 55 miles per hour and at least 15 miles per hour over the legal limit in violation of G.S. 20-141(j).

(11) Conviction of assault with a motor vehicle. (1935, c. 52, s. 12; 1947, c. 1067, s. 14; 1967, c. 1098, s. 2; 1971, c. 619, s. 7; 1973, c. 18, s. 1; c. 1081, s. 3; c. 1330, s. 2; 1975, c. 716, s. 5; c. 831.)

I. In General.
II. Driving under the Influence.
III. Reckless Driving.

I. IN GENERAL.

Cross References. — As to power to suspend or revoke license generally, see § 20-16 and note. As to period of suspension or revocation, see § 20-19.

Editor's Note. — The first 1975 amendment substituted "Division" for "Department" in the introductory paragraph and in subdivision (5).

The second 1975 amendment added subdivision (11).

Revocation of License Not Part of Court's Punishment. — The revocation of a license to operate a motor vehicle is not a part of, nor within the limits of, punishment to be fixed by the court wherein the offender is tried. When the conviction has become final, the revocation of the license by the Department (now Division) of Motor Vehicles is a measure flowing from the police power of the State designed to protect users of the State's highways. Harrell v. Scheidt, 243 N.C. 735, 92 S.E.2d 182 (1956).

Ministerial Duty. — Mandatory revocation of an operator's license under this section is the performance of a ministerial duty. Fox v. Scheidt, 241 N.C. 31, 84 S.E.2d 259 (1954).

The record of a conviction which has become final suffices to invoke the ministerial duty of performing the mandatory requirement of the statute by the Department (now Division) of Motor Vehicles. Harrell v. Scheidt, 243 N.C. 735, 92 S.E.2d 182 (1956).

Ministerial Duty. — The revocation of a license by the Division of Motor Vehicles is nothing more than the performance of a ministerial duty by that administrative agency, and is in no sense a "judgment" that can preclude the superior court from acting on a petition filed in that court pursuant to the habitual offenders provisions of the General Statutes. In re Woods, 33 N.C. App. 86, 234 S.E.2d 45 (1977).

No action or order of the court is required to put the revocation of the license into effect. Harrell v. Scheidt, 243 N.C. 735, 92 S.E.2d 182 (1956); Barbour v. Scheidt, 246 N.C. 169, 97 S.E.2d 855 (1957).

"Forthwith" does not mean the absolute exclusion of any interval of time, but means only that no unreasonable length of time shall intervene before performance. State v. Ball, 255 N.C. 351, 121 S.E.2d 604 (1961).

This section does not require the Commissioner to act instantaneously. State v. Ball, 255 N.C. 351, 121 S.E.2d 604 (1961).

The word "forthwith" in this section does not require instantaneous action but only action within a reasonable length of time. Simpson v. Garrett, 15 N.C. App. 449, 190 S.E.2d 251 (1972); State v. Ward, 31 N.C. App. 104, 228 S.E.2d 490 (1976).

And Action by Division within 11 Days of Notice Reasonably Complied with Section. — Where the Department (now Division) of Motor Vehicles acted within 11 days after it received notice of plaintiff's second conviction for reckless driving, this was reasonable compliance with this section. Simpson v. Garrett, 15 N.C. App. 449, 190 S.E.2d 251 (1972).

Injunction Not Available to Plaintiff Who Could Have Prevented Delay in Start of Revocation Period. — Where the elapse of approximately 15 months between plaintiff's last conviction for reckless driving and the order of revocation was not caused by defendant, Commissioner of Motor Vehicles or his Department (now Division), but the delay apparently resulted from the failure of the clerk of the court where plaintiff was last convicted to act promptly in forwarding a record of the conviction to the Department (now Division) of Motor Vehicles, and plaintiff could have prevented any delay in the start of the revocation period by surrendering his license to the clerk and obtaining a receipt therefor at the time of his second conviction, plaintiff is not entitled to injunctive relief. Simpson v. Garrett, 15 N.C. App. 449, 190 S.E.2d 251 (1972).

Applies Only to Conviction in North Carolina Court. — The mandatory provision of this section applies only to a conviction in a North Carolina court. Carmichael v. Scheidt, 249 N.C. 472, 106 S.E.2d 685 (1959).

This section does not specifically require notice, and revocation under this statute is not reviewable in court. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

The surrendering of his license, and the forwarding of it to the Department (now Division) by the court, gives the licensee sufficient notice that his operator's license has been revoked. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

Notice and Record Showing Revocation under Section. — An official notice and record of "revocation of license" for the specified reason of "conviction of involuntary manslaughter" mailed to a driver by the Department (now Division) of Motor Vehicles

was held to show that the license was revoked under this section rather than suspended under § 20-16, and did not support a finding by the trial court that the license was suspended under the latter statute. Mintz v. Scheidt, 241 N.C. 268, 84 S.E.2d 882 (1954).

Division Not Estopped to Assert That It Acted under Section. — Where the Department (now Division) of Motor Vehicles revokes a driver's license under the mandatory provisions of this section, the Department (now Division) will not be stopped from asserting that it was acting under the provisions of this section by reason of a letter subsequently written to the licensee granting him a hearing under § 20-16(c) [now subsection (d)], since in such instance a hearing is authorized by law. Mintz v. Scheidt, 241 N.C. 268, 84 S.E.2d 882 (1954).

Plea of Nolo Contendere. — This section mandatorily required the Department (now Division) of Motor Vehicles to revoke the petitioner's license upon receipt of the record from the superior court of his plea of nolo contendere, which in that case for the purposes of that case was equivalent to a conviction on the charge of driving a motor vehicle while under the influence of intoxicating liquor upon the public highways. Fox v. Scheidt, 241 N.C. 31, 84 S.E.2d 259 (1954).

As a basis for suspension or revocation of an operator's license, a plea of nolo contendere has the same effect as a conviction or plea of guilty of such offense. Gibson v. Scheidt, 259 N.C. 339, 130 S.E.2d 679 (1963).

A plea of nolo contendere to a charge of manslaughter resulting from the operation of an automobile supports the revocation of the driver's license under the mandatory provisions of this section. Mintz v. Scheidt, 241 N.C. 268, 84 S.E.2d 882 (1954).

Review of Revocation. — Mandatory revocations under this section are not reviewable under § 20-25. In re Wright, 228 N.C. 584, 46 S.E.2d 696 (1948); Winesett v. Scheidt, 239 N.C. 190, 79 S.E.2d 501 (1954); Fox v. Scheidt, 241 N.C. 31, 84 S.E.2d 259 (1954); Harrell v. Scheidt, 243 N.C. 735, 92 S.E.2d 182 (1956).

There is no right of judicial review when the revocation is mandatory pursuant to the provisions of this section. In re Austin, 5 N.C. App. 575, 169 S.E.2d 20 (1969); Rhyne v. Garrett, 18 N.C. App. 565, 197 S.E.2d 235 (1973).

The mandatory provision of this section is not subject to judicial review. Carmichael v. Scheidt, 249 N.C. 472, 106 S.E.2d 685 (1959).

II. DRIVING UNDER THE INFLUENCE.

Revocation of a driver's license is mandatory whenever it is made to appear that the licensee has been found guilty of driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug. Parks v. Howland, 4 N.C. App. 197, 166 S.E.2d 701 (1969); In re Austin, 5 N.C. App. 575, 169 S.E.2d 20 (1969).

Period of Revocation. — Where there is mandatory revocation under subdivision (2) of this section, the period of revocation shall be as provided in § 20-19. Carmichael v. Scheidt, 249 N.C. 472, 106 S.E.2d 685 (1959); In re Austin, 5 N.C. App. 575, 169 S.E.2d 20 (1969).

Evidence that defendant has been convicted of operating an automobile while under the influence of intoxicants was competent on the question as to whether a driver's license issued to defendant had been legally revoked. State v. Stewart, 224 N.C. 528, 31 S.E.2d 534 (1944).

III. RECKLESS DRIVING.

The provisions of subdivision (6) of this section are mandatory. Snyder v. Scheidt, 246 N.C. 81, 97 S.E.2d 461 (1957).

The provisions of subdivision (6) of this section and § 20-19(f) are mandatory and not discretionary. Simpson v. Garrett, 15 N.C. App. 449, 190 S.E.2d 251 (1972).

Section 20-16(a)(9) Did Not Repeal Subdivision (6) of This Section by Implication. — Subdivision (6) of this section authorizing the mandatory revocation of a driver's license upon two convictions of reckless driving within a 12-month period was not repealed by implication by the subsequent enactment of § 20-16(a)(9) authorizing the discretionary suspension of a driver's license upon one or more convictions of reckless driving and one or more convictions of speeding in excess of 44 (now 55) mph and not more than 75 (now 80) mph within a 12-month period. Person v. Garrett, 280 N.C. 163, 184 S.E.2d 873 (1971).

The word "conviction," as used in subdivision (6), refers to a final conviction by a court of competent jurisdiction. Snyder v. Scheidt, 246 N.C. 81, 97 S.E.2d 461 (1957).

Date of Offense, Not Date of Conviction, Controls. — Subdivision (6) of this section directs the revocation of a driver's license for one year upon his conviction of two charges of reckless driving committed within a period of 12 months, and if both offenses were committed within a 12-month period, it is immaterial that the conviction of the second offense was entered more than 12 months after the first. The date of the offense, not the date of the conviction, is the determinative factor. Snyder v. Scheidt, 246 N.C. 81, 97 S.E.2d 461 (1957).

Notice of Second Conviction Must Precede Revocation. — The Department (now Division) of Motor Vehicles was not authorized under this section to revoke plaintiff's license before it received notice of his second conviction for reckless driving. Simpson v. Garrett, 15 N.C. App. 449, 190 S.E.2d 251 (1972).

Revocation Not Mandatory for Reckless

Driving. — The offense of reckless driving in violation of § 20-140 is not an offense for which, upon conviction, the revocation or suspension of an operator's license is mandatory. In re Bratton, 263 N.C. 70, 138 S.E.2d 809 (1964).

§ 20-17.1. Revocation of license of mental incompetents, alcoholics and habitual users of narcotic drugs. — (a) The Commissioner, upon receipt of notice that any person has been legally adjudicated incompetent or has been involuntarily admitted to an institution for the treatment of alcoholism or drug addiction, shall forthwith make inquiry into the facts for the purpose of determining whether such person is competent to operate a motor vehicle. Unless the Commissioner is satisfied that such person is competent to operate a motor vehicle with safety to persons and property, he shall revoke such person's driving privilege. Provided that if such person requests, in writing, a hearing, he shall retain his license until after the hearing, and if the revocation is sustained after such hearing, the person whose driving privilege has been revoked under the provisions of this section, shall have the right to a review by the review board as provided in G.S. 20-9(g)(4) upon written request filed with the Division.

(b) If any person shall be adjudicated as incompetent or is involuntarily admitted for the treatment of alcoholism or drug addiction, the clerk of the court in which any such adjudication is made shall forthwith send a certified copy of abstract thereof to the Commissioner.

(c) Repealed by Session Laws 1973, c. 475, s. 3½.

(d) It is the intent of this section that the provisions herein shall be carried out by the Commissioner of Motor Vehicles for the safety of the motoring public. The Commissioner shall have authority to make such agreements as are necessary with the persons in charge of every institution of any nature for the care and treatment of alcoholics or habitual users of narcotic drugs, to effectively carry out the duty hereby imposed and the person in charge of the institutions described above shall cooperate with and assist the Commissioner of Motor Vehicles.

(e) Notwithstanding the provisions of G.S. 8-53, 8-53.2, 122-8.1 and 122-8.2, the person or persons in charge of any institution as set out in subsection (a) hereinabove shall furnish such information as may be required for the effective enforcement of this section. Information furnished to the Division of Motor Vehicles as provided herein shall be confidential and the Commissioner of Motor Vehicles shall be subject to the same penalties and is granted the same protection as is the department, institution or individual furnishing such information. No criminal or civil action may be brought against any person or agency who shall provide or submit to the Commissioner of Motor Vehicles or his authorized agents the information as required herein.

(f) Revocations under this section may be reviewed as provided in G.S. 20-9(g)(4). (1947, c. 1006, s. 9; 1953, c. 1300, s. 36; 1955, c. 1187, s. 16; 1969, c. 186, s. 1; c. 1125; 1971, c. 208, ss. 1, 1½; c. 401, s. 1; c. 767; 1973, c. 475, s. 3½; c. 1362; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsections (a) and (e).

For note on reporting patients for review of driver's license, see 48 N.C.L. Rev. 1003 (1970).

Constitutionality. — This section is neither vague nor overbroad. Jones v. Penny, 387 F. Supp. 383 (M.D.N.C. 1974).

A legitimate State interest may be rationally advanced by the classification drawn in this section, thus it does not deny equal protection of the laws to those involuntarily committed. Jones v. Penny, 387 F. Supp. 383 (M.D.N.C. 1974).

To decide that those whose institutionalization was legally coerced present, as a class, significantly greater highway safety problems and thus require renewed scrutiny as to driving skills is, whatever its wisdom or efficacy or validity in a particular case, not irrational under the equal protection clause. Jones v. Penny, 387 F. Supp. 383 (M.D.N.C. 1974).

That North Carolina has not chosen in this

section to include "all alcoholics and drug addicts" is not irrational. Jones v. Penny, 387 F. Supp. 383 (M.D.N.C. 1974).

This section fairly informs those it affects of the standard against which their conduct will be measured, and thus there is no constitutional infirmity presented. Jones v. Penny, 387 F. Supp. 383 (M.D.N.C. 1974).

The Phrase "Is Satisfied" in Subsection (a). — This section imparts an objective standard, and the phrase "is satisfied" refers to the conclusion the Commissioner reaches after his inquiry into the facts for the purpose of determining whether such person is competent to operate a motor vehicle with safety to persons and property. Jones v. Penny, 387 F. Supp. 383 (M.D.N.C. 1974).

There is no substantive constitutional right to drive an automobile. Jones v. Penny, 387 F. Supp. 383 (M.D.N.C. 1974).

But once licenses are issued, their continued possession may become essential in the pursuit of a livelihood, and suspension of issued licenses thus involves State action that adjudicates important interests of the licensees; in such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. Jones v. Penny, 387 F. Supp. 383 (M.D.N.C. 1974).

Persons involuntarily committed are entitled to notice and hearing before the Department (now Division) of Motor Vehicles prior to any revocation of their driving privileges. Jones v. Penny, 387 F. Supp. 383 (M.D.N.C. 1974).

The type of "facts" to be looked into and the scope of the "inquiry" are tied to the obvious purpose of this section: to determine driving competency. By themselves they set no standard against which the plaintiff's privilege is judged. Jones v. Penny, 387 F. Supp. 383 (M.D.N.C. 1974).

Subsection (f) of This Section. — Those who seek and lose on review under this section are treated unequally as to the revocation period since § 20-9(g)(4) applies. Jones v. Penny, 387 F. Supp. 383 (M.D.N.C. 1974).

§ 20-18. Conviction of offenses described in § 20-181 not ground for suspension or revocation. — Conviction of offenses described in G.S. 20-181 shall not be cause for the suspension or revocation of operator's or chauffeur's license under the terms of this Article. (1939, c. 351, s. 2; 1955, c. 913, s. 1.)

Cited in State v. McDaniels, 219 N.C. 763, 14 S.E.2d 793 (1941).

§ 20-19. Period of suspension or revocation. — (a) When a license is suspended under subdivision (9) of G.S. 20-16(a), the period of suspension shall be in the discretion of the Division and for such time as it deems best for public safety but shall not exceed six months.

(b) When a license is suspended under subdivision (10) of G.S. 20-16(a), the period of suspension shall be in the discretion of the Division and for such time as it deems best for public safety but shall not exceed a period of 12 months.

(c) When a license is suspended under any other provision of this Article which does not specifically provide a period of suspension, the period of suspension shall be not more than one year.

(d) When a license is revoked because of a second conviction for driving or operating a vehicle while under the influence of intoxicating liquor or while under the influence of an impairing drug, occurring within three years after a prior conviction, the period of revocation shall be four years; provided, that the Division may, after the expiration of two years, issue a new license upon satisfactory proof that the former licensee has not been convicted within the past two years with a violation of any provision of the motor vehicle laws, liquor laws or drug laws of North Carolina or any other state and is not an excessive user of alcohol or drugs and upon such terms and conditions which the Division may see fit to impose for the balance of said period of revocation; provided, that as to a license which has been revoked because of a second conviction for driving under the influence of intoxicating liquor or a narcotic drug prior to May 2, 1957, and which has not been restored, the Division may upon the application of the former licensee, and after the expiration of two years of such period of revocation, issue a new license upon satisfactory proof that the former licensee

has not been convicted within the past two years with a violation of any provision of the motor vehicle laws, liquor laws or drug laws of North Carolina or any other state and is not an excessive user of alcohol or drugs and upon such terms and conditions which the Division may see fit to impose for the balance of a four-year revocation period, which period shall be computed from the date of the original revocation.

(e) When a license is revoked because of a third or subsequent conviction for driving or operating a vehicle while under the influence of intoxicating liquor or while under the influence of an impairing drug, occurring within five years after a prior conviction, the period of revocation shall be permanent; provided, that the Division may, after the expiration of three years, issue a new license upon satisfactory proof that the former licensee has not been convicted within the past three years with a violation of any provision of motor vehicle laws, liquor laws or drug laws of North Carolina or any other state and is not an excessive user of alcohol or drugs; provided, that as to a license which has been revoked because of a third or subsequent conviction for driving under the influence of intoxicating liquor or a narcotic drug prior to May 2, 1957, and which license has not been restored, the Division may, upon application of the former licensee and after the expiration of three years of such period of revocation, issue a new license upon satisfactory proof that the former licensee has not been convicted within the past three years with a violation of any provision of the motor vehicle laws, liquor laws or drug laws of North Carolina or any other state and is not an excessive user of alcohol or drugs. When a new license is issued under the provisions of this subsection, it may be issued upon such terms and conditions as the Division may see fit to impose. The terms and conditions imposed by the Division may not exceed a period of three years.

(f) When a license is revoked under any other provision of this article which does not specifically provide a period of revocation, the period of revocation shall be one year.

(g) When a license is suspended under subdivision (11) of G.S. 20-16(a), the period of suspension shall be for a period of time not in excess of the period of nonoperation imposed by the court as a condition of the suspended sentence; further, in such case, it shall not be necessary to comply with the Motor Vehicle Safety and Financial Responsibility Act in order to have such license returned at the expiration of the suspension period.

(h) As used in this section, the term "under the influence of an impairing drug" shall mean under the influence of any narcotic drug or under the influence of any other drug to such degree that a person's physical or mental faculties are appreciably impaired. (1935, c. 52, s. 13; 1947, c. 1067, s. 15; 1951, c. 1202, ss. 2-4; 1953, c. 1138; 1955, c. 1187, ss. 13, 17, 18; 1957, c. 499, s. 2; c. 515, s. 1; 1959, c. 1264, s. 11A; 1969, c. 242; 1971, c. 619, ss. 8-10; 1973, c. 1445, ss. 1-4; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsections (a), (b), (d) and (e).

Effective Date of Revocation. — A revocation based on a second offense for driving while under the influence of intoxicating liquor or a narcotic drug must be for a period of three (now four) years, and the effective date of the revocation for such period should not begin prior to the date of the second conviction. Likewise, when a license is permanently revoked, the effective date of such revocation should not be earlier than the date of the conviction for the third offense. Carmichael v. Scheidt, 249 N.C. 472, 106 S.E.2d 685 (1959).

Period of Suspension Runs from Date of Order by Division. — When within five days from receipt of notice of conviction the Department (now Division) ordered the revocation of an operator's license for one year, the revocation was in effect until the same date in the following year, and did not expire one year from the date of conviction or the date of receipt of notice by the Department (now Division). State v. Ball, 255 N.C. 351, 121 S.E.2d 604 (1961).

Injunction Not Available to Plaintiff Who Could Have Prevented Delay in Start of Revocation Period. — Where the elapse of approximately 15 months between plaintiff's last conviction for reckless driving and the order

of revocation was not caused by defendant, Commissioner of Motor Vehicles or his Department (now Division), but the delay apparently resulted from the failure of the clerk of the court where plaintiff was last convicted to act promptly in forwarding a record of the conviction to the Department (now Division) of Motor Vehicles, and plaintiff could have prevented any delay in the start of the revocation period by surrendering his license to the clerk and obtaining a receipt therefor at the time of his second conviction, plaintiff is not entitled to injunctive relief. Simpson v. Garrett, 15 N.C. App. 449, 190 S.E.2d 251 (1972).

Reinstatement or the receipt of a new license during the revocation period is not a legal right of the defendant, but an act of grace which the General Assembly permits, but does not require, the Department (now Division) to apply. The authority to exercise or apply this act of grace is granted to the Department (now Division), not to the courts. In re Austin, 5 N.C. App. 575, 169 S.E.2d 20 (1969).

Warrant Need Not Charge Second Offense in Order to Support Revocation under Subsection (d). — Where defendant's driver's license had previously been suspended for a period of one year for conviction of driving while under the influence of intoxicating liquor, and defendant pleaded guilty to another such offense upon warrant not charging a second offense, the Department (now Division) of Motor Vehicles, upon receipt of the report of the later conviction, must revoke defendant's license for the period provided by subsection (d) of this section. Harrell v. Scheidt, 243 N.C. 735, 92 S.E.2d 182 (1956).

Out-of-State Conviction to Be Counted as Conviction for Purpose of Subsection (e). — An out-of-state conviction of operating a motor vehicle upon the public highway while under the influence of intoxicating liquor or an impairing drug is to be counted as a conviction for the purpose of the operation of the mandatory provision of subsection (e). In re Oates, 18 N.C. App. 320, 196 S.E.2d 596 (1973).

Review of Permanent Revocation under Subsection (e). — Where the Department (now Division) of Motor Vehicles permanently revoked plaintiff's driver's license for a third offense of driving while under the influence, the departmental action was mandatory, and the superior court was without authority to revoke or make any order with reference thereto. Rhyne v. Garrett, 18 N.C. App. 565, 197 S.E.2d 235 (1973).

Conflict between § 20-227 and Subsection (e). — When in conflict or irreconcilable under the facts of a particular case, the five-year period of § 20-227 must prevail over the three-year provision under subsection (e) of this section. State v. Freedle, 30 N.C. App. 118, 226 S.E.2d 184, appeal dismissed, 290 N.C. 779, 229 S.E.2d 34 (1976), rehearing denied, 291 N.C. 325, 230 S.E.2d 678 (1976).

The provisions of subsection (f) of this section are mandatory. Snyder v. Scheidt, 246 N.C. 81, 97 S.E.2d 461 (1957).

The provisions of § 20-17(6) and subsection (f) of this section are mandatory and not discretionary. Simpson v. Garrett, 15 N.C. App. 449, 190 S.E.2d 251 (1972).

Subsection (f)'s one-year period applies to § 20-17.1. Jones v. Penny, 387 F. Supp. 383 (M.D.N.C. 1974).

Division Required to Revoke License for Statutory Period. — Upon receiving a record of an operator's or chauffeur's conviction upon two charges of reckless driving committed within a period of 12 months, the Department (now Division) of Motor Vehicles is required to forthwith revoke the license of such persons for the statutory period. Simpson v. Garrett, 15 N.C. App. 449, 190 S.E.2d 251 (1972).

Where there is mandatory revocation under subdivision (2) of § 20-17, the period of revocation shall be as provided in this section. Carmichael v. Scheidt, 249 N.C. 472, 106 S.E.2d 685 (1959); In re Austin, 5 N.C. App. 575, 169 S.E.2d 20 (1969).

Applied in Fox v. Scheidt, 241 N.C. 31, 84 S.E.2d 259 (1954); State v. Moore, 247 N.C. 368, 101 S.E.2d 26 (1957); Honeycutt v. Scheidt, 254 N.C. 607, 119 S.E.2d 777 (1961); Gibson v. Scheidt, 259 N.C. 339, 130 S.E.2d 679 (1963); In re Woods, 33 N.C. App. 86, 234 S.E.2d 45 (1977).

Stated in State v. Letterlough, 6 N.C. App. 36, 169 S.E.2d 269 (1969); Ennis v. Garrett, 279 N.C. 612, 184 S.E.2d 246 (1971).

Cited in State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

§ 20-20. Surrender of licenses. — Whenever any vehicle operator's or chauffeur's license issued by the Division is revoked or suspended under the terms of this Chapter, the licensee shall surrender to the Division all vehicle operator's and chauffeur's licenses and duplicates thereof issued to him by the Division which are in his possession. (1935, c. 52, s. 14; 1943, c. 649, s. 4; 1967, c. 280; 1969, c. 182; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment, effective July 1, 1975, substituted "Division" for "Department" in three places.

Stated in State v. Hughes, 6 N.C. App. 287, 170 S.E.2d 78 (1969).

§ 20-21. No operation under foreign license during suspension or revocation in this State. — Any resident or nonresident whose operator's or chauffeur's license or right or privilege to operate a motor vehicle in this State has been suspended or revoked as provided in this Article shall not operate a motor vehicle in this State under a license, permit or registration issued by another jurisdiction or otherwise during such suspension, or after such revocation until a new license is obtained when and as permitted under this Article. (1935, c. 52, s. 15.)

§ 20-22. Suspending privileges of nonresidents and reporting convictions. — (a) The privilege of driving a motor vehicle on the highways of this State given to a nonresident hereunder shall be subject to suspension or revocation by the Division in like manner and for like cause as an operator's or chauffeur's license issued hereunder may be suspended or revoked.

(b) The Division is further authorized, upon receiving a record of the conviction in this State of a nonresident driver of a motor vehicle of any offense under the motor vehicle laws of this State, to forward a certified copy of such record to the motor vehicle administrator in the state wherein the person so convicted is a resident. (1935, c. 52, s. 16; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment, effective July 1, 1975, substituted "Division" for "Department" in two places.

Opinions of Attorney General. — Honorable John S. Gardner, District Court Judge, Sixteenth Judicial District, 40 N.C.A.G. 420 (1969).

Cited in Morrisey v. Crabtree, 143 F. Supp. 105 (M.D.N.C. 1956).

§ 20-23. Suspending resident's license upon conviction in another state. — The Division is authorized to suspend or revoke the license of any resident of this State upon receiving notice of the conviction as defined in G.S. 20-24(c) of such person in another state of the offenses hereinafter enumerated which, if committed in this State, would be grounds for the suspension or revocation of the license of an operator or chauffeur. The provisions of this section shall apply only for the offenses as set forth in G.S. 20-26(a). (1935, c. 52, s. 17; 1971, c. 486, s. 2; 1975, c. 716, s. 5.)

Cross Reference. — See note to § 20-16.

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

Opinions of Attorney General. — Honorable John S. Gardner, District Court Judge, Sixteenth Judicial District, 40 N.C.A.G. 420 (1969).

Section Is Not Mandatory. — The Department (now Division) of Motor Vehicles, under provisions of this section, is merely authorized, not directed, to suspend or revoke the license of any resident of this State upon receiving notice of the conviction of such person in another state of any offense therein which, if committed in this State, would be grounds for the suspension or revocation of the license of an operator or chauffeur. Carmichael v. Scheidt, 249 N.C. 472, 106 S.E.2d 685 (1959).

Discretion of Division. — Under the provisions of this section, it is discretionary with the Department (now Division) to suspend or revoke an operator's license upon receiving notice of his conviction in another state of an offense which, if committed in this State, would be grounds for suspension or revocation. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

Section Construed with § 20-16. — See note to § 20-16.

And § 20-25. — This section and § 20-25 must be construed in pari materia. In re Wright, 228 N.C. 584, 46 S.E.2d 696 (1948).

Licensee May Show Invalidity of Out-of-State Conviction. — Where an order of the Department (now Division) of Motor Vehicles permanently revoking the license of a driver upon a third conviction for operating a motor vehicle while under the influence of intoxicating liquor is based in part upon notice of the licensee's conviction of that offense in another state, the licensee has the right to show, if he can, that the proceedings in such other state were irregular, invalid and insufficient to

support the reported conviction, and he is entitled to a hearing de novo in the superior court upon his petition for review. The sustaining of a demurrer to such petition is error, petitioner being entitled to an adjudication of the validity of the out-of-state conviction in order to determine whether the revocation should be permanent or for the period of time prescribed by subsection (d) of § 20-19. Carmichael v. Scheidt, 249 N.C. 472, 106 S.E.2d 685 (1959).

Conviction of Drunken Driving. — Upon a receipt of notification from the highway department of another state that a resident of this State had there been convicted of drunken driving, the Department (now Division) of Motor Vehicles has the right to suspend the driving license of such person. In re Wright, 228 N.C. 301, 45 S.E.2d 370 (1947).

Notice May Be from Any Source. — This section does not limit the notice of conviction in another state upon which the Department (now Division) may act to notice from a judicial tribunal or other official agency. Under the wording of the statute, from whatever source the notice may come, the Department (now Division) may act. In re Wright, 228 N.C. 584, 46 S.E.2d 696 (1948).

§ 20-23.1. Suspending or revoking operating privilege of person not holding license. — In any case where the Division would be authorized to suspend or revoke the license of a person but such person does not hold a license, the Division is authorized to suspend or revoke the operating privilege of such a person in like manner as it could suspend or revoke his license if such person held an operator's or chauffeur's license, and the provisions of this Chapter governing suspensions, revocations, issuance of a license, and driving after license suspended or revoked, shall apply in the discretion of the Division in the same manner as if the license has been suspended or revoked. (1955, c. 1187, s. 19; 1969, c. 186, s. 2; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout the section.

Driving during Period of Suspension Constitutes Violation of § 20-28. — Under the provisions of this section and § 20-28(a), when a person who does not hold a driver's license has his operating privilege revoked or suspended in the manner and under the conditions prescribed by statute, and while such operating privilege is thus suspended or revoked he drives a motor vehicle upon the highways of this State, he violates G.S. 20-28(a). State v. Newborn, 11 N.C. App. 292, 181 S.E.2d 214 (1971).

§ 20-23.2. Suspension of license for conviction of traffic offense in federal court. — Upon receipt of notice of conviction in any court of the federal government sitting in North Carolina of the offense of driving or operating a vehicle while under the influence of intoxicating liquor or while under the influence of an impairing drug as defined in G.S. 20-19(h), the Division is authorized to revoke the driving privilege of the person convicted in the same manner as if such conviction had occurred in a court of this State. Provided that this section shall apply only to offenses committed on highways in federal parks in this State. (1969, c. 988; 1971, c. 619, s. 11; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment, effective July 1, 1975, substituted "Division" for "Department."

§ 20-24. When court to forward license to Division and report convictions. — (a) Whenever any person is convicted of any offense for which this Article makes mandatory the revocation of the operator's or chauffeur's license of such person by the Division, the court in which such conviction is had shall require the surrender to it of all operators' and chauffeurs' licenses then held by the person so convicted and the court shall thereupon forward the same, together with a record of such conviction, to the Division within 30 days.

The clerks of court, assistant clerks of court and deputy clerks of court in which any person is convicted, and as a result thereof the revocation or

suspension of the operator's or chauffeur's license of such person is required under the provisions of this Chapter, are hereby designated as agents of the Division of Motor Vehicles for the purpose of receiving all operators' and chauffeurs' licenses required to be surrendered under this section, and are hereby authorized to and shall give to such licensee a dated receipt for any such license surrendered, such receipt to be upon such form as may be approved by the Commissioner of Motor Vehicles. The original of such receipt shall be mailed forthwith to the Driver License Section of the Division of Motor Vehicles together with the operator's or chauffeur's license. Any operator's or chauffeur's license which has been surrendered and for which a receipt has been issued as herein required shall be revoked or suspended as the case may be as of the date shown upon the receipt issued to such person.

(b) Every court having jurisdiction over offenses committed under this Article, or any other law of this State regulating the operation of motor vehicles on highways, shall forward to the Division a record of the conviction of any person in said court for a violation of any [of] said laws, and may recommend the suspension of the operator's or chauffeur's license of the person so convicted. Every court shall also forward to the Division a record of every conviction in which sentence is suspended on condition that the defendant not operate a motor vehicle for a period of time, and such report shall state the period of time for which such condition is imposed; provided that the punishment for the violation of this subsection shall be the same as provided in G.S. 20-7(o).

(c) For the purpose of this Article the term "conviction" shall mean a final conviction. Also, for the purposes of this Article a forfeiture of bail or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction. Also, a defendant shall be treated for the purposes of this Article as having been convicted of any offense under this Chapter as to which he:

(1) Has been served with process under Article 17, Criminal Process, Chapter 15A of the General Statutes;
(2) Has failed to appear upon due call of the case; and
(3) Has failed within 90 days thereafter to submit himself to the jurisdiction of the court to answer the charge.

In addition to the foregoing provisions and for the purpose of this Article, a third or subsequent prayer for judgment continued within any five-year period shall be considered as a final conviction and to this end all orders entering prayer for judgments continued entered by the courts shall be reported to the Division of Motor Vehicles.

(d) After November 1, 1935, no operator's or chauffeur's license shall be suspended or revoked except in accordance with the provisions of this Article. (1935, c. 52, s. 18; 1949, c. 373, ss. 3, 4; 1955, c. 1187, s. 14; 1959, c. 47; 1965, c. 38; 1973, c. 19; 1975, cc. 46, 445; c. 716, s. 5; c. 871, s. 1.)

Local Modification. — Hertford as to subsection (b): 1953, c. 1059; Washington, as to subsection (b): 1953, c. 765.

Editor's Note. — The first 1975 amendment added "within 30 days" at the end of the first paragraph of subsection (a).

The second 1975 amendment added the third sentence, containing subdivisions (1) through (3), in subsection (c).

The third 1975 amendment substituted "Division" for "Department" throughout subsections (a) and (b) and substituted "Driver License Section of the Division of Motor Vehicles" for "Driver License Division of the Department of Motor Vehicles" in the second sentence of the second paragraph of subsection (a). Pursuant to Session Laws 1975, c. 716, s. 5, "Division" has also been substituted for "Department" in the paragraph added to subsection (c) by the fourth 1975 amendment.

The fourth 1975 amendment added the last paragraph in subsection (c).

Opinions of Attorney General. — Honorable John S. Gardner, District Court Judge, Sixteenth Judicial District, 40 N.C.A.G. 420 (1969).

Jurisdiction to Revoke. — A municipal court is without authority to revoke a driver's license, the power to suspend or revoke drivers' licenses being vested exclusively in the Department of Revenue, subject to the right of review by the

superior court, as provided in § 20-25. State v. McDaniels, 219 N.C. 763, 14 S.E.2d 793 (1941).

Meaning of Forfeiture of Bail or Collateral. — "Bail" as here used means security for a defendant's appearance in court to answer a criminal charge there pending. Ordinarily it is evidenced by a bond or recognizance which becomes a record of the court. The forfeiture thereof is a judicial act. In re Wright, 228 N.C. 584, 46 S.E.2d 696 (1948).

The mere deposit of security with an arresting officer or magistrate pending issuance and service of warrant, which deposit is retained without the semblance of judicial or legal forfeiture, is not a forfeiture of "bail" within the meaning of subsection (c) of this section. In re Wright, 228 N.C. 584, 46 S.E.2d 696 (1948); In re Donnelly, 260 N.C. 375, 132 S.E.2d 904 (1963).

Where no warrant is served, no legal action is pending in court; and when no legal action is pending, there can be no valid judgment of forfeiture of bail. In re Donnelly, 260 N.C. 375, 132 S.E.2d 904 (1963).

Bond forfeiture held to be equivalent to a conviction of driving while under the influence of an intoxicant. Rhyne v. Garrett, 18 N.C. App. 565, 197 S.E.2d 235 (1973).

Plea of Nolo Contendere. — Where the petitioner entered a plea of nolo contendere to the charge of a second offense of operating an automobile upon the public highways of the State while under the influence of intoxicating liquor, which plea was accepted by the court, for the purposes of that case in that court, such plea was equivalent to a plea of guilty, or conviction by a jury, and subsection (a) of this section required that court to enter a notation of such conviction upon the license of petitioner to operate an automobile in North Carolina, and to compel the surrender to it of such license then held by petitioner, and thereupon to forward the license, together with a record of the conviction, to the Department (now Division) of Motor Vehicles. Fox v. Scheidt, 241 N.C. 31, 84 S.E.2d 259 (1954).

When Conviction Final. — The conviction alone, without the imposition of a judgment from which an appeal might be taken, is not a final conviction within the terms of subsection (c). Barbour v. Scheidt, 246 N.C. 169, 97 S.E.2d 855 (1957).

A conviction in a criminal case is not final within the meaning of subsection (c) of this section where no judgment is imposed on the verdict, but merely an order is entered continuing prayer for judgment upon payment of costs. Barbour v. Scheidt, 246 N.C. 169, 97 S.E.2d 855 (1957).

Trial Court Is Required to Forward Record of Conviction. — This section requires that the trial courts shall forward to the Department (now Division) a record of the conviction of any person. Tilley v. Garrett, 8 N.C. App. 556, 174 S.E.2d 617 (1970).

But Court Is Not Required to Forward Warrant and Judgment. — This section does not require that the warrant and judgment, or certified copies thereof, shall be forwarded by the trial court. Tilley v. Garrett, 8 N.C. App. 556, 174 S.E.2d 617 (1970).

Forwarding of License as Notice of Revocation. — The surrendering of his license and forwarding of it to the Department (now Division) by the court gives the licensee sufficient notice that his operator's license has been revoked. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

This section designates clerks of court and assistant and deputy clerks of court as agents of the Department (now Division) of Motor Vehicles for receipt of driver's licenses in cases where revocation is required. Simpson v. Garrett, 15 N.C. App. 449, 190 S.E.2d 251 (1972).

Injunction Not Available to Plaintiff Who Could Have Prevented Delay in Start of Revocation Period. — Where the elapse of approximately 15 months between plaintiff's last conviction for reckless driving and the order of revocation was not caused by defendant Commissioner of Motor Vehicles or his Department (now Division), but the delay apparently resulted from the failure of the clerk of the court where plaintiff was last convicted to act promptly in forwarding a record of the conviction to the Department (now Division) of Motor Vehicles, and plaintiff could have prevented any delay in the start of the revocation period by surrendering his license to the clerk and obtaining a receipt therefor at the time of his second conviction, plaintiff is not entitled to injunctive relief. Simpson v. Garrett, 15 N.C. App. 449, 190 S.E.2d 251 (1972).

Applied in State v. Ball, 255 N.C. 351, 121 S.E.2d 604 (1961); In re Sparks, 25 N.C. App. 65, 212 S.E.2d 220 (1975).

Quoted in Harrell v. Scheidt, 243 N.C. 735, 92 S.E.2d 182 (1956).

Stated in Winesett v. Scheidt, 239 N.C. 190, 79 S.E.2d 501 (1954).

§ 20-25. Right of appeal to court. — Any person denied a license or whose license has been canceled, suspended or revoked by the Division, except where such cancellation is mandatory under the provisions of this Article, shall have a right to file a petition within 30 days thereafter for a hearing in the matter in the superior court of the county wherein such person shall reside, or to the resident judge of the district or judge holding the court of that district, or special or emergency judge holding a court in such district in which the violation was committed, and such court or judge is hereby vested with jurisdiction and it shall be its or his duty to set the matter for hearing upon 30 days' written notice to the Division, and thereupon to take testimony and examine into the facts of the case, and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation or revocation of license under the provisions of this Article. (1935, c. 52, s. 19; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in two places.

Power to Suspend or Revoke Licenses Vested Exclusively in Department (now Division) of Motor Vehicles. — By Session Laws 1941, c. 36 (§§ 20-1, 20-2, 20-3 and 20-4], the power to suspend or revoke drivers' licenses after July 1, 1941, vested exclusively in the newly created Department (now Division) of Motor Vehicles, subject to the same right of review by the superior court as existed prior to that date. State v. Cooper, 224 N.C. 100, 29 S.E.2d 18 (1944).

Section Construed with § 20-23. — This section and § 20-23 must be construed in pari materia. In re Wright, 228 N.C. 584, 46 S.E.2d 696 (1948).

A license to operate a motor vehicle is a privilege in the nature of a right of which the licensee may not be deprived save in the manner and upon the conditions prescribed by statute. These, under express provisions of this section, include full de novo review by a superior court judge, at the election of the licensee, in all cases except where the suspension or revocation is mandatory. Underwood v. Howland, 274 N.C. 473, 164 S.E.2d 2 (1968).

Provisions Satisfy Requirements of Due Process. — The provisions of § 20-48, together with the provisions of § 20-16(d), relating to the right of review, and the provisions of this section, relating to the right of appeal, satisfy the requirements of procedural due process. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970); State v. Atwood, 27 N.C. App. 445, 219 S.E.2d 521 (1975), rev'd on other grounds, 290 N.C. 266, 225 S.E.2d 543 (1976).

A petitioner seeking judicial review of a decision of the North Carolina Driver License Medical Review Board must file such petition in the Superior Court of Wake County pursuant to § 150A-45 and may not obtain a hearing under the present section in the superior court of the county in which he resides. Cox v. Miller, 26 N.C. App. 749, 217 S.E.2d 198 (1975).

Discretionary suspensions and revocations of driving licenses by the Department (now Division) of Motor Vehicles are reviewable under this section. State v. Cooper, 224 N.C. 100, 29 S.E.2d 18 (1944); In re Wright, 228 N.C. 584, 46 S.E.2d 696 (1948).

Discretionary revocations and suspensions may be reviewed by the court under this section, while mandatory revocations and suspensions may not. Underwood v. Howland, 274 N.C. 473, 164 S.E.2d 2 (1968); Taylor v. Garrett, 7 N.C. App. 473, 173 S.E.2d 31 (1970).

Discretionary revocation of a driver's license is reviewable under the provisions of this section but mandatory revocations are not. In re Austin, 5 N.C. App. 575, 169 S.E.2d 20 (1969).

By Trial De Novo. — All suspensions, cancellations and revocations of driving licenses made in the discretion of the Department (now Division) of Motor Vehicles, whether under §§ 20-16, 20-23 or any other provision of this Chapter, are reviewable by trial de novo. In re Wright, 228 N.C. 584, 46 S.E.2d 696 (1948).

The hearing in the superior court is de novo, and the court is not bound by the findings of fact or the conclusion of law made by the Department (now Division). In re Wright, 228 N.C. 301, 45 S.E.2d 370 (1947); Fox v. Scheidt, 241 N.C. 31, 84 S.E.2d 259 (1954).

Upon the filing of a petition for review, it is the duty of the judge, after notice to the Department (now Division), "to take testimony and examine into the facts of the case, and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation, or revocation of license under the provisions of this Article." This is more than a review as upon a writ of certiorari. It is a rehearing de novo, and the judge is not bound by the findings of fact or the conclusions of law made by the Department (now Division). Else why "take testimony," "examine into the facts," and "determine" the question at issue? Parks v. Howland, 4 N.C. App. 197, 166 S.E.2d 701 (1969).

Any person whose driver's license has been suspended under § 20-16.2(d) has the right to a full de novo review by a superior court judge.

This means the court must hear the matter on its merits from beginning to end as if no trial or hearing had been held by the Department (now Division) and without any presumption in favor of its decision. Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971).

But mandatory revocation under § 20-17 are not reviewable. And no right accrues to a licensee who petitions for a review of the order of the Department (now Division) when it acts under the terms of § 20-17, for then its action is mandatory. In re Wright, 228 N.C. 584, 46 S.E.2d 696 (1948); Winesett v. Scheidt, 239 N.C. 190, 79 S.E.2d 501 (1954); Fox v. Scheidt, 241 N.C. 31, 84 S.E.2d 259 (1954); Mintz v. Scheidt, 241 N.C. 268, 84 S.E.2d 882 (1954).

There is no right of judicial review when the revocation is mandatory pursuant to the provisions of § 20-17. In re Austin, 5 N.C. App. 575, 169 S.E.2d 20 (1969); Rhyne v. Garrett, 18 N.C. App. 565, 197 S.E.2d 235 (1973).

The jurisdiction vested by this section is not a delegation of legislative and administrative authority. The review is judicial and is governed by the standards and guides which are applicable to other judicial proceedings. In re Wright, 228 N.C. 584, 46 S.E.2d 696 (1948).

Such jurisdiction is not the limited, inherent power of courts to review the discretionary acts of an administrative officer. The power is conferred by statute, and the statute must be looked to in order to ascertain the nature and extent of the review contemplated by the legislature. In re Wright, 228 N.C. 301, 45 S.E.2d 370 (1947).

The Section Imposes Additional Jurisdiction. — The court has inherent authority to review the discretionary action of an administrative agency whenever such action affects personal or property rights, upon a prima facie showing, by petition for a writ of certiorari, that such agency has acted arbitrarily, capriciously, or in disregard of law. This section dispenses with the necessity of an application for writ of certiorari, provides for direct approach to the courts and enlarges the scope of the hearing. That the legislature had full authority to impose this additional jurisdiction upon the courts is beyond question. In re Wright, 228 N.C. 584, 46 S.E.2d 696 (1948).

But no discretionary power is conferred upon the court in reviewing the suspension or revocation of driving licenses, and the court may determine only if, upon the facts, petitioner's license is subject to suspension or revocation under the provisions of the statute. In re Wright, 228 N.C. 584, 46 S.E.2d 696 (1948).

On appeal and hearing de novo in the superior court, that court is not vested with discretionary authority. It makes judicial review of the facts, and if it finds that the license of petitioner is in fact and in law subject to suspension or revocation, the order of the Department (now Division) must be affirmed; otherwise not. In re Donnelly, 260 N.C. 375, 132 S.E.2d 904 (1963).

And failure of the section to provide standards for the guidance of the courts does not invalidate it or negate the jurisdiction. In re Wright, 228 N.C. 584, 46 S.E.2d 696 (1948).

No discretionary power is conferred upon the court in matters pertaining to the revocation of licenses. If, under the facts found by the judge, the statute requires the supension or revocation of petitioner's license, the order of the Department (now Division) entered in conformity with the facts found must be affirmed. Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971).

Remedy for Improper Deprivation of License. — If an individual has been improperly deprived of his license by the Department (now Division) of Motor Vehicles due to a mistake of law or fact, his remedy is to apply for a hearing as provided by § 20-16(d), or by application to the superior court as permitted by this section. At a hearing held pursuant to either of these sections, he would be permitted to show that the suspension was erroneous. He could not ignore the quasi-judicial determination made by the Department (now Division). Beaver v. Scheidt, 251 N.C. 671, 111 S.E.2d 881 (1960).

Hearing by Division Is Prerequisite to Court Review. — Section 20-16(c) [now subsection (d)] provides for a rehearing by the Department (now Division) of Motor Vehicles upon application of a licensee whose license has been suspended, and this procedure should be followed and should be made to appear in the petition before review by the superior court. In re Wright, 228 N.C. 301, 45 S.E.2d 370 (1947).

Errors in Administrative Proceedings Are Rendered Harmless by Hearing De Novo. — If any errors were committed in the administrative proceedings, they are rendered harmless by the hearing de novo on appeal. Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971).

Hearing Must Be Sufficiently Formal to Permit Appellate Review. — Although a hearing conducted pursuant to this section may be as informal as the particular judge permits, nevertheless there should be sufficient formality in compiling a record of the proceeding so as to permit an appellate review. Tilley v. Garrett, 8 N.C. App. 556, 174 S.E.2d 617 (1970).

Burden of Proof. — Since the hearing on appeal in the superior court is de novo, if the Department (now Division) has the burden of proof at the first hearing held under § 20-16(d), obviously it also has the burden at the de novo hearing in the superior court. Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971).

Plaintiff May Not Complain That Division Has No Valid Warrant and Valid Judgment in Records. — If the plaintiff has been improperly deprived of his license by the Department (now Division) due to a mistake of law or fact,

he is entitled to show that the suspension was erroneous; however, he has no ground to complain that the Department (now Division) does not have as a part of its records a "valid warrant" and a "valid judgment." Plaintiff has available to him the records of the court in which he is alleged to have been convicted by which he may show whether the conviction was valid. Tilley v. Garrett, 8 N.C. App. 556, 174 S.E.2d 617 (1970).

Cancellation of Suspension. — Petitioner was arrested in South Carolina, charged with operating a motor vehicle while under the influence of intoxicants. He gave bond for appearance, but no warrant was served on him and no trial had, and his bond was forfeited. His license was suspended by the Department (now Division) of Motor Vehicles upon information of the highway department of South Carolina that he had been found guilty of driving while intoxicated. Upon review the superior court found, in addition, that the suspension was based upon misinformation and further that petitioner in fact was not guilty. It was held that the findings supported the court's order directing the respondent to cancel the suspension and to restore license to petitioner. In re Wright, 228 N.C. 301, 45 S.E.2d 370 (1947).

Denial of License on Petition for Reinstatement. — If a petitioner is unlawfully and illegally denied a license upon a hearing on a petition for reinstatement of his license, the judge of the superior court, upon proper allegations in a petition and proper notice to the respondent as provided in this section, is authorized to take testimony, examine into the facts of the case, and determine whether the petitioner was illegally and unlawfully denied a license under the provisions of the Uniform Driver's License Act. In re Austin, 5 N.C. App. 575, 169 S.E.2d 20 (1969).

Review of Revocation Based on Conviction of Offense in Another State. — The fact that the Department (now Division) of Motor Vehicles, in the exercise of its discretion, accepted the certification of a conviction in another state at its face value did not foreclose the petitioner's right to review as provided in this section. In other words, the General Assembly has never made it mandatory on the Department (now Division) to suspend or revoke the license of a resident of this State based on the conviction of such person in another state of any offense therein which, if committed in this State, would make the revocation mandatory. Carmichael v. Scheidt, 249 N.C. 472, 106 S.E.2d 685 (1959).

On appeal from a suspension of a resident's license under § 20-23, it is the conviction in another state that is under review in the superior court. In re Donnelly, 260 N.C. 375, 132 S.E.2d 904 (1963).

The superior court of North Carolina may not determine the guilt of a license holder, with respect to offenses alleged to have been committed in another state, as the sole predicate for suspension or revocation of his license. In re Donnelly, 260 N.C. 375, 132 S.E.2d 904 (1963).

§ 20-26. Records; copies furnished. — (a) The Division shall keep a record of proceedings and orders pertaining to all operator's and chauffeur's licenses granted, refused, suspended or revoked. The Division shall keep records of convictions as defined in G.S. 20-24(c) occurring outside North Carolina only for the offenses of exceeding a stated speed limit of 55 miles per hour or more by more than 15 miles per hour, driving while license suspended or revoked, careless and reckless driving, engaging in prearranged speed competition, engaging willfully in speed competition, hit-and-run driving resulting in damage to property, unlawfully passing a stopped school bus, illegal transportation of intoxicating liquors, and the offenses included in G.S. 20-17.

(b) The Division shall furnish certified copies of license records required to be kept by subsection (a) of this section to State, county, municipal and court officials of this State for official use only, without charge.

(c) The Division shall furnish copies of license records required to be kept by subsection (a) of this section to other persons, firms and corporations for uses other than official upon prepayment of the fee therefor, according to the following schedule:

(1) Limited extract copy of license record, for period up to three years $1.00

(2) Complete extract copy of license record 1.00

(3) Certified true copy of complete license record 3.00

All fees received by the Division under the provisions of this subsection shall be paid into and become a part of the "Operator's and Chauffeur's License

Fund." (1935, c. 52, s. 20; 1961, c. 307; 1969, c. 783, s. 3; 1971, c. 486, s. 1; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout the section.

Accidents Are Not Required to Be Shown on Records. — See opinion of Attorney General to Mr. Fred Colquitt, Director, Driver's License Section, Department of Motor Vehicles, 45 N.C.A.G. 218 (1976).

§ 20-27. Availability of records. — All records of the Division pertaining to application and to operator's and chauffeur's license, except the confidential medical report referred to in G.S. 20-7, of the current or previous five years shall be open to public inspection at any reasonable time during office hours. (1935, c. 52, s. 21; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

§ 20-28. Unlawful to drive while license suspended or revoked. — (a) Any person whose operator's or chauffeur's license has been suspended or revoked other than permanently, as provided in this Chapter, who shall drive any motor vehicle upon the highways of the State while such license is suspended or revoked shall be guilty of a misdemeanor and his license shall be suspended or revoked, as the case may be, for an additional period of one year for the first offense, two years for the second offense, and permanently for a third or subsequent offense; provided, any person whose license has been permanently suspended or revoked under this section may apply for a new license after three years from the commencement of the permanent suspension or revocation. Upon the filing of such application, the Division may, with or without a hearing, issue a new license upon satisfactory proof that the former licensee has been of good behavior for a minimum of three years from the last date of suspension or revocation and that his conduct and attitude are such as to entitle him to favorable consideration.

Notwithstanding any other provisions of this section, in those cases of conviction of the offense provided in this section in which the judge and district attorney of the court wherein a conviction for violation of this section was obtained recommend in writing to the Division that the Division examine into the facts of the case and exercise discretion in suspending or revoking the driver's license for the additional periods provided by this section, the Division shall conduct a hearing and may impose a lesser period of additional suspension or revocation than that provided in this section or may refrain from imposing any additional period. If the judge and district attorney hearing said case are not reasonably available to make or refuse such recommendation, then the judge and district attorney presiding and serving over the court of conviction may make the recommendation.

Upon conviction, a violator of this section shall be punished by a fine of not less than two hundred dollars ($200.00) or imprisonment in the discretion of the court not to exceed two years, or both; provided, however, the restoree of a suspended or revoked operator's or chauffeur's license who operates a motor vehicle upon the streets or highways of the State without maintaining financial responsibility as provided by law shall be punished as for operating without an operator's license.

(b) Any person whose license has been permanently revoked or permanently suspended, as provided in this Article, who shall drive any motor vehicle upon the highways of this State while such license is permanently revoked or permanently suspended shall be guilty of a misdemeanor and shall be imprisoned

for not less than one year. This subsection shall not apply to any license revocations under G.S. 20-17.1; penalty for violation of G.S. 20-17.1 shall be applied as prescribed under G.S. 20-28(a). (1935, c. 52, s. 22; 1945, c. 635; 1947, c. 1067, s. 16; 1955, c. 1020, s. 1; c. 1152, s. 18; c. 1187, s. 20; 1957, c. 1406; 1959, c. 515; 1967, c. 447; 1973, c. 47, s. 2; cc. 71, 1132; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsection (a).

The right to operate a motor vehicle upon the public highways is not an unrestricted right but a privilege which can be exercised only in accordance with the legislative restrictions fixed thereon. State v. Tharrington, 1 N.C. App. 608, 162 S.E.2d 140 (1968).

In this section the General Assembly anticipated there would be hardship cases where the violation of subsection (a) would be technical rather than wilful. Gibson v. Scheidt, 259 N.C. 339, 130 S.E.2d 679 (1963).

Suspension or Revocation of License under Subsection (a) Not Proper without Conviction. — Where plaintiff has never been convicted of or tried for the offense defined in subsection (a), unless and until he is so tried and convicted, subsection (a) vests no authority in the Department (now Division) in respect of the suspension or revocation of his operator's license. Gibson v. Scheidt, 259 N.C. 339, 130 S.E.2d 679 (1963).

Operation Must Have Occurred during Suspension or Revocation. — To constitute a violation of subsection (a), the operation of a motor vehicle must occur "while such license is suspended or revoked," that is, during the period of suspension or revocation. State v. Sossamon, 259 N.C. 374, 130 S.E.2d 638 (1963).

Subsection (a) deals solely and directly with the offense of driving while one's operator's license is suspended or revoked and contains provisions bearing directly upon periods of suspension and revocation upon conviction. In re Bratton, 263 N.C. 70, 138 S.E.2d 809 (1964).

One violates this section if he operates a motor vehicle on a public highway while his operator's license is in a state of suspension. State v. Blacknell, 270 N.C. 103, 153 S.E.2d 789 (1967).

To constitute a violation of subsection (a) of this section there must be: (1) operation of a motor vehicle by a person; (2) on a public highway; (3) while his operator's license is suspended or revoked. State v. Cook, 272 N.C. 728, 158 S.E.2d 820 (1968); State v. Hughes, 6 N.C. App. 287, 170 S.E.2d 78 (1969); State v. Springs, 26 N.C. App. 757, 217 S.E.2d 200 (1975).

In order to convict a person of a violation of subsection (a), such person must have: (1) operated a motor vehicle; (2) on a public highway; and (3) while his operator's license or operating privilege was lawfully suspended or revoked. State v. Newborn, 11 N.C. App. 292, 181 S.E.2d 214 (1971).

In order to constitute a violation of this section, defendant must be found guilty of driving "while" his license is revoked, and a verdict specifically finding defendant guilty of driving "after" his license was revoked is therefore defective. State v. McDonald, 21 N.C. App. 136, 203 S.E.2d 397 (1974).

To convict for a violation of subsection (a), the State must prove: (1) the operation of a motor vehicle, (2) on a public highway, (3) while one's operator's license is suspended or revoked. State v. Chester, 30 N.C. App. 224, 226 S.E.2d 524 (1976).

A conviction under subsection (a) requires that the State prove beyond a reasonable doubt (1) the operation of a motor vehicle by a person, (2) on a public highway, (3) while his operator's license is suspended or revoked. State v. Atwood, 290 N.C. 266, 225 S.E.2d 543 (1976).

Offense Must Have Occurred upon Public Highway. — The trial judge's failure to require the jury to find beyond a reasonable doubt that the offense occurred upon a public highway was prejudicial error. State v. Harris, 10 N.C. App. 553, 180 S.E.2d 29 (1971); State v. Springs, 26 N.C. App. 757, 217 S.E.2d 200 (1975).

What Term "Highway" Encompasses. — The term "highway" encompasses "highway of the State" or "public highway for purposes of framing a valid arrest warrant." State v. Bigelow, 19 N.C. App. 570, 199 S.E.2d 494 (1973).

Intent Immaterial. — The operation of a motor vehicle upon the highways of the State by a person whose driver's license has been revoked is unlawful, regardless of intent, since the specific performance of the act forbidden constitutes the offense itself. State v. Correll, 232 N.C. 696, 62 S.E.2d 82 (1950).

A person has no right to drive his car upon the highways of North Carolina after his license has been revoked and it makes no difference what the person's intentions are in so doing. State v. Tharrington, 1 N.C. App. 608, 162 S.E.2d 140 (1968); State v. Hurley, 18 N.C. App. 285, 196 S.E.2d 542 (1973).

There is nothing in subsection (a) of this section which would imply that knowledge or intent is a part of the crime of operating a motor vehicle after one's license has been suspended. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970); State v. Hurley, 18 N.C. App. 285, 196 S.E.2d 542 (1973).

Actual or Constructive Knowledge Required for Conviction. — The legislature intended that there be actual or constructive knowledge of the suspension or revocation in order for there to be

a conviction under this section. State v. Atwood, 290 N.C. 266, 225 S.E.2d 543 (1976).

While a specific intent is not an element of the offense of operating a motor vehicle on a public highway while one's license is suspended or revoked, the burden is on the State to prove that defendant had knowledge at the time charged that his operator's license was suspended or revoked. State v. Chester, 30 N.C. App. 224, 226 S.E.2d 524 (1976).

Mailing of Notice under § 20-48 Raises Prima Facie Presumption of Knowledge. — For purposes of a conviction for driving while license is suspended or revoked, mailing of the notice under § 20-48 raises only a prima facie presumption that defendant received the notice and thereby acquired knowledge of the suspension or revocation. State v. Atwood, 290 N.C. 266, 225 S.E.2d 543 (1976).

The State satisfies the burden of proving that defendant had knowledge at the time charged that his operator's license was suspended or revoked when, nothing else appearing, it has offered evidence of compliance with the notice requirements of § 20-48 because of the presumption that he received notice and had such knowledge. State v. Chester, 30 N.C. App. 224, 226 S.E.2d 524 (1976).

When Instructions as to Knowledge Required. — In a prosecution for violation of subsection (a) where the evidence for the State discloses that the division complied with the notice requirements of § 20-48: (1) Where there is no evidence that defendant did not receive the notice mailed by the division, it is not necessary for the trial court to charge on guilty knowledge; (2) where there is some evidence of failure of defendant to receive the notice or some other evidence sufficient to raise the issue, then the trial court must, in order to comply with § 1-180 and apply the law to the evidence, instruct the jury that guilty knowledge by the defendant is necessary to convict; and (3) where all the evidence indicates that defendant had no notice or knowledge of the suspension or revocation of license, a nonsuit should be granted. State v. Chester, 30 N.C. App. 224, 226 S.E.2d 524 (1976); State v. Hayes, 31 N.C. App. 121, 228 S.E.2d 460 (1976).

Offense by Person Not Holding License. — Under the provisions of § 20-23.1 and subsection (a) of this section, when a person who does not hold a driver's license has his operating privilege revoked or suspended in the manner and under the conditions prescribed by statute, and while such operating privilege is thus suspended or revoked he drives a motor vehicle upon the highways of this State, he violates subsection (a). State v. Newborn, 11 N.C. App. 292, 181 S.E.2d 214 (1971).

A warrant is fatally defective which does not allege in words or in substance an essential element of the offense defined in subsection (a). State v. Sossamon, 259 N.C. 374, 130 S.E.2d 638 (1963).

Warrant Need Not Specifically Refer to Section. — A warrant charging that the named defendant did unlawfully and willfully operate a motor vehicle on public streets or highways while his license was suspended sufficiently charges defendant's violation of this section without specific reference to the statute. State v. Blacknell, 270 N.C. 103, 153 S.E.2d 789 (1967).

Warrant Need Not Allege That Defendant Was Driving on "Public" Highway. — A warrant for driving while driver's license was suspended is not fatally defective in failing to allege that defendant was driving upon a "public" street or highway, since this section uses the phrase "highways of the State." State v. Martin, 13 N.C. App. 613, 186 S.E.2d 647 (1972).

Admissibility of Division Records. — The records of the Department (now Division), properly authenticated, are competent for the purpose of establishing the status of a person's operator's license and driving privilege. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970); State v. Rhodes, 10 N.C. App. 154, 177 S.E.2d 754 (1970).

In a prosecution of a defendant for driving while his license was suspended, a properly certified copy of the driver's license record of defendant on file with the Department (now Division) of Motor Vehicles is admissible as evidence that the defendant's license was in a state of revocation for a period covering the date of the offense for which he was charged. State v. Herald, 10 N.C. App. 263, 178 S.E.2d 120 (1970).

Certification by an employee of the Department (now Division) of Motor Vehicles that the original of an order of security requirement or suspension of driving privilege was mailed to defendant on a specified date at his address shown on the records of the Department (now Division) of Motor Vehicles is sufficient to render admissible a copy of the document in a prosecution of a defendant for driving while his license was suspended. State v. Herald, 10 N.C. App. 263, 178 S.E.2d 120 (1970).

A defendant is entitled to have the contents of the official record of the status of his driver's license limited, if he so requests, to the formal parts thereof, including the certification and seal, plus the fact that under official action of the Department (now Division) of Motor Vehicles the defendant's license was in a state of revocation or suspension on the date he is charged with committing the offense under this section. State v. Rhodes, 10 N.C. App. 154, 177 S.E.2d 754 (1970).

Where a defendant fails to request that the contents of his certified driving record be limited to the portions thereof relating to the status of his license on the day he was charged with

driving while his license was revoked, he may not complain on appeal that the record indicates that he had been involved in a number of accidents. State v. Herald, 10 N.C. App. 263, 178 S.E.2d 120 (1970).

Collateral Attack on Order of Revocation Not Permitted. — Defendant could not, when on trial for the criminal offense of driving while his license was revoked, collaterally attack the record of revocation which did not on its face disclose invalidity. State v. Ball, 255 N.C. 351, 121 S.E.2d 604 (1961).

Evidence Sufficient to Prove Defendant Was Operator. — In a prosecution for driving under the influence and driving while license was revoked, evidence that defendant was seated behind the wheel of a car which had the motor running was sufficient to prove that defendant was the operator of the car under § 20-4.01(25). State v. Turner, 29 N.C. App. 163, 223 S.E.2d 530 (1976).

Applied in State v. Meadows, 234 N.C. 657, 68 S.E.2d 406 (1951); Beaver v. Scheidt, 251 N.C. 671, 111 S.E.2d 881 (1960); State v. Sossamon, 259 N.C. 378, 130 S.E.2d 640 (1963); State v. Blackwelder, 263 N.C. 96, 138 S.E.2d 787 (1964); State v. Letterlough, 6 N.C. App. 36, 169 S.E.2d 269 (1969); State v. Rowland, 13 N.C. App. 253, 185 S.E.2d 296 (1971); State v. Guffey, 283 N.C. 94, 194 S.E.2d 827 (1973); State v. Toler, 18 N.C. App. 149, 196 S.E.2d 295 (1973); State v. Phillips, 25 N.C. App. 313, 212 S.E.2d 906 (1975).

Cited in State v. Harris, 22 N.C. App. 279, 206 S.E.2d 371 (1974); State v. Parks, 24 N.C. App. 314, 210 S.E.2d 288 (1974); State v. Bohannon, 26 N.C. App. 486, 216 S.E.2d 424 (1975).

§ 20-28.1. Conviction of moving offense committed while driving during period of suspension or revocation of license; hearings upon recommendation of judge and district attorney. — (a) Upon receipt of notice of conviction of any person of a motor vehicle moving offense, such offense having been committed while such person's driving privilege was in a state of suspension or revocation, the Division shall revoke such person's driving privilege for an additional period of time as set forth in subsection (b) hereof.

(b) When a driving privilege is subject to revocation under this section, the additional period of revocation shall be as follows:

(1) A first such revocation shall be for one year;

(2) A second such revocation shall be for two years; and

(3) A third or subsequent such revocation shall be permanent.

(c) Any person whose driving privilege has been permanently revoked under this section may apply for a new license after three years from the commencement of the permanent revocation. Upon the filing of such application, the Division may, with or without a hearing, issue a new license upon satisfactory proof that the former licensee has been of good behavior for a minimum of three years from the last date of revocation and that his conduct and attitude are such as to entitle him to favorable consideration.

(d) Notwithstanding any other provisions of this section, in those cases of conviction of the offense provided in this section in which the judge and district attorney of the court wherein a conviction for violation of this section was obtained recommend in writing to the Division that the Division examine into the facts of the case and exercise discretion in suspending or revoking the driver's license for the additional periods provided by this section, the Division shall conduct a hearing and may impose a lesser period of additional suspension or revocation than that provided in this section or may refrain from imposing any additional period. If the judge and district attorney hearing said case are not reasonably available to make or refuse such recommendation, then the judge and district attorney presiding and serving over the court of conviction may make the recommendation. (1965, c. 286; 1969, c. 348; 1971, c. 163; 1973, c. 47, s. 2; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout the section.

Application of Section. — This section does not apply to a conviction of a "motor vehicle moving offense" during the interim between the termination of an original order of revocation and the payment of the fee required by § 20-7(i1). Ennis v. Garrett, 279 N.C. 612, 184 S.E.2d 246 (1971).

Effect of Termination of Revocation Period. — When the period of revocation stated in the

original order of revocation terminates, the license is no longer "in a state of suspension or revocation" within the meaning of this section. Ennis v. Garrett, 279 N.C. 612, 184 S.E.2d 246 (1971).

When the period of revocation stated in the original order of revocation terminates, the former holder of the license may not immediately resume driving. Before he may do so the fee required by § 20-7(i1) must be paid. Ennis v. Garrett, 279 N.C. 612, 184 S.E.2d 246 (1971).

When the period of revocation stated in the original order of revocation terminates, the former holder of the license is simply a person without a valid operator's or chauffeur's license; if, before payment of the fee required by § 20-7(i1), he operates a motor vehicle upon a highway of this State, he is subject to the penalties provided for one who operates a motor vehicle without a valid operator's or chauffeur's license. Ennis v. Garrett, 279 N.C. 612, 184 S.E.2d 246 (1971).

Suspension Due to Insurance Agent's Failure to Give Notice of Insurance. — Where, by error, a licensee's insurance agent fails to furnish the Commissioner notice of the existence of liability insurance on her car and she receives notification of suspension of her license for lack of liability insurance but she continues to drive, relying on her agent to correct his error, subsequent moving violations during the period of the suspension make revocation for an additional period mandatory under this section even though the suspension would not have been entered if the Commissioner had been properly advised of the existence of liability insurance. Carson v. Godwin, 269 N.C. 744, 153 S.E.2d 473 (1967).

Former Provisions Construed. — See Underwood v. Howland, 274 N.C. 473, 164 S.E.2d 2 (1968).

Applied in Taylor v. Garrett, 7 N.C. App. 473, 173 S.E.2d 31 (1970).

§ 20-29. Surrender of license. — Any person operating or in charge of a motor vehicle, when requested by an officer in uniform, or, in the event of accident in which the vehicle which he is operating or in charge of shall be involved, when requested by any other person, who shall refuse to write his name for the purpose of identification or to give his name and address and the name and address of the owner of such vehicle, or who shall give a false name or address, or who shall refuse, on demand of such officer or such other person, to produce his license and exhibit same to such officer or such other person for the purpose of examination, or who shall refuse to surrender his license on demand of the Division, or fail to produce same when requested by a court of this State, shall be guilty of a misdemeanor and upon conviction shall be punished as provided in this Article. Pickup notices for operators' or chauffeurs' licenses or revocation or suspension of license notices and orders or demands issued by the Division for the surrender of such licenses may be served and executed by patrolmen or other peace officers, and such patrolmen and peace officers, while serving and executing such notices, orders and demands, shall have all the power and authority possessed by peace officers when serving and executing warrants charging violations of the criminal laws of the State. (1935, c. 52, s. 23; 1949, c. 583, s. 7; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in two places.

Sufficiency of Warrant. — A warrant under this section was fatally defective where it failed to aver that defendant refused to exhibit his license upon request while operating or in charge of a motor vehicle. The warrant should also name the officer who demands the right to inspect the license. State v. Danziger, 245 N.C. 406, 95 S.E.2d 862 (1957).

Applied in State v. Clark, 21 N.C. App. 35, 203 S.E.2d 103 (1974); State v. Keziah, 24 N.C. App. 298, 210 S.E.2d 436 (1974).

§ 20-29.1. Commissioner may require reexamination; issuance of limited or restricted licenses. — The Commissioner of Motor Vehicles, having good and sufficient cause to believe that a licensed operator or chauffeur is incompetent or otherwise not qualified to be licensed, may, upon written notice of at least five days to such licensee, require him to submit to a reexamination to determine his competency to operate a motor vehicle. Upon the conclusion of such

examination, the Commissioner shall take such action as may be appropriate, and may suspend or revoke the license of such person or permit him to retain such license, or may issue a license subject to restrictions or upon failure of such reexamination may cancel the license of such person until he passes a reexamination. Refusal or neglect of the licensee to submit to such reexamination shall be grounds for the cancelation of the license of the person failing to be reexamined, and the license so canceled shall remain canceled until such person satisfactorily complies with the reexamination requirements of the Commissioner. The Commissioner may, in his discretion and upon the written application of any person qualified to receive an operator's or chauffeur's license, issue to such person an operator's or chauffeur's license restricting or limiting the licensee to the operation of a single prescribed motor vehicle or to the operation of a particular class or type of motor vehicle. Such a limitation or restriction shall be noted on the face of the license, and it shall be unlawful for the holder of such limited or restricted license to operate any motor vehicle or class of motor vehicle not specified by such restricted or limited license, and the operation by such licensee of motor vehicles not specified by such license shall be deemed the equivalent of operating a motor vehicle without any chauffeur's or operator's license. Any such restricted or limited licensee may at any time surrender such restricted or limited license and apply for and receive an unrestricted operator's or chauffeur's license upon meeting the requirements therefor. (1943, c. 787, s. 2; 1949, c. 1121; 1971, c. 546.)

Notice of Suspension Required. — A requirement for notice is made by § 20-16(d) in all cases in which a license is suspended under the authority of that section. Even though a similar requirement for notice does not appear in this section, a reading of this Chapter, in which both sections appear, makes it clear that the legislature intended that notice be given to the licensee when the Commissioner suspends a license under this section as well as when suspension is made under the authority of § 20-16. State v. Hughes, 6 N.C. App. 287, 170 S.E.2d 78 (1969).

In any case in which a license is suspended under the authority of this section, the Commissioner of Motor Vehicles is required to notify the licensee of such suspension. That such notice is required is made more apparent when it is realized that even a failure to pass a reexamination conducted under this section does not necessarily result in suspension of the license. State v. Hughes, 6 N.C. App. 287, 170 S.E.2d 78 (1969).

§ 20-30. Violations of license or learner's permit provisions. — It shall be unlawful for any person to commit any of the following acts:

(1) To display or cause to be displayed or to have in possession any operator's or chauffeur's license or learner's permit, knowing the same to be fictitious or to have been canceled, revoked, suspended or altered.

(2) To counterfeit, sell, lend to, or knowingly permit the use of, by one not entitled thereto, any operator's or chauffeur's license or learner's permit.

(3) To display or to represent as one's own a license or learner's permit not issued to the person so displaying same.

(4) To fail or refuse to surrender to the Division upon demand any license or learner's permit or the badge of any chauffeur whose license or learner's permit has been suspended, canceled or revoked as provided by law.

(5) To use a false or fictitious name or give a false or fictitious address in any application for an operator's or chauffeur's license or learner's permit, or any renewal or duplicate thereof, or knowingly to make a false statement or knowingly conceal a material fact or otherwise commit a fraud in any such application, or for any person to procure, or knowingly permit or allow another to commit any of the foregoing

acts. Any license or learner's permit procured as aforesaid shall be void from the issuance thereof, and any moneys paid therefor shall be forfeited to the State.

(6) To photostat or otherwise reproduce an operator's or chauffeur's license or learner's permit or to possess an operator's or chauffeur's license or learner's permit which has been photostated or otherwise reproduced, unless such photostat or other reproduction was authorized by the Commissioner. (1935, c. 52, s. 24; 1951, c. 542, s. 4; 1967, c. 1098, s. 1; 1973, c. 18, s. 2; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subdivision (4).

Applied in State v. Hayes, 31 N.C. App. 121, 228 S.E.2d 460 (1976).

§ 20-31. Making false affidavits perjury. — Any person who shall make any false affidavit, or shall knowingly swear or affirm falsely, to any matter or thing required by the terms of this Article to be sworn to or affirmed shall be guilty of perjury and upon conviction shall be punished by fine or imprisonment as other persons committing perjury are punishable under the laws of this State. (1935, c. 52, s. 25.)

Cross Reference. — As to perjury, see § 14-209 et seq.

§ 20-32. Unlawful to permit unlicensed minor to drive motor vehicle. — It shall be unlawful for any person to cause or knowingly permit any minor under the age of 18 years to drive a motor vehicle upon a highway as an operator, unless such minor shall have first obtained a license to so drive a motor vehicle under the provisions of this Article. (1935, c. 52, s. 26; 1973, c. 684.)

Editor's Note. — Most of the cases treated below were decided under a corresponding provision of an earlier law.

Violation of Age Limit as Negligence. — Where a person within the age prohibited by the statute runs an automobile upon and injures a pedestrian, the violation of the statute is negligence per se, and a charge by the court that it is a circumstance from which the jury could infer negligence is reversible error. Taylor v. Stewart, 172 N.C. 203, 90 S.E. 134 (1916).

Same; Liability for Injuries. — While it is negligence per se for one within the prohibited age to run an automobile, it is necessary that such negligence proximately cause the injury for damages to be recovered on that account, with the burden of proof on the plaintiff to show it by the preponderance of the evidence. Taylor v. Stewart, 172 N.C. 203, 90 S.E. 134 (1916).

Same; Jury Question. — It is for the jury to determine whether a competent and careful chauffeur of maturer years could have avoided the injury under the circumstances, or whether it was due to the fact that a lad within the prohibited age was running it at the time. Taylor v. Stewart, 172 N.C. 203, 90 S.E. 134 (1916).

Same; Liability of Father. — While ordinarily a father is not held responsible in damages for the negligent acts of his minor son done without his knowledge and consent, such may be inferred, as where the father constantly permitted his 13-year-old son to run his automobile. Taylor v. Stewart, 172 N.C. 203, 90 S.E. 134 (1916).

Liability of Owner for Torts of Driver. — See Linville v. Nissen, 162 N.C. 95, 77 S.E. 1096 (1913); Cates v. Hall, 171 N.C. 360, 88 S.E. 524 (1916); Williams v. May, 173 N.C. 78, 91 S.E. 604 (1917); Wilson v. Polk, 175 N.C. 490, 95 S.E. 849 (1918). For a complete treatment, see 2 N.C.L. Rev. 181.

Same; Where Driver Is Son. — See Linville v. Nissen, 162 N.C. 95, 77 S.E. 1096 (1913); Clark v. Sweaney, 176 N.C. 529, 97 S.E. 474 (1918). See also 2 N.C.L. Rev. 181.

Instruction. — An instruction to the effect that it would be negligence per se for defendant to permit his child under the legal driving age to operate his automobile but that defendant could not be held liable unless the jury found from the preponderance of the evidence that such negligence was the proximate or one of the proximate causes of the injury, was held sufficient to cover this aspect of the case. Hoke v. Atlantic Greyhound Corp., 227 N.C. 412, 42 S.E.2d 593 (1947).

§ 20-33. Unlawful to employ unlicensed chauffeur. — No person shall employ any chauffeur to operate a motor vehicle who is not licensed as provided by this Article. (1935, c. 52, s. 27.)

§ 20-34. Unlawful to permit violations of this Article. — No person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be driven by any person who has no legal right to do so or in violation of any of the provisions of this Article. (1935, c. 52, s.28.)

§ 20-34.1. Unlawful to issue licenses for anything of value except prescribed fees. — It shall be unlawful for any employee of the Division of Motor Vehicles to charge or accept any money or other thing of value except the fees prescribed by law for the issuance of an operator's or chauffeur's license, and the fact that the license is not issued after said employee charges or accepts money or other thing of value shall not constitute a defense to a criminal action under this section. In a prosecution under this section it shall not be a defense to show that the person giving the money or other thing of value or the person receiving the license or intended to receive the same is entitled to a license under the Uniform Driver's License Act. Any person violating this section shall be guilty of a felony and upon conviction shall be punished by imprisonment in the State's prison for not more than five years or by a fine of not more than five thousand dollars ($5,000) or by both such fine and imprisonment. (1951, c. 211; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the first sentence.

Permitting Violation Is Negligence Per Se. — Under this section it is negligence per se for the owner of a car or one having it under his control to permit a person under legal age to operate same, but such negligence must be proximate cause of injury in order to be actionable. Hoke v. Atlantic Greyhound Corp., 226 N.C. 692, 40 S.E.2d 345 (1946).

§ 20-35. Penalties for misdemeanor. — (a) It shall be a misdemeanor to violate any of the provisions of this Article unless such violation is by this Article or other law of this State declared to be a felony.

(b) Unless another penalty is in this Article or by the laws of this State provided, every person convicted of a misdemeanor for the violation of any provision of this Article shall be punished by a fine of not more than five hundred dollars ($500.00) or by imprisonment for not more than six months. (1935, c. 52, s. 29.)

Cross Reference. — As to jurisdiction of prosecution under this section, see notes to §§ 7A-271 and 7A-272.

This section and § 20-7, being in pari materia, must be construed together, and, if possible, they must be reconciled and harmonized. State v. Tolley, 271 N.C. 459, 156 S.E.2d 858 (1967).

Excessive Penalty. — Any person convicted of operating a motor vehicle over any highway in this State without having first been licensed as such operator, in violation of § 20-7(a), is guilty of a misdemeanor; and, under § 20-7(n) and subsection (b) of this section, is subject to punishment by imprisonment for a term of not more than six months. The superior court, even if it has jurisdiction in other respects, has no authority to pronounce judgment imposing a prison sentence of two years for this criminal offense. State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

Cited in Hoke v. Atlantic Greyhound Corp., 226 N.C. 692, 40 S.E.2d 345 (1946).

§ 20-36. Ten-year-old convictions not considered. — No conviction of any violation of the motor vehicle laws shall be considered by the Division in determining whether any person's driving privilege shall be suspended or revoked or in determining the appropriate period of suspension or revocation after 10 years has elapsed from the date of such conviction. (1971, c. 15; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

Ten-Year Limitation Applicable to Division of Motor Vehicle Action Only. — See opinion of Attorney General to Honorable Robert A. Collier, Jr., 41 N.C.A.G. 322 (1971).

§ 20-37. Limitations on issuance of licenses. — There shall be no operator's or chauffeur's license issued within this State other than that provided for in this Article, nor shall there be any other examination required: Provided, however, that cities and towns shall have the power to license, regulate and control drivers and operators of taxicabs within the city or town limits and to regulate and control operators of taxicabs operating between the city or town to points, not incorporated, within a radius of five miles of said city or town. (1935, c. 52, s. 34; 1943, c. 639, s. 2.)

Editor's Note. — For comment on the 1943 amendment, see 21 N.C.L. Rev. 358.

Authority to License and Regulate Taxicabs. — In adopting this section the General Assembly delegated the authority to license taxicabs and regulate their use on public streets to the several municipalities. Suddreth v. City of Charlotte, 223 N.C. 630, 27 S.E.2d 650 (1943).

In the exercise of this delegated power, it is the duty of the municipal authorities in their sound discretion, to determine what ordinances or regulations are reasonably necessary for the protection of the public or the better government of the town; and when in the exercise of such discretion an ordinance is adopted, it is presumed to be valid; and, the courts will not declare it invalid unless it is clearly shown to be so. State v. Stallings, 230 N.C. 252, 52 S.E.2d 901 (1949).

Under such delegated power a city may require, as a condition incident to the privilege of operating a taxicab on its streets, that the driver of such taxicab shall wear a distinctive cap or other insignia while operating a taxicab, to show that he is a duly licensed taxicab driver. State v. Stallings, 230 N.C. 252, 52 S.E.2d 901 (1949).

Stated in Victory Cab Co. v. City of Charlotte, 234 N.C. 572, 68 S.E.2d 433 (1951).

Cited in Morrisey v. Crabtree, 143 F. Supp. 105 (M.D.N.C. 1956).

ARTICLE 2A.

Afflicted, Disabled or Handicapped Persons.

§ 20-37.1. Motorized wheelchairs or similar vehicles. — Any afflicted or disabled person who is qualified to operate a motorized wheelchair or other similar vehicle not exceeding 1,000 pounds gross weight, may apply to the Division of Motor Vehicles for a special operator's license and permanent registration plates. When it is made to appear to the satisfaction of the Division of Motor Vehicles that the applicant is qualified to operate such vehicle, and is dependent upon such vehicle as a means of conveyance or as a means of earning a livelihood, said Division shall, upon the payment of a license fee of one dollar ($1.00) for each such motor vehicle, issue to such applicant for his exclusive personal use a special vehicle operator's license, which shall be renewed annually upon the payment of a fee of fifty cents (50¢), and permanent registration plates for such vehicle. The initial one dollar ($1.00) fee required by this section shall be in full payment of the permanent registration plates issued for such vehicle and such plates need not thereafter be renewed and such plates shall be valid only on the vehicle for which issued and then only while such vehicle is owned by the person to whom the plates were originally issued.

Any person other than the licensee who shall operate any motor vehicle equipped with any such special license plate as is authorized by this section shall be guilty of a misdemeanor and upon conviction subject to punishment in the discretion of the court. (1949, c. 143; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the first and second sentences.

§ 20-37.2. Handicapped drivers — display of distinctive flags. — Handicapped or paraplegic drivers of motor vehicles are authorized when getting into and out of such vehicles, or when in distress, to display a white flag of approximately seven and one-half inches in width and 13 inches in length, with the letter "H" thereon in red color with an irregular one-half inch red border. Said flag shall be of reflective material so as to be readily discernible under darkened conditions and shall be issued under § 20-37.3. (1967, c. 296, s. 2.)

§ 20-37.3. Handicapped drivers — issuance of flags and cards. — The Commissioner of Motor Vehicles may, upon application and payment of a fee of two dollars ($2.00), issue to any handicapped person a distress flag as described in § 20-37.2, and a card which shall be applicant's authority to use such flag. This card shall set forth the applicant's name, address, date of birth, physical apparatus, if any, needed to operate a motor vehicle, and other pertinent facts which the Commissioner of Motor Vehicles deems desirable. The card and flag issued to an applicant shall bear corresponding numbers. In the event of loss or destruction of such flag a replacement may be issued upon the payment of the sum of one dollar ($1.00) by the applicant. The Commissioner of Motor Vehicles shall maintain a list of those persons to whom distress flags and cards have been issued. (1967, c. 296, s. 3.)

§ 20-37.4. Handicapped drivers — unauthorized use of flag; violation of §§ 20-37.2 to 20-37.5. — Any person who is not a handicapped or paraplegic person who uses the above-mentioned flag or facsimile thereof as a distress signal or for any other purpose or any other person who violates any provision of G.S. 20-37.2 to 20-37.5 shall be guilty of a misdemeanor. (1967, c. 296, s. 4.)

§ 20-37.5. Handicapped — definition. — As used in this Article, handicapped shall mean:

(1) Any person who has an obvious physical disability that requires the use of a wheelchair, braces, walkers, or crutches, and those who have lost the use of one or both legs; or

(2) Any person who, as determined and certified by a physician, is severely restricted in mobility by a pulmonary or cardiovascular disability, arthritic condition, orthopedic or neurologic impairment. (1967, c. 296, s. 5; 1977, c. 340, s. 1.)

Editor's Note. — The 1977 amendment rewrote this section.

§ 20-37.6. Handicapped — parking privileges. — (a) Any person who falls within the definition of handicapped as defined in G.S. 20-37.5 shall be allowed to park for unlimited periods in parking zones restricted as to length of time parking is permitted. This section shall have no application to those zones or during times in which the stopping, parking, or standing of all vehicles is prohibited or which are reserved for special types of vehicles. As a condition to this privilege the vehicle shall display a distinguishing license plate or placard which shall be issued for vehicles registered to the disabled person. Such license

plate shall be issued for the normal fee applicable to standard license plates, except that a person who qualifies for a license plate under this section and also qualifies as a disabled veteran under G.S. 20-81.4 shall be issued the license plate provided for herein free of charge.

(b) Any person who qualifies for issuance of a distinguishing license plate under subsection (a) may apply to the Division of Motor Vehicles for issuance of a distinguishing placard to be designed by the Division of Motor Vehicles, the State Vocational Rehabilitation Agency, and the Department of Insurance. Such placard shall be at least six inches by twelve inches in size, and shall display such information as the Division of Motor Vehicles deems necessary for enforcement purposes. Such placard may be used on vehicles transporting the disabled person to whom issued as hereinafter provided, in lieu of the distinguishing license plate issued pursuant to subsection (a). When the placard provided herein is displayed on the driver's side dashboard of a vehicle, all parking rights and privileges extended to vehicles displaying a distinguishing license plate issued pursuant to subsection (a) shall be applicable to such vehicle. The Division of Motor Vehicles shall establish procedures for the issuance of distinguishing placards, may charge a fee sufficient to pay the actual cost for issuance thereof and may issue two such placards to applicant upon request.

(c) Designation of parking spaces for the physically handicapped required in the North Carolina Building Code shall after July 1, 1977, be by the use of sign D9-6, Manual on Uniform Traffic Control Devices, provided nonconforming signs in use prior to July 1, 1977, shall not constitute a violation during the useful life thereof which may not be extended by other than normal maintenance. Designation of parking spaces for the physically handicapped in other areas, including public vehicular areas referenced in G.S. 20-4.01(32) shall be by the use of sign D9-6, Manual on Uniform Traffic Control Devices, provided nonconforming signs in use prior to ratification of this bill shall not constitute a violation during the useful life thereof which may not be extended by other than normal maintenance.

(d) It shall be unlawful to park or leave standing any vehicle in a space designated for physically handicapped persons when such vehicle does not display the distinguishing license plate or placard as provided in this section where appropriate aboveground signs or symbol and words giving notice thereof are erected marking the designated parking space. It shall be unlawful for any person not qualifying for the rights and privileges extended to handicapped persons under this section to exercise or attempt to exercise such rights or privileges by the unauthorized use of a distinguishing license plate or placard issued pursuant to the provisions of this section. The punishment for violation of this section shall not exceed a fine of ten dollars ($10.00) and the prima facie rule of evidence set forth in G.S. 20-162.1 shall apply. (1971, c. 374, s. 1; 1973, cc. 126, 1384; 1977, c. 340, s. 2.)

Editor's Note. — The 1977 amendment designated the former provisions of this section as subsection (a), and in that subsection, substituted "falls within the definition of handicapped as defined in G.S. 20-37.5" for "has lost the use of one or both legs or is so severely disabled as to be unable to walk without the aid of a mechanical device," deleted "the" preceding "length of time" in the first sentence and inserted "or placard" in the third sentence. The amendment also added subsections (b) through (d).

ARTICLE 2B.

Special Identification Cards for Nonoperators.

§ 20-37.7. Special identification card. — (a) The Division of Motor Vehicles shall upon satisfactory proof of identification issue a special identification card to any person 16 years or older who is a resident of the State of North Carolina and for any reason does not possess a valid driver's license issued by the Division of Motor Vehicles.

(b) Every application for a special identification card shall be made upon the approved form furnished by the Division.

(c) A special identification card issued under this section shall be similar in size, shape, and design to a driver's license and shall include a photograph, but the card shall be of a distinctive color and shall clearly state that it does not enable the person to whom it is issued to operate a motor vehicle.

(d) A special identification card shall not expire but may be reissued. The fee for the issuance or reissuance of a special identification card shall be one dollar ($1.00) and shall be placed in the "Operators' and Chauffeurs' License Fund" for use as provided in G.S. 20-7(j).

(e) Any fraud or misrepresentation in the application for or use of a special identification card issued under this section is a misdemeanor, punishable by a fine of not more than five hundred dollars ($500.00) or by imprisonment of 90 days, or both.

(f) The Division of Motor Vehicles shall maintain hard copies of applications and information pertaining to the recipients of a special identification card and such indices as deemed appropriate, but such information shall not be required to be computerized. The Division may promulgate any rules and regulations it deems necessary for the effective implementation of the provisions of this section.

(g) The fact of issuance of a special identification card pursuant to this section shall not place upon the State of North Carolina or any agency thereof any liability for the misuse thereof and the acceptance thereof as valid identification is a matter left entirely to the discretion of any person to whom such card is presented.

(h) The Division may utilize the various communications media throughout the State to inform North Carolina residents of the provisions of this section. (1973, c. 438, s. 1; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsections (a), (b), (f) and (h).

ARTICLE 3.

Motor Vehicle Act of 1937.

Part 1. General Provisions.

§ 20-38: Repealed by Session Laws 1973, c. 1330, s. 39.

Cross Reference. — For definitions applicable throughout this Chapter, see § 20-4.01.

Part 2. Authority and Duties of Commissioner and Division.

§ 20-39. Administering and enforcing laws; rules and regulations; agents, etc.; seal. — (a) The Commissioner is hereby vested with the power and is

charged with the duty of administering and enforcing the provisions of this Article and of all laws regulating the operation of vehicles or the use of the highways, the enforcement or administration of which is now or hereafter vested in the Division.

(b) The Commissioner is hereby authorized to adopt and enforce such rules and regulations as may be necessary to carry out the provisions of this Article and any other laws the enforcement and administration of which are vested in the Division.

(c) The Commissioner is authorized to designate and appoint such agents, field deputies, and clerks as may be necessary to carry out the provisions of this Article.

(d) The Commissioner shall adopt an official seal for the use of the Division. (1937, c. 407, s. 4; 1975, c. 716, s. 5.)

Cross Reference. — As to Commissioner and organization of Division, see §§ 20-2, 20-3.

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout the section.

§ 20-40. Offices of Division. — The Commissioner shall maintain an office in Raleigh, North Carolina, and in such places in the State as he shall deem necessary to properly carry out the provisions of this Article. (1937, c. 407, s. 5.)

§ 20-41. Commissioner to provide forms required. — The Commissioner shall provide suitable forms for applications, certificates of title and registration cards, registration number plates and all other forms requisite for the purpose of this Article, and shall prepay all transportation charges thereon. (1937, c. 407, s. 6.)

§ 20-42. Authority to administer oaths and certify copies of records. — (a) Officers and employees of the Division designated by the Commissioner are, for the purpose of administering the motor vehicle laws, authorized to administer oaths and acknowledge signatures, and shall charge for the acknowledgment of signatures a fee according to the following schedule:

(1) One signature	$1.00
(2) Two signatures	1.50
(3) Three or more signatures	2.00

Funds received under the provisions of this subsection shall be used to defray a part of the costs of distribution of license plates, registration certificates and certificates of title issued by the Division.

(b) The Commissioner and such officers of the Division as he may designate are hereby authorized to prepare under the seal of the Division and deliver upon request a certified copy of any record of the Division, charging a fee of one dollar ($1.00) for each document so certified, and every such certified copy shall be admissible in any proceeding in any court in like manner as the original thereof, without further certification. Provided that any copy of any record of the Division furnished to State, county, municipal and court officials of this State for official use shall be furnished without charge. (1937, c. 407, s. 7; 1955, c. 480; 1961, c. 861, s. 1; 1967, c. 691, s. 41; c. 1172; 1971, c. 749; 1975, c. 716, s. 5; 1977, c. 785.)

Cross Reference. — As to copy of record kept by Commissioner, etc., certified by Commissioner, as evidence, see § 8-37.

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout the section.

The 1977 amendment in subsection (a), increased the fee for acknowledgment of one signature from $.50 to $1.00, for acknowledgment of two signatures from $.75 to $1.50, and for acknowledgment of three or more signatures from $1.00 to $2.00.

Admissibility of Division Records. — The records of the Department (now Division), properly authenticated, are competent for the purpose of establishing the status of a person's operator's license and driving privilege. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970); State v. Rhodes, 10 N.C. App. 154, 177 S.E.2d 754 (1970).

A defendant is entitled to have the contents of the official record of the status of his driver's license limited, if he so requests, to the formal parts thereof, including the certification and seal, plus the fact that under official action of the Department (now Division) of Motor Vehicles the defendant's license was in a state of revocation or suspension on the date he is charged with committing the offense under § 20-28. State v. Rhodes, 10 N.C. App. 154, 177 S.E.2d 754 (1970).

Records of the Department (now Division) of Motor Vehicles are not competent to prove the contents of the records of a court of law. State v. Mabry, 18 N.C. App. 492, 197 S.E.2d 44 (1973).

The effect of subsection (b) is to provide merely that properly certified copies of the Department's (now Division) records are admissible in like manner as the original thereof. Such records of the Department (now Division) are competent to prove, among other things, the status of an individual's license with the Department (now Division) and actions previously taken by the Department (now Division). State v. Mabry, 18 N.C. App. 492, 197 S.E.2d 44 (1973).

There is no error in allowing a properly certified copy of a record of the Division to be read into evidence by the district attorney, as opposed to having the document passed among the jurors. State v. Miller, 288 N.C. 582, 220 S.E.2d 326 (1975).

No Restriction on Signature Rule. — This section does not impose upon the general rule (that a stamped, printed or typewritten signature is a good signature), the restriction that the signature be made under the hand of the person making it. State v. Watts, 289 N.C. 445, 222 S.E.2d 389 (1976).

Applied in State v. Moore, 247 N.C. 368, 101 S.E.2d 26 (1957); State v. Blacknell, 270 N.C. 103, 153 S.E.2d 789 (1967); State v. Hughes, 6 N.C. App. 287, 170 S.E.2d 78 (1969).

Quoted in State v. Parker, 20 N.C. App. 146, 201 S.E.2d 35 (1973).

Cited in State v. Corl, 250 N.C. 252, 108 S.E.2d 608 (1959); State v. Knight, 261 N.C. 17, 134 S.E.2d 101 (1964); State v. Letterlough, 6 N.C. App. 36, 169 S.E.2d 269 (1969); State v. Carlisle, 20 N.C. App. 358, 201 S.E.2d 704 (1973); State v. Salter, 29 N.C. App. 372, 224 S.E.2d 247 (1976).

§ 20-43. Records of Division. — (a) All records of the Division, other than those declared by law to be confidential for the use of the Division, shall be open to public inspection during office hours.

(b) The Commissioner, upon receipt of notification from another state or foreign country that a certificate of title issued by the Division has been surrendered by the owner in conformity with the laws of such other state or foreign country, may cancel and destroy such record of certificate of title. (1937, c. 407, s. 8; 1947, c. 219, s. 1; 1971, c. 1070, s. 1; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsections (a) and (b).

Cited in Hodgson v. Hyatt Realty & Inv. Co., 353 F. Supp. 1363 (M.D.N.C. 1973).

§ 20-44. Authority to grant or refuse applications. — The Division shall examine and determine the genuineness, regularity and legality of every application for registration of a vehicle and for a certificate of title therefor, and of any other application lawfully made in the Division, and may in all cases make investigation as may be deemed necessary or require additional information, and shall reject any such application if not satisfied of the genuineness, regularity, or legality thereof or the truth of any statement contained therein, or for any other reason, when authorized by law. (1937, c. 407, s. 9; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

§ 20-45. Seizure of documents and plates. — The Division is hereby authorized to take possession of any certificate of title, registration card, permit, license, or registration plate issued by it upon expiration, revocation, cancellation, or suspension thereof, or which is fictitious, or which has been unlawfully or erroneously issued, or which has been unlawfully used. (1937, c. 407, s. 10; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

§ 20-46. Distribution of synopsis of laws. — The Division may publish a synopsis or summary of the laws of this State regulating the operation of vehicles, and deliver to any person on request a copy thereof without charge. (1937, c. 407, s. 11; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

§ 20-47. Division may summon witnesses and take testimony. — (a) The Commissioner and officers of the Division designated by him shall have authority to summon witnesses to give testimony under oath or to give written deposition upon any matter under the jurisdiction of the Division. Such summons may require the production of relevant books, papers, or records.

(b) Every such summons shall be served at least five days before the return date, either by personal service made by any person over 18 years of age or by registered mail, but return acknowledgment is required to prove such latter service. Failure to obey such a summons so served shall constitute a misdemeanor. The fees for the attendance and travel of witnesses shall be the same as for witnesses before the superior court.

(c) The superior court shall have jurisdiction, upon application by the Commissioner, to enforce all lawful orders of the Commissioner under this section. (1937, c. 407, s. 12; 1975, c. 716, s. 5.)

Cross References. — As to fees of witnesses generally, see § 7A-314. As to penalties for persons convicted of misdemeanors for violations of this Article, see § 20-176.

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsection (a).

§ 20-48. Giving of notice. — (a) Whenever the Division is authorized or required to give any notice under this Chapter or other law regulating the operation of vehicles, unless a different method of giving such notice is otherwise expressly prescribed, such notice shall be given either by personal delivery thereof to the person to be so notified or by deposit in the United States mail of such notice in an envelope with postage prepaid, addressed to such person at his address as shown by the records of the Division. The giving of notice by mail is complete upon the expiration of four days after such deposit of such notice. Proof of the giving of notice in either such manner may be made by the certificate of any officer or employee of the Division or affidavit of any person over 18 years of age, naming the person to whom such notice was given and specifying the time, place, and manner of the giving thereof.

(b) Notwithstanding any other provision of this Chapter at any time notice is now required by registered mail with return receipt requested, certified mail

with return receipt requested may be used in lieu thereof and shall constitute valid notice to the same extent and degree as notice by registered mail with return receipt requested. (1937, c. 407, s. 13; 1955, c. 1187, s. 21; 1971, c. 1231, s. 1; 1975, c. 326, s. 3; c. 716, s. 5.)

Editor's Note. — The first 1975 amendment designated the former provisions of this section as subsection (a) and added subsection (b).

The second 1975 amendment substituted "Division" for "Department" in subsection (a).

Provisions Satisfy Requirements of Due Process. — The provisions of this section, together with the provisions of § 20-16(d), relating to the right of review, and the provisions of § 20-25, relating to the right of appeal, satisfy the requirements of procedural due process. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

This section does afford the defendant procedural due process with respect to the manner of giving him notice of the revocation or suspension of his driving privileges. State v. Hayes, 31 N.C. App. 121, 228 S.E.2d 460 (1976).

Notice of Suspension or Revocation of License. — This section, which is the section providing for the manner in which notice is to be given, is reasonably calculated to assure that notice will reach the intended party and afford him the opportunity of resisting or avoiding the proposed suspension, as well as to give him notification of the actual suspension of his operator's license and driving privilege. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

When the Department (now Division) complies with the procedure set forth in this section as to notice of suspension of the operator's license and driving privilege, such compliance constitutes constructive notice to the defendant that his license has been suspended. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

Certification by an employee of the Department (now Division) of Motor Vehicles that the original of an order of security requirement or suspension of driving privilege was mailed to defendant on a specified date at his address shown on the records of the Department (now Division) of Motor Vehicles is sufficient to render admissible a copy of the document in a prosecution of a defendant for driving while his license was suspended. State v. Herald, 10 N.C. App. 263, 178 S.E.2d 120 (1970).

For purposes of a conviction for driving while license is suspended or revoked, mailing of the notice under this section raises only a prima facie presumption that defendant received the notice and thereby acquired knowledge of the suspension or revocation and defendant is not by this section denied the right to rebut the presumption. State v. Atwood, 290 N.C. 266, 225 S.E.2d 543 (1976).

The State satisfies the burden of proving that defendant had knowledge at the time charged that his operator's license was suspended or revoked when, nothing else appearing, it has offered evidence of compliance with the notice requirements of this section because of the presumption that he received notice and had such knowledge. State v. Chester, 30 N.C. App. 224, 226 S.E.2d 524 (1976).

Full Signature and Notarization. — There is nothing in this section which requires that the certificate to prove that the notice of revocation was mailed in accordance with the statute contain the full signature of the employee making the certificate or that such certificate be notarized. State v. Johnson, 25 N.C. App. 630, 214 S.E.2d 278, cert. denied, 288 N.C. 247, 217 S.E.2d 671 (1975).

Initialed certificate lacking notary's authentication meets all the requirements of this section and provides prima facie evidence of the genuineness of such certificate, the truth of the statements made in such certificate, and the official character of the person who purportedly initialed and executed it. State v. Johnson, 25 N.C. App. 630, 214 S.E.2d 278, cert. denied, 288 N.C. 247, 217 S.E.2d 671 (1975).

Applied in State v. Hughes, 6 N.C. App. 287, 170 S.E.2d 78 (1969); State v. Phillips, 25 N.C. App. 313, 212 S.E.2d 906 (1975).

§ 20-49. Police authority of Division. — The Commissioner and such officers and inspectors of the Division as he shall designate and all members of the Highway Patrol shall have the power:

(1) Of peace officers for the purpose of enforcing the provisions of this Article and of any other law regulating the operation of vehicles or the use of the highways.

(2) To make arrests upon view and without warrant for any violation committed in their presence of any of the provisions of this Article or other laws regulating the operation of vehicles or the use of the highways.

(3) At all time to direct all traffic in conformance with law, and in the event of a fire or other emergency or to expedite traffic or to insure safety, to direct traffic as conditions may require, notwithstanding the provisions of law.
(4) When on duty, upon reasonable belief that any vehicle is being operated in violation of any provision of this Article or of any other law regulating the operation of vehicles to require the driver thereof to stop and exhibit his driver's license and the registration card issued for the vehicle, and submit to an inspection of such vehicle, the registration plates and registration card thereon or to an inspection and test of the equipment of such vehicle.
(5) To inspect any vehicle of a type required to be registered hereunder in any public garage or repair shop or in any place where such vehicles are held for sale or wrecking, for the purpose of locating stolen vehicles and investigating the title and registration thereof.
(6) To serve all warrants relating to the enforcement of the laws regulating the operation of vehicles or the use of the highways.
(7) To investigate traffic accidents and secure testimony of witnesses or of persons involved.
(8) To investigate reported thefts of motor vehicles, trailers and semitrailers.
(9) For the purpose of determining compliance with the provisions of this Chapter, to inspect all files and records of the persons hereinafter designated and required to be kept under the provisions of this Chapter or of the registrations of the Division:
    a. Persons dealing in or selling and buying new, used or junked motor vehicles and motor vehicle parts; and
    b. Persons operating garages or other places where motor vehicles are repaired, dismantled, or stored. (1937, c. 407, s. 14; 1955, c. 554, s. 1; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the introductory paragraph and in subdivision (9).

Subdivisions (2) and (4) of this section are not irreconcilable with § 20-183. State v. Allen, 15 N.C. App. 670, 190 S.E.2d 714 (1972), rev'd on other grounds, 282 N.C. 503, 194 S.E.2d 9 (1973).

Applied in State v. Clark, 21 N.C. App. 35, 203 S.E.2d 103 (1974).

Part 3. Registration and Certificates of Titles of Motor Vehicles.

§ 20-50. Owner to secure registration and certificate of title; temporary registration markers. — (a) Except as otherwise provided in this Article, every owner of a vehicle intended to be operated upon any highway of this State and required by this Article to be registered shall, before the same is so operated, apply to the Division for and obtain the registration thereof, the registration plates therefor and a certificate of title therefor, and attach the registration plates to the vehicle, except when an owner is permitted to operate a vehicle under the registration provisions relating to manufacturers, dealers and nonresidents contained in G.S. 20-79, or under temporary registration plates as provided in this Article: Provided that the Commissioner of Motor Vehicles or his duly authorized agent is empowered to grant a special one-way trip permit to move a vehicle without license upon good cause being shown. It is further provided that when the owner of a vehicle leases such vehicle to a carrier of passengers or property and it is actually used by such carrier in the operation of its business, the registration plates may be obtained by the lessee, upon written consent of the owner, after the certificate of title has been obtained by the owner. Provided further that when the owner of a vehicle leases such vehicle to a farmer and it is actually used by such farmer in the operation of his farm,

the registration plates may be obtained by the farmer at the applicable farmer rate, upon written consent of the owner, after the certificate of title has been obtained by the owner. The lessee shall make application on an appropriate form furnished by the Division and file such evidence of the lease as the Division may require.

(b) The Division may upon receipt of proper application upon a form supplied by the Division and an accompanying fee of three dollars ($3.00) grant a 10-day temporary registration marker subject to the following limitations and conditions:

(1) Temporary 10-day registration markers shall be issued only upon proper proof that the applicant has met the applicable financial responsibility requirements.

(2) Temporary 10-day registration markers shall expire 10 days from the date of issuance.

(3) Temporary 10-day registration markers may be used only on the vehicle for which issued and may not be transferred, loaned or assigned to another.

(4) In the event a temporary 10-day registration marker is lost or stolen, notice shall be furnished to the Division.

(5) The Commissioner shall have the power to make such rules and regulations not inconsistent herewith as he shall deem necessary for the purpose of carrying out the provisions of this section.

(6) The provisions of G.S. 20-63, 20-71, 20-110 and 20-111 shall apply in like manner to temporary 10-day registration markers as is applicable to nontemporary plates not by their nature rendered inapplicable. (1937, c. 407, s. 15; 1943, c. 648; 1945, c. 956, s. 3; 1947, c. 219, s. 2; 1953, c. 831, s. 3; 1957, c. 246, s. 2; 1961, c. 360, s. 1; 1963, c. 552, s. 1; 1973, c. 919; 1975, c. 462; c. 716, s. 5; c. 767, s. 1.)

Editor's Note. — The first 1975 amendment added the next-to-last sentence of subsection (a).

The second 1975 amendment substituted "Division" for "Department" in subsections (a) and (b).

The third 1975 amendment deleted "common" preceding "carrier" in two places near the middle of subsection (a).

Opinions of Attorney General. — Mr. Eric L. Gooch, Director, Sales and Use Tax Division, N.C. Department of Revenue, 40 N.C.A.G. 446 (1969).

A "certificate of number" required by § 75A-5 is not a "certificate of title" to be compared with that required by this section for vehicles intended to be operated on the highways. Lane v. Honeycutt, 14 N.C. App. 436, 188 S.E.2d 604 (1972).

A mobile home is a motor vehicle under former § 20-38(17) [now § 20-4.01(23)] and is subject to the mandatory provisions of the statutes relating to the registration of motor vehicles in this State. King Homes, Inc. v. Bryson, 273 N.C. 84, 159 S.E.2d 329 (1968).

Mortgage registration statute compared with prior similar statute. See Carolina Disct. Corp. V. Landis Motor Co., 190 N.C. 157, 129 S.E. 414 (1925).

Applied in Hawkins v. M & J Fin. Corp., 238 N.C. 174, 77 S.E.2d 669 (1953).

Stated in Southern Auto Fin. Co. v. Pittman, 253 N.C. 550, 117 S.E.2d 423 (1960); Pilot Freight Carriers, Inc. v. Scheidt, 263 N.C. 737, 140 S.E.2d 383 (1965); Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970).

Cited in Community Credit Co. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962); State v. White, 3 N.C. App. 31, 164 S.E.2d 36 (1968); United States v. Powers, 439 F.2d 373 (4th Cir. 1971); Ferguson v. Morgan, 282 N.C. 83, 191 S.E.2d 817 (1972); Williams v. Wachovia Bank & Trust Co., 292 N.C. 416, 233 S.E.2d 589 (1977).

§ 20-50.1. Certain bicycles with motors exempt. — Notwithstanding any of the provisions of Chapter 20 of the North Carolina General Statutes, all pedal bicycles with helper motors rated at one brake horsepower or less and incapable of exceeding 20 miles per hour shall be exempt from all title and registration requirements of Chapter 20, provided such bicycles so equipped shall not be operated upon any highway or public vehicular area of this State by any person under the age of 16 years. (1973, c. 1143, s. 1; c. 1403, s. 1.)

§ 20-51. Exempt from registration. — The following shall be exempt from the requirement of registration and certificate of title:

(1) Any such vehicle driven or moved upon a highway in conformance with the provisions of this Article relating to manufacturers, dealers, or nonresidents.

(2) Any such vehicle which is driven or moved upon a highway only for the purpose of crossing such highway from one property to another.

(3) Any implement of husbandry, farm tractor, road construction or maintenance machinery or other vehicle which is not self-propelled that was designed for use in work off the highway and which is operated on the highway for the purpose of going to and from such nonhighway projects.

(4) Any vehicle owned and operated by the government of the United States.

(5) Farm tractors equipped with rubber tires and trailers or semitrailers when attached thereto and when used by a farmer, his tenant, agent, or employee in transporting his own farm implements, farm supplies, or farm products from place to place on the same farm, from one farm to another, from farm to market, or from market to farm. This exemption shall extend also to any tractor and trailer or semitrailer while on any trip within a radius of 10 miles from the point of loading. This section shall not be construed as granting any exemption to farm tractors and trailers or semitrailers which are operated on a for-hire basis, whether money or some other thing of value is paid or given for the use of such tractors and trailers or semitrailers.

(6) Any trailer or semitrailer attached to and drawn by a properly licensed motor vehicle when used by a farmer, his tenant, agent, or employee in transporting unginned cotton, peanuts, soybeans, corn, hay, tobacco, silage, cucumbers, fertilizers or chemicals purchased or owned by such farmer or tenant for personal use in implementing husbandry or irrigation pipes and equipment owned by such farmer or tenant from place to place on the same farm, from one farm to another, from farm to gin, from farm to dryer, or from farm to market, and when not operated on a for-hire basis. The term "transporting" as used herein shall include the actual hauling of said products and all unloaded travel in connection therewith.

(7) Those small farm trailers known generally as tobacco-handling trailers, tobacco trucks or tobacco trailers when used by a farmer, his tenant, agent or employee, when transporting or otherwise handling tobacco in connection with the pulling, tying or curing thereof.

(8) Any vehicle which is driven or moved upon a highway only for the purpose of crossing or traveling upon such highway from one side to the other provided the owner or lessee of the vehicle owns the fee or a leasehold in all the land along both sides of the highway at the place or crossing. (1937, c. 407, s. 16; 1943, c. 500; 1949, c. 429; 1951, c. 705, s. 2; 1953, c. 826, ss. 2, 3; c. 1316, s. 1; 1961, cc. 334, 817; 1963, c. 145; 1965, c. 1146; 1971, c. 107; 1973, cc. 478, 757, 964.)

Cross References. — As to manufacturers and dealers, see § 20-79. As to nonresidents, see § 20-83.

Farm tractors are not to be considered motor vehicles within the statute relating to the registration and certificates of titles of motor vehicles. Brown v. Fidelity & Cas. Co., 241 N.C. 666, 86 S.E.2d 433 (1955).

Cited in Hawkins v. M & J Fin. Corp., 238 N.C. 174, 77 S.E.2d 669 (1953).

§ 20-52. Application for registration and certificate of title. — (a) Every owner of a vehicle subject to registration hereunder shall make application to

the Division for the registration thereof and issuance of a certificate of title for such vehicle upon the appropriate form or forms furnished by the Division, and every such application shall bear the signature of the owner written with pen and ink, and said signature shall be acknowledged by the owner before a person authorized to administer oaths, and said application shall contain:

(1) The name, bona fide residence and mail address of the owner or business address of the owner if a firm, association or corporation;

(2) A description of the vehicle, including, insofar as the hereinafter specified data may exist with respect to a given vehicle, the make, model, type of body, the serial number of the vehicle, the engine and other identifying numbers of the vehicle and whether new or used, and if a new vehicle, the date of sale and actual date of delivery of vehicle by the manufacturer or dealer to the person intending to operate such vehicle;

(3) A statement of the applicant's title and of all liens or encumbrances upon said vehicle and the names and addresses of all lienholders in the order of their priority, and the amount, date and nature of the security agreement;

(4) Such further information as may reasonably be required by the Division to enable it to determine whether the vehicle is lawfully entitled to registration and the owner entitled to a certificate of title.

(b) When such application refers to a new vehicle purchased from a manufacturer or dealer, such application shall be accompanied with a manufacturer's certificate of origin that is properly assigned to the applicant. If the new vehicle is acquired from a dealer or person located in another jurisdiction other than a manufacturer, the application shall be accompanied with such evidence of ownership as is required by the laws of that jurisdiction duly assigned by the disposer to the purchaser, or, if no such evidence of ownership be required by the laws of such other jurisdiction, a notarized bill of sale from the disposer. (1937, c. 407, s. 17; 1961, c. 835, ss. 2, 3; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsection (a).

A mobile home is a motor vehicle, and is subject to the mandatory provisions of the statutes relating to the registration of motor vehicles in this State. King Homes, Inc. v. Bryson, 273 N.C. 84, 159 S.E.2d 329 (1968).

Cited in Community Credit Co. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962); Ferguson v. Morgan, 282 N.C. 83, 191 S.E.2d 817 (1972).

§ 20-52.1. Manufacturer's certificate of transfer of new motor vehicle. — (a) Any manufacturer transferring a new motor vehicle to another shall, at the time of the transfer, supply the transferee with a manufacturer's certificate of origin assigned to the transferee.

(b) Any dealer transferring a new vehicle to another dealer shall, at the time of transfer, give such transferee the proper manufacturer's certificate assigned to the transferee.

(c) Upon sale of a new vehicle by a dealer to a consumer-purchaser, the dealer shall execute in the presence of a person authorized to administer oaths an assignment of the manufacturer's certificate of origin for the vehicle, including in such assignment the name and address of the transferee and no title to a new motor vehicle acquired by a dealer under the provisions of subsections (a) and (b) of this section shall pass or vest until such assignment is executed and the motor vehicle delivered to the transferee.

Any dealer transferring title to, or an interest in, a new vehicle shall deliver the manufacturer's certificate of origin duly assigned in accordance with the foregoing provision to the transferee at the time of delivering the vehicle, except

that where a security interest is obtained in the motor vehicle from the transferee in payment of the purchase price or otherwise, the transferor shall deliver the manufacturer's certificate of origin to the lienholder and the lienholder shall forthwith forward the manufacturer's certificate of origin together with the transferee's application for certificate of title and necessary fees to the Division. Any person who delivers or accepts a manufacturer's certificate of origin assigned in blank shall be guilty of a misdemeanor. (1961, c. 835, s. 4; 1967, c. 863; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the second paragraph of subsection (c).

A mobile home is a motor vehicle, and is subject to the mandatory provisions of the statutes relating to the registration of motor vehicles in this State. King Homes, Inc. v. Bryson, 273 N.C. 84, 159 S.E.2d 329 (1968).

§ 20-53. Application for specially constructed, reconstructed, or foreign vehicle. — (a) In the event the vehicle to be registered is a specially constructed, reconstructed, or foreign vehicle, such fact shall be stated in the application, and with reference to every foreign vehicle which has been registered outside of this State, the owner shall surrender to the Division all registration cards and certificates of title or other evidence of such foreign registration as may be in his possession or under his control, except as provided in subsection (b) hereof.

(b) Where, in the course of interstate operation of a vehicle registered in another state, it is desirable to retain registration of said vehicle in such other state, such applicant need not surrender, but shall submit for inspection said evidence of such foreign registration, and the Division in its discretion, and upon a proper showing, shall register said vehicle in this State but shall not issue a certificate of title for such vehicle.

(c), (d) Repealed by Session Laws 1965, c. 734, s. 2. (1937, c. 407, s. 18; 1949, c. 675; 1953, c. 853; 1957, c. 1355; 1965, c. 734, s. 2; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsections (a) and (b).

For comment on former subsection (c), see 27 N.C.L. Rev. 471.

§ 20-54. Authority for refusing registration or certificate of title. — The Division shall refuse registration or issuance of a certificate of title or any transfer of registration upon any of the following grounds:

(1) That the application contains any false or fraudulent statement or that the applicant has failed to furnish required information or reasonable additional information requested by the Division or that the applicant is not entitled to the issuance of a certificate of title or registration of the vehicle under this Article;

(2) That the vehicle is mechanically unfit or unsafe to be operated or moved upon the highways;

(3) That the Division has reasonable ground to believe that the vehicle is a stolen or embezzled vehicle, or that the granting of registration or the issuance of a certificate of title would constitute a fraud against the rightful owner or other person having valid lien upon such vehicle;

(4) That the registration of the vehicle stands suspended or revoked for any reason as provided in the motor vehicle laws of this State;

(5) That the required fee has not been paid. (1937, c. 407, s. 19; 1975, c. 716, s. 5.)

Cross Reference. — As to fees, see § 20-85.

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the introductory paragraph and in subdivisions (1) and (3).

§ 20-55. Examination of registration records and index of stolen and recovered vehicles. — The Division, upon receiving application for any transfer of registration or for original registration of a vehicle, other than a new vehicle sold by a North Carolina dealer, shall first check the engine and serial numbers shown in the application with its record of registered motor vehicles, and against the index of stolen and recovered motor vehicles required to be maintained by this Article. (1937, c. 407, s. 20; 1971, c. 1070, s. 2; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

§ 20-56. Registration indexes. — The Division shall file each application received, and when satisfied as to the genuineness and regularity thereof, and that the applicant is entitled to register such vehicle and to the issuance of a certificate of title, shall register the vehicle therein described and keep a record thereof as follows:

(1) Under a distinctive registration number assigned to the vehicle;
(2) Alphabetically, under the name of the owner;
(3) Under the motor number or any other identifying number of the vehicle; and
(4) In the discretion of the Division, in any other manner it may deem advisable. (1937, c. 407, s. 20½; 1949, c. 583, s. 5; 1971, c. 1070, s. 3; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the introductory paragraph and in subdivision (4).

Stated in Hawkins v. M & J Fin. Corp., 238 N.C. 174, 77 S.E.2d 669 (1953).

§ 20-57. Division to issue certificate of title and registration card. — (a) The Division upon registering a vehicle shall issue a registration card and a certificate of title as separate documents.

(b) The registration card shall be delivered to the owner and shall contain upon the face thereof the name and address of the owner, space for owner's signature, the registration number assigned to the vehicle, and such description of the vehicle as determined by the Commissioner, provided that if there are more than two owners the Division may show only two owners on the registration card and indicate that additional owners exist by placing after the names listed "et al." Upon application to the Division, the registered owner may acquire additional copies of the registration card at a fee of fifty cents (50¢) each.

(c) Every owner upon receipt of a registration card, shall write his signature thereon with pen and ink in the space provided. Every such registration card shall at all times be carried in the vehicle to which it refers or in the vehicle to which transfer is being effected, as provided by G.S. 20-64 at the time of its operation, and such registration card shall be displayed upon demand of any peace officer or any officer of the Division: Provided, however, any person charged with failing to so carry such registration card shall not be convicted if he produces in court a registration card theretofore issued to him and valid at the time of his arrest: Provided further, that in case of a transfer of a license plate from one vehicle to another under the provisions of G.S. 20-72, evidence of application for transfer shall be carried in the vehicle in lieu of the registration card.

(d) The certificate of title shall contain upon the face thereof the identical information required upon the face of the registration card except the abbreviation "et al." if such appears and in addition thereto the name of all owners, the date of issuance and all liens or encumbrances disclosed in the application for title. All such liens or encumbrances shall be shown in the order of their priority, according to the information contained in such application.

(e) The certificate of title shall also contain upon the reverse side form of assignment of title or interest and warranty thereof, with space for notation of liens and encumbrances upon such vehicle at the time of a transfer.

(f) Certificates of title upon which liens or encumbrances are shown shall be delivered or mailed by the Division to the holder of the first lien or encumbrance.

(g) Certificates of title shall bear thereon the seal of the Division.

(h) Certificates of title need not be renewed annually, but shall remain valid until canceled by the Division for cause or upon a transfer of any interest shown therein. (1937, c. 407, s. 21; 1943, c. 715; 1961, c. 360, s. 2; c. 835, s. 5; 1963, c. 552, s. 2; 1973, c. 72; c. 764, ss. 1-3; c. 1118; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout the section.

Stated in Hawkins v. M & J Fin. Corp., 238 N.C. 174, 77 S.E.2d 669 (1953).

Cited in Community Credit Co. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962).

§ 20-58. Perfection by indication of security interest on certificate of title. — Except as provided in G.S. 20-58.8, a security interest in a vehicle of a type for which a certificate of title is required shall be perfected only as hereinafter provided.

(1) If the vehicle is not registered in this State, the application for notation of a security interest shall be the application for certificate of title provided for in G.S. 20-52.

(2) If the vehicle is registered in this State, the application for notation of a security interest shall be in the form prescribed by the Division, signed by the debtor, and containing the amount, date and nature of the security agreement, and the name and address of the secured party from whom information concerning the security interest may be obtained. The application must be accompanied by the existing certificate of title unless it is in the possession of a prior secured party. If there is an existing certificate of title issued by this or any other jurisdiction in the possession of a prior secured party, the application for notation of the security interest shall in addition, contain the name and address of such prior secured party.

(3) If the application for notation of security interest is made in order to continue the perfection of a security interest perfected in another jurisdiction, it may be signed by the secured party instead of the debtor. Such application shall be accompanied by documentary evidence of a perfected security interest. No such application shall be valid unless an application for a certificate of title has been made in North Carolina. (1937, c. 407, s. 22; 1955, c. 554, s. 2; 1961, c. 835, s. 6; 1969, c. 838, s. 1; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subdivision (2).

For case law survey as to credit transactions, see 44 N.C.L. Rev. 956 (1966).

Opinions of Attorney General. — Mr. Eric L. Gooch, Director, Sales and Use Tax Division, N.C. Department of Revenue, 40 N.C.A.G. 446 (1969).

Purpose. — The manifest purpose of § 20-58 et seq. is to provide notice by recording the security interest on the certificate of title.

Ferguson v. Morgan, 14 N.C. App. 520, 188 S.E.2d 672, rev'd on other grounds, 282 N.C. 83, 191 S.E.2d 817 (1972).

Provisions of the Uniform Commercial Code with reference to the place for filing financing statements have no application to vehicles subject to registration with the Department of Motor Vehicles. Ferguson v. Morgan, 282 N.C. 83, 191 S.E.2d 817 (1972).

Necessity for Recording Mortgage or Other Lien. — It is no longer necessary to record the mortgage or other lien on vehicles required to be registered under the State motor vehicle laws in the county where the debtor resides. Ferguson v. Morgan, 282 N.C. 83, 191 S.E.2d 817 (1972).

The certificate of title issued by the Department (now Division) now fixes the priority of liens. It is no longer necessary to record the mortgage or other lien in the county where the debtor resides. Community Credit Co. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962), decided under this section as it stood before the 1969 revision of §§ 20-58 through 20-58.8.

Pledge Not Prohibited. — No language of the 1961 act amending this section expressly prohibited the creation of a pledge. Wachovia Bank & Trust Co. v. Wayne Fin. Co., 262 N.C. 711, 138 S.E.2d 481 (1964), decided under this section as it stood before the 1969 revision of §§ 20-58 through 20-58.8.

Mortgagee in Possession May Have Priority. — The legislature did not intend to prevent a mortgagee who has actual possession of the pledged vehicle from acquiring a lien having priority over liens not then perfected. Wachovia Bank & Trust Co. v. Wayne Fin. Co., 262 N.C. 711, 138 S.E.2d 481 (1964), decided under this section as it stood before the 1969 revision of §§ 20-58 through 20-58.8.

Duty of Officer to Report Levy; Levy Subordinate to Liens Theretofore Noted. — When a levy has been made on an automobile pursuant to an execution, it is the duty of the officer to report the levy to the Department (now Division) of Motor Vehicles in a form prescribed by it. The levy so reported is subordinate to all liens theretofore noted on the certificate by the Department (now Division). Community Credit Co. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962), decided under this section as it stood before the 1969 revision of §§ 20-58 through 20-58.8.

Plaintiff Estopped from Asserting Lien on Vehicles Where It Did Nothing to Perfect Security Interest. — See Wayne Fin. Corp. v. Shivar, 8 N.C. App. 489, 174 S.E.2d 876 (1970).

Stated in Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970).

Cited in Moser v. Employers Com. Union Ins. Co. of America, 25 N.C. App. 309, 212 S.E.2d 664 (1975).

§ 20-58.1. Duty of the Division upon receipt of application for notation of security interest. — (a) Upon receipt of an application for notation of security interest, the required fee and accompanying documents required by G.S. 20-58, the Division, if it finds the application and accompanying documents in order, shall either endorse upon the certificate of title or issue a new certificate of title containing, the name and address of each secured party, the amount of each security interest, and the date of perfection of each security interest as determined by the Division. The Division shall deliver or mail the certificate to the first secured party named in it and shall also notify the new secured party that his security interest has been noted upon the certificate of title.

(b) If the certificate of title is in the possession of some prior secured party, the Division, when satisfied that the application is in order, shall procure the certificate of title from the secured party in whose possession it is being held, for the sole purpose of noting the new security interest. Upon request of the Division, a secured party in possession of a certificate of title shall forthwith deliver or mail the certificate of title to the Division. Such delivery of the certificate does not affect the rights of any secured party under his security agreement. (1961, c. 835, s. 6; 1969, c. 838, s. 1; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout the section.

Notation Is Necessary for Perfection of Security Interest as of Date Provided in § 20-58.2. — A security interest would be perfected as of the date provided in § 20-58.2 only if the notation of the security interest is actually made on the certificate of title by the Department (now Division) as provided in this section. Ferguson v. Morgan, 14 N.C. App. 520, 188 S.E.2d 672 (1972).

Quoted in Wayne Fin. Corp. v. Shivar, 8 N.C. App. 489, 174 S.E.2d 876 (1970); Ferguson v. Morgan, 282 N.C. 83, 191 S.E.2d 817 (1972).

§ 20-58.2. Date of perfection. — If the application for notation of security interest with the required fee is delivered to the Division within 10 days after the date of the security agreement, the security interest is perfected as of that date. Otherwise, the security interest is perfected as of the date of delivery of the application to the Division. (1961, c. 835, s. 6; 1969, c. 838, s. 1; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

Effective Date of Lien. — The lien, if the agreement to pay is filed with the Department (now Division) within 10 days from its date, relates back to the day the lien was created. Wachovia Bank & Trust Co. v. Wayne Fin. Co., 262 N.C. 711, 138 S.E.2d 481 (1964), decided under § 20-58 as it stood before the 1969 revision of §§ 20-58 through 20-58.8.

Applied in Ferguson v. Morgan, 282 N.C. 83, 191 S.E.2d 817 (1972).

§ 20-58.3. Notation of assignment of security interest on certificate of title. — An assignee of a security interest may have the certificate of title endorsed or issued with the assignee named as the secured party, upon delivering to the Division on a form prescribed by the Division, with the required fee, an assignment by the secured party named in the certificate together with the certificate of title. The assignment must contain the address of the assignee from which information concerning the security interest may be obtained. If the certificate of title is in the possession of some other secured party the procedure prescribed by G.S. 20-58.1(b) shall be followed. (1961, c. 835, s. 6; 1969, c. 838, s. 1; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

§ 20-58.4. Release of security interest. — (a) Upon the satisfaction or other discharge of a security interest in a vehicle for which the certificate of title is in the possession of the secured party, the secured party shall within 10 days after demand and, in any event, within 30 days, execute a release of his security interest, in the space provided therefor on the certificate or as the Division prescribes, and mail or deliver the certificate and release to the next secured party named therein, or if none, to the owner or other person authorized to receive the certificate for the owner.

(b) Upon the satisfaction or other discharge of a security interest in a vehicle for which the certificate of title is in the possession of a prior secured party, the secured party whose security interest is satisfied shall within 10 days execute a release of his security interest in such form as the Division prescribes and mail or deliver the same to the owner or other person authorized to receive the same for the owner.

(c) An owner, upon securing the release of any security interest in a vehicle shown upon the certificate of title issued therefor, may exhibit the documents evidencing such release, signed by the person or persons making such release, and the certificate of title to the Division which shall, when satisfied as to the genuineness and regularity of the release, issue to the owner either a new certificate of title in proper form or an endorsement or rider attached thereto showing the release of the security interest.

(d) If an owner exhibits documents evidencing the release of a security interest as provided in subsection (c) of this section but is unable to furnish the certificate of title to the Division because it is in possession of a prior secured party, the Division, when satisfied as to the genuineness and regularity of the release, shall procure the certificate of title from the person in possession thereof for the sole purpose of noting thereon the release of the subsequent security interest, following which the Division shall return the certificate of title

to the person from whom it was obtained and notify the owner that the release has been noted on the certificate of title.

(e) If it is impossible for the owner to secure from the secured party the release contemplated by this section, the owner may exhibit to the Division such evidence as may be available showing satisfaction or other discharge of the debt secured, together with a sworn affidavit by the owner that the debt has been satisfied, which the Division may treat as a proper release for purposes of this section when satisfied as to the genuineness, truth and sufficiency thereof. Prior to cancellation of a security interest under the provisions of this subsection, at least 15 days' notice of the pendency thereof shall be given to the secured party at his last known address by the Division by registered letter. (1961, c. 835, s. 6; 1969, c. 838, s. 1; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout the section.

§ 20-58.5. Duration of security interests in favor of firms which cease to do business. — Any security interest recorded in favor of a firm or corporation which, since the recording of such security interest, has dissolved, ceased to do business, or gone out of business for any reason, and which remains of record as a security interest of such firm or corporation for a period of more than three years from the date of the recording thereof, shall become null and void and of no further force and effect. (1961, c. 835, s. 6; 1969, c. 838, s. 1.)

§ 20-58.6. Duty of secured party to disclose information. — A secured party named in a certificate of title shall, upon written request of the Division, the owner or another secured party named on the certificate, disclose information when called upon by such person, within 10 days after his lien shall have been paid and satisfied, and any person convicted under this section shall be fined not more than fifty dollars ($50.00) or imprisoned not more than 30 days. (1937, c. 407, s. 23; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

§ 20-58.7. Cancellation of certificate. — The cancellation of a certificate of title shall not, in and of itself, affect the validity of a security interest noted on it. (1961, c. 835, s. 6; 1969, c. 838, s. 1.)

§ 20-58.8. Applicability of §§ 20-58 to 20-58.8; use of term "lien". — (a) The provisions of G.S. 20-58 through 20-58.8 apply to the perfection of security interests pursuant to G.S. 25-9-302.

(b) The provisions of G.S. 20-58 through 20-58.8 inclusive shall not apply to or affect:

(1) A lien given by statute or rule of law for storage of a motor vehicle or to a supplier of services or materials for a vehicle;

(2) A lien arising by virtue of a statute in favor of the United States, this State or any political subdivision of this State; or

(3) A security interest in a vehicle created by a manufacturer or by a dealer in new or used vehicles who holds the vehicle in his inventory. Such security interests shall be perfected by filing a financing statement under Article 9 of the Uniform Commercial Code.

(c) When the term "lien" is used in other sections of this Chapter, or has been used prior to October 1, 1969, with reference to transactions governed by G.S. 20-58 through 20-58.8, to describe contractual agreements creating security

interests in personal property, the term "lien" shall be construed to refer to a "security interest" as the term is used in G.S. 20-58 through 20-58.8 and the Uniform Commercial Code. (1961, c. 835, s. 6; 1969, c. 838, s. 1.)

§ 20-58.9: Repealed by Session Laws 1969, c. 838, s. 3.

§ 20-58.10. Effective date of §§ 20-58 to 20-58.9. — The provisions of G.S. 20-58 through 20-58.9 inclusive shall be effective and relate to the perfecting and giving notice of security interests entered into on and after January 1, 1962. (1961, c. 835, s. 6.)

Applied in Community Credit Co. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962); Ferguson v. Morgan, 282 N.C. 83, 191 S.E.2d 817 (1972).

§ 20-59. Unlawful for lienor who holds certificate of title not to surrender same when lien satisfied. — It shall be unlawful and constitute a misdemeanor for a lienor who holds a certificate of title as provided in this Article to refuse or fail to surrender such certificate of title to the person legally entitled thereto, when called upon by such person, within 10 days after his lien shall have been paid and satisfied, and any person convicted under this section shall be fined not more than fifty dollars ($50.00) or imprisoned not more than 30 days. (1937, c. 407, s. 23.)

§ 20-60. Owner after transfer not liable for negligent operation. — The owner of a motor vehicle who has made a bona fide sale or transfer of his title or interest, and who has delivered possession of such vehicle and the certificate of title thereto properly endorsed to the purchaser or transferee, shall not be liable for any damages thereafter resulting from negligent operation of such vehicle by another. (1937, c. 407, s. 24.)

§ 20-61. Owner dismantling or wrecking vehicle to return evidence of registration. — Any owner dismantling or wrecking any vehicle shall forward to the Division the certificate of title, registration card and other proof of ownership, and the registration plates last issued for such vehicle, unless such plates are to be transferred to another vehicle of the same owner. In that event, the plates shall be retained and preserved by the owner for transfer to such other vehicle. No person, firm or corporation shall dismantle or wreck any motor vehicle without first complying with the requirements of this section. The Commissioner upon receipt of certificate of title and notice from the owner thereof that a vehicle has been junked or dismantled may cancel and destroy such record of certificate of title. (1937, c. 407, s. 25; 1947, c. 219, s. 3; 1961, c. 360, s. 3; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

§ 20-62. Sale of motor vehicles to be dismantled. — Any owner who sells a motor vehicle as scrap or to be dismantled or destroyed shall assign the certificate of title thereto to the purchaser, and shall deliver such certificate so assigned to the Division with an application for a permit to dismantle such vehicle. The Division shall thereupon issue to the purchaser a permit to dismantle the same, which shall authorize such person to possess or transport such vehicle or to transfer ownership thereto by endorsement upon such permit. A certificate of title shall not again be issued for such motor vehicle in the event it is scrapped, dismantled, or destroyed. In any case, where the owner for any reason fails to send in title for a junked or dismantled vehicle, the Division shall

have authority to take possession of such title for cancellation. (1937, c. 407, s. 26; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in three places.

§ 20-63. Registration plates to be furnished by the Division; requirements; surrender and reissuance; displaying; preservation and cleaning; alteration or concealment of numbers; commission contracts for issuance. — (a) The Division upon registering a vehicle shall issue to the owner one registration plate for a motorcycle, trailer or semitrailer and for every other motor vehicle. Registration plates issued by the Division under this Article shall be and remain the property of the State, and it shall be lawful for the Commissioner or his duly authorized agents to summarily take possession of any plate or plates which he has reason to believe is being illegally used, and to keep in his possession such plate or plates pending investigation and legal disposition of the same. Whenever the Commissioner finds that any registration plate issued for any vehicle pursuant to the provisions of this Article has become illegible or is in such a condition that the numbers thereon may not be readily distinguished, he may require that such registration plate, and its companion when there are two registration plates, be surrendered to the Division. When said registration plate or plates are so surrendered to the Division, a new registration plate or plates shall be issued in lieu thereof without charge. The owner of any vehicle who receives notice to surrender illegible plate or plates on which the numbers are not readily distinguishable and who willfully refuses to surrender said plates to the Division shall be guilty of a misdemeanor.

(b) Every registration plate shall have displayed upon it the registration number assigned to the vehicle for which it is issued, also the name of the State of North Carolina, which may be abbreviated, and the year number for which it is issued or the date of expiration thereof.

(c) Such registration plate and the required numerals thereon, except the year number for which issued, shall be of sufficient size to be plainly readable from a distance of 100 feet during daylight.

(d) Registration plates issued for a motor vehicle other than a motorcycle, trailer, or semitrailer shall be attached thereto, one in the front and the other in the rear: Provided, that when only one registration plate is issued for a motor vehicle other than a truck-tractor, said registration plate shall be attached to the rear of the motor vehicle. The registration plate issued for a truck-tractor shall be attached to the front thereof.

(e) Preservation and Cleaning of Registration Plates. — It shall be the duty of each and every registered owner of a motor vehicle to keep the registration plates assigned to such motor vehicle reasonably clean and free from dust and dirt, and such registered owner, or any person in his employ, or who operates such motor vehicle by his authority, shall, upon the request of any proper officer, immediately clean such registration plates so that the numbers thereon may be readily distinguished, and any person who shall neglect or refuse to so clean a registration plate, after having been requested to do so, shall be guilty of a misdemeanor, and fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days.

(f) Operating with False Numbers. — Any person who shall willfully operate a motor vehicle with a registration plate which has been repainted or altered or forged shall be guilty of a misdemeanor.

(g) Alteration, Disguise, or Concealment of Numbers. — Any operator of a motor vehicle who shall willfully mutilate, bend, twist, cover or cause to be covered or partially covered by any bumper, light, spare tire, tire rack, strap,

or other device, or who shall paint, enamel, emboss, stamp, print, perforate, or alter or add to or cut off any part or portion of a registration plate or the figures or letters thereon, or who shall place or deposit or cause to be placed or deposited any oil, grease, or other substance upon such registration plates for the purpose of making dust adhere thereto, or who shall deface, disfigure, change, or attempt to change any letter or figure thereon, or who shall display a number plate in other than a horizontal upright position, shall be guilty of a misdemeanor.

(h) Commission Contracts for Issuance of Plates and Certificates. — All registration plates, registration certificates and certificates of title issued by the Division, outside of those issued from the Raleigh offices of the said Division and those issued and handled through the United States mail, shall be issued insofar as practicable and possible through commission contracts entered into by the Division for the issuance of such plates and certificates in localities throughout North Carolina with persons, firms, corporations or governmental subdivisions of the State of North Carolina and the Division shall make a reasonable effort in every locality, except as hereinbefore noted, to enter into a commission contract for the issuance of such plates and certificates and a record of these efforts shall be maintained in the Division. In the event the Division is unsuccessful in making commission contracts as hereinbefore set out it shall then issue said plates and certificates through the regular employees of the Division. Whenever registration plates, registration certificates and certificates of title are issued by the Division through commission contract arrangements, the Division shall provide proper supervision of such distribution. Commission contracts entered into hereunder shall provide for the payment of compensation at a rate per registration plate as may be set by the General Assembly. Nothing contained in this subsection will allow or permit the operation of fewer outlets in any county in this State than are now being operated. (1937, c. 407, s. 27; 1943, c. 726; 1951, c. 102, ss. 1-3; 1955, c. 119, s. 1; 1961, c. 360, s. 4; c. 861, s. 2; 1963, c. 552, s. 6; c. 1071; 1965, c. 1088; 1969, c. 1140; 1971, c. 945; 1973, c. 629; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsections (a) and (h).

Session Laws 1975, 2nd Sess., c. 983, s. 93, provides: "G.S. 20-63(h) authorizes and directs the Division of Motor Vehicles insofar as practicable to enter into commission contracts with persons, firms, etc., in localities throughout North Carolina to issue registration plates, registration certificates and certificates of title at a rate per registration plate as may be set by the General Assembly. The commission contract rate for fiscal year 1976-77 shall be forty cents (40¢) per registration plate, and the rate shall remain the same until changed by the General Assembly."

License plates are a receipt for the privilege of using North Carolina highways; thus any aid they give to commerce relates only to intrastate movements. Hodgson v. Hyatt Realty & Inv. Co., 353 F. Supp. 1363 (M.D.N.C. 1973).

A North Carolina license plate remains the property of the State and can be summarily seized under certain conditions under subsection (a). Hodgson v. Hyatt Realty & Inv. Co., 353 F. Supp. 1363 (M.D.N.C. 1973).

Aiding and Abetting Unlawful Use of Plate. — Guilt also attaches to anyone who knowingly aids and abets the unlawful use of a license plate. Woodruff v. Holbrook, 255 N.C. 740, 122 S.E.2d 709 (1961).

Subsection (h) was intended to further the public convenience by setting up local license plate distribution points throughout the State. Hodgson v. Hyatt Realty & Inv. Co., 353 F. Supp. 1363 (M.D.N.C. 1973).

As well as to eliminate the necessity of employing temporary Department (now Division) personnel for a 45-day period between January 1 and February 15 of each year when the vast bulk of the license plates are issued. Hodgson v. Hyatt Realty & Inv. Co., 353 F. Supp. 1363 (M.D.N.C. 1973).

The legislature did not intend to aid or facilitate the functioning of an interstate facility, in this case the state highways. Hodgson v. Hyatt Realty & Inv. Co., 353 F. Supp. 1363 (M.D.N.C. 1973).

Those commissioned to sell license plates are not dealing in interstate commerce, but perform a general tax-collecting effort, since this section and § 20-97 do not earmark the funds for any specific project or road, and not all of the

tax even goes to the Department of Highways. Hodgson v. Hyatt Realty & Inv. Co., 353 F. Supp. 1363 (M.D.N.C. 1973).

The tax collection from license sales under subsection (h) is essentially a local activity which Congress did not intend to include under the Fair Labor Standards Act. Hodgson v. Hyatt Realty & Inv. Co., 353 F. Supp. 1363 (M.D.N.C. 1973).

The maximum punishment for a violation of this section or § 20-111 would be that prescribed by § 20-176(b), namely, a fine of not more than $100.00 or imprisonment in the county or municipal jail for not more than 60 days, or both such fine and imprisonment. State v. Tolley, 271 N.C. 459, 156 S.E.2d 858 (1967).

§ 20-63.1. Division may cause plates to be reflectorized. — The Division of Motor Vehicles is hereby authorized to cause vehicle license plates for 1968 and future years to be completely treated with reflectorized materials designed to increase visibility and legibility of license plates at night. (1967, c. 8; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

§ 20-64. Transfer of registration plates to another vehicle. — (a) Except as otherwise provided in this Article, registration plates shall be retained by the owner thereof upon disposition of the vehicle to which assigned, and may be assigned to another vehicle, belonging to such owner and of a like vehicle category within the meaning of G.S. 20-87 and 20-88, upon proper application to the Division and payment of a transfer fee and such additional fees as may be due because the vehicle to which the plates are to be assigned requires a greater registration fee than that vehicle to which the license plates were last assigned. In cases where the plate is assigned to another vehicle belonging to such owner, and is not of a like vehicle category within the meaning of G.S. 20-87 and 20-88, the owner shall surrender the plate to the Division and receive therefor a plate of the proper category, and the unexpired portion of the fee originally paid by the owner for the plate so surrendered shall be a credit toward the fee charged for the new plate of the proper category. Provided, that the owner shall not be entitled to a cash refund when the registration fee for the vehicle to which the plates are to be assigned is less than the registration fee for that vehicle to which the license plates were last assigned. Provided, however, registration plates may not be transferred under this section after December 31 of the year for which issued. An owner assigning or transferring plates to another vehicle as provided herein shall be subject to the same assessments and penalties for use of the plates on another vehicle or for improper use of the plates, as he could have been for the use of the plates on the vehicle to which last assigned. Provided, however, that upon compliance with the requirements of this section, the registration plates of vehicles owned by and registered in the name of a corporation may be transferred and assigned to a like vehicle category within the meaning of G.S. 20-87 and 20-88, upon the showing that the vehicle to which the transfer and assignment is to be made is owned by a corporation which is a wholly owned subsidiary of the corporation applying for such transfer and assignment.

(b) Upon a change of the name of a corporation or a change of the name under which a proprietorship or partnership is doing business, the corporation, partnership or proprietorship shall forthwith apply for correction of the certificate of title of all vehicles owned by such corporation, partnership or proprietorship so as to correctly reflect the name of the corporation or the name under which the proprietorship or partnership is doing business, and pay the fees required by law.

(c) Upon a change in the composition of a partnership, ownership of vehicles belonging to such partnership shall not be deemed to have changed so long as one partner of the predecessor partnership remains a partner in the reconstituted partnership, but the reconstituted partnership shall forthwith apply for correction of the certificate of title of all vehicles owned by such partnership so as to correctly reflect the composition of the partnership and the name under which it is doing business, if any, and pay the fees required by law.

(d) When a proprietorship or partnership is incorporated, the corporation shall retain license plates assigned to vehicles belonging to it and may use the same, provided the corporation applies for and obtains transfers of the certificates of title of all vehicles and pays the fees required by law.

(e) Upon death of the owner of a registered vehicle, such registration shall continue in force as a valid registration until the end of the year for which the license is issued unless ownership of the vehicle passes or is transferred to any person other than the surviving spouse before the end of the year.

(f) Whenever the owner of a registered vehicle transfers or assigns his interest to another, such transferor may, by surrendering the registration plate to the Division, secure a refund of the unexpired portion of such plate on a monthly basis, beginning the first day of the month following surrender of the plate to the Division, provided, that the annual license fee for such surrendered plate is sixty dollars ($60.00) or more. No such refund shall be made unless the owner or transferor can furnish proof of financial responsibility upon such registered vehicle effective until the date of the surrender of the plate.

(g) The Commissioner of Motor Vehicles shall have the power to make such rules and regulations as he may deem necessary for the administration of transfers of license plates and vehicles under this Article. (1937, c. 407, s. 28; 1945, c. 576, s. 1; 1947, c. 914, s. 1; 1951, c. 188; c. 819, s. 1; 1961, c. 360, s. 5; 1963, cc. 1067, 1190; 1967, c. 995; 1973, c. 1134; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsections (a) and (f).

Stated in Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970).

§ 20-64.1. Revocation of license plates by Utilities Commission. — The license plates of any carrier of persons or property by motor vehicle for compensation may be revoked and removed from the vehicles of any such carrier for willful violation of any provision of either the North Carolina Truck Act of 1947 or the Bus Act of 1949, or for the willful violation of any lawful rule or regulation made and promulgated by the North Carolina Utilities Commission under said acts. To that end said Commission shall have power upon complaint or upon its own motion, after notice and hearing under the rules of evidence prescribed in G.S. 62-18, to order the license plates of any such offending carrier revoked and removed from the vehicles of such carrier for a period not exceeding 30 days, and it shall be the duty of the Division of Motor Vehicles to execute such orders made by the North Carolina Utilities Commission upon receipt of a certified copy of the same.

This section shall be in addition to and independent of other provisions of law for the enforcement of the motor carrier laws of this State. (1951, c. 1120; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the last sentence of the first paragraph.

In Chapter 62 as rewritten by Session Laws 1963, c. 1165, the North Carolina Truck Act of 1947 and the Bus Act of 1949 referred to in this section are combined as §§ 62-259 through 62-279. Section 62-278 in Chapter 62 as rewritten is in substance a reenactment of this section.

§ 20-64.2. Permit for emergency use of registration plate. — The Commissioner may, if in his opinion it is equitable, grant to the licensee a special permit for the use of a registration plate on a vehicle other than the vehicle for which the plate was issued, when the vehicle for which such plate was issued is undergoing repairs in a regular repair shop or garage.

Application for such permit shall be made on forms provided by the Division and must show, in addition to such other information as may be required by the Commissioner, that an emergency exists which would warrant the issuance of such permit.

Such permit shall be evidenced by a certificate issued by the Commissioner and which shall show the time of issuance, the person to whom issued, the motor number, serial number or identification number of the vehicle on which such plate is to be used and shall be in the immediate possession of the person operating such vehicle at all times while operating the same. And such certificate shall be valid only so long as the vehicle for which the registration plate has been issued shall remain in the repair shop or garage but not to exceed a period of 20 days from its issuance. The person to whom the permit provided in this section is issued shall be liable for any additional license fees or penalties that might accrue by reason of the provisions of §§ 20-86 and 20-96 of the General Statutes. (1957, c. 402; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the second paragraph.

§ 20-65. Expiration of registration. — Every vehicle registration under this Article and every registration card and registration plate issued hereunder shall expire at midnight on the thirty-first day of December of each year: Provided, however, that it shall not be unlawful to continue to operate any vehicle upon the highways of this State after the expiration of the registration of said vehicle, registration card and registration plate during the period between the thirty-first day of December and the fifteenth day of February, inclusive, if the license plate is registered to the vehicle on which it is being used prior to the thirty-first day of December. (1937, c. 407, s. 29; 1943, c. 592, s. 1; 1955, c. 554, s. 3; 1961, c. 360, s. 6.)

§ 20-66. Renewal of registration; semipermanent plates issued; renewal sticker annually. — (a) Application for renewal of a vehicle registration shall be made by the owner upon proper application and by payment of the registration fee for such vehicle, as provided by law. The Division may receive and grant applications for renewal of registration at any time prior to expiration of registration.

(b) For the registration period beginning January 1, 1975, the Division, upon proper application for renewal of registration for private passenger motor vehicles, shall issue a new registration plate and registration card. For the registration period beginning January 1, 1976, and all subsequent registration periods, the Division, upon application for renewal of registration, shall, in lieu of a new registration plate, issue one or more stickers, tabs or other suitable devices denoting the registration period for which issued; provided that for the registration periods beginning January 1, 1978, and thereafter, the Division may, as it deems advisable in the discretion of the Commissioner, issue new registration plates together with such stickers, tabs or other devices; provided further, the provisions of this subsection shall not apply to special issue plates, including but not limited to official plates, legislator plates, horseless carriage plates, personalized registered plates, civil air patrol plates, amateur radio operator plates, national guard plates, and handicapped person plates.

(b1) For renewal periods beginning January 1, 1978, and thereafter, renewal registrations of private hauler trucks licensed for 4,000 pounds gross weight, motorcycles, U-drive-it passenger vehicles and trailers may be made by issuance of stickers, tabs, or other devices in lieu of new registration plates, or in combination with new registration plates, at the discretion of the Commissioner. Such stickers, tabs or other devices shall show the period of validity of registration. This provision shall not apply to trucks licensed as farm trucks, common carriers, for-hire trucks, rental trucks or contract carrier trucks.

(c) Stickers, tabs or other devices issued hereunder shall be displayed as prescribed by the Commissioner. Except where the physical differences between the stickers, tabs, or devices and registration plates by their nature render any provision of this Chapter inapplicable, all provisions of this Chapter relating to registration plates shall apply to stickers, tabs or devices.

(d) The Division may also provide for the issuance of license plates for motor vehicles with the dates of expiration thereof to vary from month to month so as to approximately equalize the number that expire during the year. (1937, c. 407, s. 30; 1955, c. 554, s. 3; 1973, c. 1389, s. 1; 1975, c. 716, s. 5; 1977, c. 337.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout the section.

The 1977 amendment, effective Jan. 1, 1978, added subsection (b1).

§ 20-66.1: Repealed by Session Laws 1973, c. 1389, s. 2.

Cross Reference. — For present provisions covering the subject matter of the repealed section, see § 20-66.

§ 20-67. Notice of change of address or name. — (a) Whenever any person, after making application for or obtaining the registration of a vehicle or a certificate of title, shall move from the address named in the application or shown upon a registration card or certificate of title, such person shall within 10 days thereafter notify the Division in writing of his old and new addresses.

(b) Whenever the name of any person who has made application for or obtained the registration of a vehicle or a certificate of title is thereafter changed by marriage or otherwise, such person shall thereafter forward or cause to be forwarded to the Division the certificate of title and to make application for correction of the certificate on forms provided by the Division. (1937, c. 407, s. 31; 1955, c. 554, s. 4; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsections (a) and (b).

Stated in State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

§ 20-68. Replacement of lost or damaged certificates, cards and plates. — (a) In the event any registration card or registration plate is lost, mutilated, or becomes illegible, the owner or legal representative of the owner of the vehicle for which the same was issued, as shown by the records of the Division, shall immediately make application for and may obtain a duplicate or a substitute or a new registration under a new registration number, as determined to be most advisable by the Division, upon the applicant's furnishing under oath information satisfactory to the Division and payment of required fee.

(b) If a certificate of title is lost, stolen, mutilated, destroyed or becomes illegible, the first lienholder or, if none, the owner or legal representative of the owner named in the certificate, as shown by the records of the Division, shall

promptly make application for and may obtain a duplicate upon furnishing information satisfactory to the Division. It shall be mailed to the first lienholder named in it or, if none, to the owner. The Division shall not issue a new certificate of title upon application made on a duplicate until 15 days after receipt of the application. A person recovering an original certificate of title for which a duplicate has been issued shall promptly surrender the original certificate to the Division. (1937, c. 407, s. 32; 1961, c. 360, s. 7; c. 835, s. 7; 1975, c. 716, s. 5.)

Cross Reference. — As to fees for duplicate certificate, see § 20-85.

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout the section.

§ 20-69. Division authorized to assign new engine number. — The owner of a motor vehicle upon which the engine number or serial number has become illegible or has been removed or obliterated shall immediately make application to the Division for a new engine or serial number for such motor vehicle. The Division, when satisfied that the applicant is the lawful owner of the vehicle referred to in such application is hereby authorized to assign a new engine or serial number thereto, and shall require that such number, together with the name of this State, or a symbol indicating this State, be stamped upon the engine, or in the event such number is a serial number, then upon such portion of the motor vehicle as shall be designated by the Division. (1937, c. 407, s. 33; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

§ 20-70. Division to be notified when another engine is installed or body changed. — (a) Whenever a motor vehicle registered hereunder is altered by the installation of another engine in place of an engine, the number of which is shown in the registration records, or the installation of another body in place of a body, the owner of such motor vehicle shall immediately give notice to the Division in writing on a form prepared by it, which shall state the number of the former engine and the number of the newly installed engine, the registration number of the motor vehicle, the name of the owner and any other information which the Division may require. Whenever another engine has been substituted as provided in this section, and the notice given as required hereunder, the Division shall insert the number of the newly installed engine upon the registration card and certificate of title issued for such motor vehicle.

(b) Whenever a new engine or serial number has been assigned to and stamped upon a motor vehicle as provided in § 20-69, or whenever a new engine has been installed or body changed as provided in this section, the Division shall require the owner to surrender to the Division the registration card and certificate of title previously issued for said vehicle. The Division shall also require the owner to make application for a duplicate registration card and a duplicate certificate of title showing the new motor or serial number thereon or new style of body, and upon receipt of such application and fee, as for any other duplicate title, the Division shall issue to said owner a duplicate registration and a duplicate certificate of title showing thereon the new number in place of the original number or the new style of body. (1937, c. 407, s. 34; 1943, c. 726; 1975, c. 716, s. 5.)

Cross Reference. — As to fee for duplicate registration card and certificate of title, see § 20-85.

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout the section.

§ 20-71. Altering or forging certificate of title, registration card or application, a felony; reproducing or possessing blank certificate of title. — (a) Any person who, with fraudulent intent, shall alter any certificate of title, registration card issued by the Division, or any application for a certificate of title or registration card, or forge or counterfeit any certificate of title or registration card purported to have been issued by the Division under the provisions of this Article, or who, with fraudulent intent, shall alter, falsify or forge any assignment thereof, or who shall hold or use any such certificate, registration card, or application, or assignment, knowing the same to have been altered, forged or falsified, shall be guilty of a felony and upon conviction thereof shall be punished in the discretion of the court.

(b) It shall be unlawful to reproduce by any means or possess a blank North Carolina motor vehicle certificate of title or facsimile thereof. The provisions of this subsection shall not apply to agents or employees of the Division while acting in the course and scope of their employment or any printing company or its employees while employed by the Division to print or reproduce such certificates of title while said company or its employees are acting within the scope of such employment. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor punishable by a fine of not less than one hundred dollars ($100.00) and not more than five hundred dollars ($500.00), imprisonment for not more than six months or both such fine and imprisonment. (1937, c. 407, s. 35; 1959, c. 1264, s. 2; 1971, c. 99; 1975, c. 716, s. 5.)

Cross Reference. — As to penalty for a violation of this Article declared to constitute a felony, see § 20-177.

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout the section.

Applied in Smart Fin. Co. v. Dick, 256 N.C. 669, 124 S.E.2d 862 (1962).

§ 20-71.1. Registration evidence of ownership; ownership evidence of defendant's responsibility for conduct of operation. — (a) In all actions to recover damages for injury to the person or to property or for the death of a person, arising out of an accident or collision involving a motor vehicle, proof of ownership of such motor vehicle at the time of such accident or collision shall be prima facie evidence that said motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which said injury or cause of action arose.

(b) Proof of the registration of a motor vehicle in the name of any person, firm, or corporation, shall for the purpose of any such action, be prima facie evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment. (1951, c. 494; 1961, c. 975.)

Editor's Note. — For case note discussing cases arising under this section, see 41 N.C.L. Rev. 124 (1962). For note on permissive user under the omnibus clause, see 41 N.C.L. Rev. 232 (1963).

Purpose of Section. — The evident purpose of this section was to require that proof of ownership of an offending motor vehicle should be regarded as prima facie evidence that it was being operated at the time of the accident by the authority of the owner, doubtless having in view the decision in Carter v. Thurston Motor Lines, 227 N.C. 193, 41 S.E.2d 586 (1947), and to provide that, in the absence of proof of ownership, proof

of motor vehicle registration in the name of a person would be prima facie evidence that the motor vehicle was being operated by one for whose conduct such person is legally responsible. Travis v. Duckworth, 237 N.C. 471, 75 S.E.2d 309 (1953).

The purpose of this section is to establish a ready means of proving agency in any case where it is charged that the negligence of a nonowner operator causes damage to the property or injury to the person of another. It does not and was not intended to have any other force or effect. Phillips v. Utica Mut. Ins. Co., 4 N.C. App. 655, 167 S.E.2d 542 (1969).

And Scope. — This section applies in all actions to recover damages for injury to the person or to property, or for the death of a person, arising out of an accident or a collision involving a motor vehicle, and the rule of evidence established thereby applies whenever a factual determination as to alleged agency is to be made whether by the court to resolve a question of fact or by a jury to resolve an issue of fact. Howard v. Sasso, 253 N.C. 185, 116 S.E.2d 341 (1960).

When Section Applies. — This section applies when plaintiff, upon sufficient allegations, seeks to hold the owner liable for the negligence of a nonowner operator under the doctrine of respondeat superior. Phillips v. Utica Mut. Ins. Co., 4 N.C. App. 655, 167 S.E.2d 542 (1969); Dupree v. Batts, 276 N.C. 68, 170 S.E.2d 918 (1969); Allen v. Schiller, 6 N.C. App. 392, 169 S.E.2d 924 (1969).

The section was plainly meant to apply in a civil case. State v. Cotten, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

But It Does Not Apply to Action Seeking Declaration of Insurers' Rights and Obligations. — An action which is not an action to recover damages for injury to the person or to the property or for the death of a person arising out of an accident or collision involving a motor vehicle, but is an action brought by an insurer against another insurer to have the court declare the rights and obligations of the insurers under their policies of insurance, is not the type of case to which this section was intended to apply. Aetna Cas. & Sur. Co. v. Lumbermen's Mut. Cas. Co., 11 N.C. App. 490, 181 S.E.2d 727 (1971).

This section creates a presumption of ownership only in those specific instances enumerated. State v. Cotten, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

Defendant's testimony that he was the registered owner of a truck made a prima facie case of agency sufficient to support, but not compel, a verdict against him under the doctrine of respondeat superior for damages proximately caused by the negligence of the operator thereof. Brown v. Nesbitt, 271 N.C. 532, 157 S.E.2d 85 (1967).

Where Defendant Admitted Ownership of Automobile. — Plaintiff was entitled to have his case submitted to the jury where defendant admitted ownership of the automobile and conceded that it was registered in his name. White v. Vananda, 13 N.C. App. 19, 185 S.E.2d 247 (1971).

The two subsections of this section are identical in their objective. While the language used in subsection (a) is not as apt as that used in subsection (b), the intent and meaning of the two are the same. Hartley v. Smith, 239 N.C. 170, 79 S.E.2d 767 (1954); State v. Cotten, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

The legislature used the language "was being operated and used with the authority, consent, and knowledge of the owner" in subsection (a) of this section to connote "under the direction and control of the owner," and when one acts under the direction and control of another, he is agent or employee. It did not intend to give greater force and effect to mere proof of registration than to the admission or actual proof of ownership. In short, proof of registration is prima facie proof of ownership under subsection (b), which in turn is prima facie proof of agency under subsection (a). Hartley v. Smith, 239 N.C. 170, 79 S.E.2d 767 (1954).

Proof of legal title to an automobile makes at least a prima facie showing of the ownership in the one in whose name the title is registered. Guilford Nat'l Bank v. Southern Ry., 319 F.2d 825 (4th Cir. 1963).

Proof of Ownership Sufficient to Support Service on Nonresident. — Under this section ownership of a vehicle involved in an accident is sufficient proof of agency to support service of process on the nonresident owner of a motor vehicle whose agent is alleged to have negligently injured plaintiff by operation of the vehicle on North Carolina highways. Todd v. Thomas, 202 F. Supp. 45 (E.D.N.C. 1962). See Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961). And see § 1-105 and the note thereto.

This section applies to an accident occurring prior to its effective date unless action was pending at the time of its effective date. Spencer v. McDowell Motor Co., 236 N.C. 239, 72 S.E.2d 598 (1952).

Proof of Ownership Alone Takes Case to Jury on Issue of Agency. — Proof of ownership by the defendant of the motor vehicle involved in the injury complained of, by force of this section, must be regarded as sufficient to carry the case to the jury on the question of the legal responsibility of the defendant for the operation of the vehicle. Travis v. Duckworth, 237 N.C. 471, 75 S.E.2d 309 (1953); Kellogg v. Thomas, 244 N.C. 722, 94 S.E.2d 903 (1956); Scott v. Lee, 245 N.C. 68, 95 S.E.2d 89 (1956); Johnson v. Wayne Thompson, Inc., 250 N.C. 665, 110 S.E.2d 306 (1959).

Under this section all now required for submission of the issue to the jury is that the injured party show ownership of the motor vehicle, which may be done prima facie by proof that the motor vehicle was registered in the name of the person sought to be charged. Jyachosky v. Wensil, 240 N.C. 217, 81 S.E.2d 644 (1954).

Under this section an admission of the ownership of one of the vehicles involved in a collision is sufficient to make out a prima facie case of agency sufficient to support, but not to compel, a verdict against the owner under the doctrine of respondeat superior for damages proximately caused by the negligence of the driver. Hartley v. Smith, 239 N.C. 170, 79 S.E.2d 767 (1954); Elliott v. Killian, 242 N.C. 471, 87 S.E.2d 903 (1955); Davis v. Lawrence, 242 N.C. 496, 87 S.E.2d 915 (1955); Hatcher v. Clayton, 242 N.C. 450, 88 S.E.2d 104 (1955); Caughron v. Walker, 243 N.C. 153, 90 S.E.2d 305 (1955).

While the vigor of the statute makes admitted ownership of a truck prima facie evidence that the operator was acting as the owner's agent or employee within the scope of his employment, and sufficient to carry the case to the jury, it does not compel the finding by the jury that the driver was negligent or that he was the agent or employee of the owner and at the time acting within the scope of his employment. Brothers v. Jernigan, 244 N.C. 441, 94 S.E.2d 316 (1956).

The ultimate issue is for jury determination, notwithstanding that the only positive evidence tends to show explicitly and clearly that the operator, whether driving with or without the owner's consent, was on a purely personal mission at the time of the collision. Whiteside v. McCarson, 250 N.C. 673, 110 S.E.2d 295 (1959).

This section makes out a prima facie case of agency which will support, but does not compel, a verdict against defendant upon the principle of respondeat superior. Chappell v. Dean, 258 N.C. 412, 128 S.E.2d 830 (1963).

Where there is sufficient evidence of negligence of the operator of a motor vehicle to be submitted to the jury on that issue, evidence that the vehicle was registered in the name of the other defendant takes the issue of such other defendant's liability to the jury. Ennis v. Dupree, 258 N.C. 141, 128 S.E.2d 231 (1962).

Proof of registration or admission of ownership furnishes, by virtue of the statute, prima facie evidence that the driver is agent of the owner in the operation, and is sufficient to support, but not compel, a verdict on the agency issue. It takes the issue to the jury. Even so, plaintiff must allege, and has the burden of proving, agency. Mitchell v. White, 256 N.C. 437, 124 S.E.2d 137 (1962).

Where a judgment of compulsory nonsuit of plaintiff's action against a defendant who was the driver of the automobile involved in the action was improvidently entered, the trial court also erred in entering a judgment of compulsory nonsuit against another defendant, for the reason that the automobile was registered in the latter's name, and therefore plaintiff was entitled to go to the jury against him by virtue of the provisions of this section. Hamilton v. McCash, 257 N.C. 611, 127 S.E.2d 214 (1962).

By reason of this section, the agency issue is for determination by the jury under proper instructions. Moore v. Crocker, 264 N.C. 232, 141 S.E.2d 307 (1965).

Admission of ownership of the vehicle involved in the collision requires the submission to the jury of the question of liability under the doctrine of respondeat superior. Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967).

Proof of ownership is prima facie proof of agency. Branch v. Dempsey, 265 N.C. 733, 145 S.E.2d 395 (1965).

Upon a showing of ownership, the artificial force of the prima facie rule under this section seems to permit a finding of agency. Torres v. Smith, 269 N.C. 546, 153 S.E.2d 129 (1967).

By reason of this section, the agency issue is for determination by the jury. Allen v. Schiller, 6 N.C. App. 392, 169 S.E.2d 924 (1969).

Evidence of ownership and registration of the motor vehicle involved in the collision must, by force of this statute, be regarded as prima facie evidence that at the time and place of the injury caused by it the motor vehicle was being operated with the authority, consent and knowledge, and under the control of a person for whose conduct the defendant was legally responsible. Allen v. Schiller, 6 N.C. App. 392, 169 S.E.2d 924 (1969).

Proof of registration of a vehicle in the name of a father is prima facie evidence of ownership by him and agency in the driver under this section. Such prima facie evidence of ownership in the father is sufficient to carry the case to the jury against him, notwithstanding that further evidence is sufficient, if true, to rebut the prima facie evidence that the father owned the motorcycle and that the minor was driving it as the owner's agent. Bowen v. Gardner, 275 N.C. 363, 168 S.E.2d 47 (1969).

This section is construed to mean that proof of ownership alone carries the case to the jury on the issue of agency. Humphries v. Going, 59 F.R.D. 583 (E.D.N.C. 1973).

But Defendant May Be Entitled to Instruction. — Where evidence discloses that an employee was driving the vehicle registered in the name of the employer, and there is evidence that the employee was driving on the occasion in question on a purely personal mission without the knowledge or consent of the employer, the court properly submits the issue of the employer's liability to the jury under instructions that if the jury should find that employee was engaged in a purely personal

mission without the knowledge or consent of the employer the jury should answer the issue in the negative. Skinner v. Jernigan, 250 N.C. 657, 110 S.E.2d 301 (1959).

Where plaintiff relies solely on the provisions of this section on the issue of respondeat superior and introduces no evidence, but defendant introduces evidence tending to show that the driver was on a purely personal mission of his own at the time of the accident, there is no evidence upon which the court may instruct the jury in plaintiff's favor on the issue, and the court's explanation of the rule of evidence prescribed by the statute is sufficient; but as to the defendant's evidence, the court is required, even in the absence of a request for special instructions, to give explicit instruction applying defendant's evidence to the issue and charging that if the jury should find the facts to be as defendant's evidence tends to show, the issue should be answered in the negative. Whiteside v. McCarson, 250 N.C. 673, 110 S.E.2d 295 (1959).

In any case in which a plaintiff, as against the registered owner of a motor vehicle, relies solely upon this section to prove the agency of nonowner operator, and in which all of the positive evidence in the case is to the effect that the operator was on a mission of his own and not on any business for the registered owner, it is the duty of the trial judge, even if there is evidence that the registered owner gave the operator permission to use the vehicle, to instruct the jury that, if they believe the evidence and find the facts to be as the evidence tends to show, that is, that the operator was on a mission of his own, they will answer the agency issue in the negative. And it is prejudicial error for the court, in such circumstances, to fail to so instruct the jury, even if there is no special request therefor. Chappell v. Dean, 258 N.C. 412, 128 S.E.2d 830 (1963).

Where plaintiff relied solely on this section to take the issue of agency to the jury and defendant's evidence tended to show that the driver was on a purely personal mission at the time of the accident, defendant, without request therefor, was entitled to a peremptory instruction, related directly to the particular facts shown by defendant's positive evidence, to answer the issue of agency in the negative. A general instruction to so answer the issue if the jury believed the facts to be as defendant's evidence tended to show, without relating the instruction directly to defendant's evidence in the particular case, was insufficient. Belmany v. Overton, 270 N.C. 400, 154 S.E.2d 538 (1967).

Where ownership of the vehicle involved in the injury complained of was sufficient to take the case to the jury under this section, the trial court's directed verdict in favor of defendant owner was harmless error where the evidence clearly established that the driver of the vehicle was on a purely personal mission at the time of the accident, thereby entitling defendant, without request, to a peremptory instruction on the issue of the owner's liability. Gwaltney v. Keaton, 29 N.C. App. 91, 223 S.E.2d 506 (1976).

And Section Applies Only Where Plaintiff Relies on Doctrine of Respondeat Superior. — This section was designed and intended to apply, and does apply, only in those cases where the plaintiff seeks to hold an owner liable for the negligence of a nonowner operator under the doctrine of respondeat superior. Roberts v. Hill, 240 N.C. 373, 82 S.E.2d 373 (1954); Jones v. Farm Bureau Mut. Auto. Ins. Co., 159 F. Supp. 404 (E.D.N.C. 1958); Howard v. Sasso, 253 N.C. 185, 116 S.E.2d 341 (1960).

Where the theory of the complaint is that defendant was driving the car or that it was being driven by another under defendant's direction and control, and there is no allegation of agency or of negligence of an alleged agent, plaintiff cannot call to his aid the provisions of this section to prove that defendant himself was operating the car or had entrusted its operation to one he knew or should have known was likely to cause an accident by reason of incompetency, carelessness or recklessness. Osborne v. Gilreath, 241 N.C. 685, 86 S.E.2d 462 (1955).

And does not apply where plaintiff attempts to prove owner liable under "family purpose doctrine." Fox v. Albea, 250 N.C. 445, 109 S.E.2d 197 (1959).

It Merely Creates a Rule of Evidence. — This section was designed to create a rule of evidence. Its purpose is to establish a ready means of proving agency in any case where it is charged that the negligence of a nonowner operator causes damage to the property or injury to the person of another. It does not have, and was not intended to have, any other or further force or effect. Hartley v. Smith, 239 N.C. 170, 79 S.E.2d 767 (1954). See Roberts v. Hill, 240 N.C. 373, 82 S.E.2d 373 (1954); Osborne v. Gilreath, 241 N.C. 685, 86 S.E.2d 462 (1955); Elliott v. Killian, 242 N.C. 471, 87 S.E.2d 903 (1955); Fox v. Albea, 250 N.C. 445, 109 S.E.2d 197 (1959); Lynn v. Clark, 252 N.C. 289, 113 S.E.2d 427 (1960); Howard v. Sasso, 253 N.C. 185, 116 S.E.2d 341 (1960); Taylor v. Parks, 254 N.C. 266, 118 S.E.2d 779 (1961); Chappell v. Dean, 258 N.C. 412, 128 S.E.2d 830 (1963).

The presumption of this section relates to the rule of evidence and procedure rather than to substantive rights. Randall Ins., Inc. v. O'Neill, 258 N.C. 169, 128 S.E.2d 239 (1962).

This section creates a rule of evidence, and has no other or further force or effect. Mitchell v. White, 256 N.C. 437, 124 S.E.2d 137 (1962).

This section merely creates a rule of evidence. Duckworth v. Metcalf, 268 N.C. 340, 150 S.E.2d 485 (1966).

This section was designed and intended to, and does, establish a rule of evidence which facilitates proof of ownership and agency in

automobile collision cases where one of the vehicles is operated by a person other than the owner. It was not enacted and designed to render proof unnecessary, nor does proof of registration or ownership make out a prima facie case for the jury on the issue of negligence. Neither is it sufficient to send the case to the jury, or support a finding favorable to plaintiff under the negligence issue, or to support a finding against a defendant on the issue of negligence. Branch v. Dempsey, 265 N.C. 733, 145 S.E.2d 395 (1965).

This section was designed and intended to apply, and does apply, only in those cases where the plaintiff seeks to hold an owner liable for the negligence of a nonowner operator under the doctrine of respondeat superior. Its purpose is to establish a ready means of proving agency in any case where it is charged that the negligence of a nonowner operator causes damage to the property or injury to the person of another or for the death of a person arising out of an accident or collision involving a motor vehicle. It does not have, and was not intended to have, any other force or effect. State v. Cotten, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

Which Applies to Making Factual Determination as to Alleged Agency. — The rule of evidence established by this section applies whenever a factual determination as to alleged agency is to be made, whether by the court to resolve a question of fact or by a jury to resolve an issue of fact. Howard v. Sasso, 253 N.C. 185, 116 S.E.2d 341 (1960).

And Does Not Change Basic Rule as to Liability. — This section did not change the basic rule as to liability. It did establish a new rule of evidence, changing radically the requirements as to what the injured plaintiff must show in evidence in order to have his case passed on by the jury. Jyachosky v. Wensil, 240 N.C. 217, 81 S.E.2d 644 (1954).

This section does not abrogate the well-settled rule of law that mere ownership of an automobile does not impose liability upon the owner for injury to another by the negligent operation of the vehicle on the part of a driver who was not, at the time of the injury, the employee or agent of the owner or who was not, at such time, acting in the course of his employment or agency. Duckworth v. Metcalf, 268 N.C. 340, 150 S.E.2d 485 (1966).

Nor Compel a Verdict against Owner. — Proof of ownership of the automobile by one not the driver makes out a prima facie case of agency of the driver for the owner at the time of the driver's negligent act or omission, but it does not compel a verdict against the owner upon the principle of respondeat superior. Duckworth v. Metcalf, 268 N.C. 340, 150 S.E.2d 485 (1966).

Effect of Establishing Facts with Respect to Agency. — Whenever the facts with respect to agency are established, without contradiction, it is the duty of the court to disregard this section, even to the point of setting aside a verdict which this section permits. Manning v. State Farm Mut. Auto. Ins. Co., 243 F. Supp. 619 (W.D.N.C. 1965).

Beginning and Termination of Presumption as to Agency. — This section creates no presumption and gives rise to no inference as to the existence of any agency relation before the operation of the vehicle begins or after it stops. Branch v. Dempsey, 265 N.C. 733, 145 S.E.2d 395 (1965).

In the absence of evidence of agency, apart from the mere act of driving a motor vehicle registered in the name of another, the agency must be deemed to have terminated when the driver has brought the vehicle to a final stop and has left it. Branch v. Dempsey, 265 N.C. 733, 145 S.E.2d 395 (1965).

Presumption Is Not One of Law, and Does Not Shift Burden of Proof. — Where the trial judge instructed the jury that proof of registration constitutes such prima facie evidence, and then stated: "... (T)hat is a rebuttable presumption and ... the defendant has the right and it is his duty to rebut this presumption of law," the quoted portion of the instruction is erroneous, since this section creates no presumption of law, and it does not shift the burden of the issue from plaintiff to defendant. Chappell v. Dean, 258 N.C. 412, 128 S.E.2d 830 (1963).

The burden of proof continues to rest upon the plaintiff to prove an agency relationship between the driver and the owner at the time of the driver's negligence which caused the injury. Duckworth v. Metcalf, 268 N.C. 340, 150 S.E.2d 485 (1966).

This section is simply a rule of evidence to shift the burden of going forward with the proof to those persons better able to establish the true facts than are plaintiffs. Manning v. State Farm Mut. Auto. Ins. Co., 243 F. Supp. 619 (W.D.N.C. 1965).

Plaintiff Is Not Relieved of Alleging Ultimate Facts. — The provisions of this section are a rule of evidence and do not relieve a plaintiff of alleging the ultimate facts on which to base a cause of actionable negligence. Parker v. Underwood, 239 N.C. 308, 79 S.E.2d 765 (1954).

Both Negligence and Agency Must Be Alleged and Proved. — This section was not enacted and designed to render proof unnecessary, nor does proof of registration or ownership make out a prima facie case for the jury on the issue of negligence. Neither is it sufficient to send the case to the jury, or to support a finding favorable to plaintiff under the negligence issue, or to support a finding against a defendant on the issue of negligence. It does not constitute evidence of negligence. It is

instead directed solely to the question of agency of a nonowner operator of a motor vehicle involved in an accident. Non constat this section, it is still necessary for the party aggrieved to allege both negligence and agency in his pleading and to prove both at the trial. Hartley v. Smith, 239 N.C. 170, 79 S.E.2d 767 (1954).

This section establishes a rule of evidence, but does not relieve a plaintiff from alleging and proving negligence and agency. Osborne v. Gilreath, 241 N.C. 685, 86 S.E.2d 462 (1955).

This section does not relieve plaintiff of the duty to allege and the burden of proving agency. Chappell v. Dean, 258 N.C. 412, 128 S.E.2d 830 (1963).

This section presupposes a cause of action based on allegations of agency and of actionable negligence, and therefore, if the complaint fails to allege agency or actionable negligence, it is demurrable and is insufficient to support a verdict for damages against the owner of the vehicle. Lynn v. Clark, 252 N.C. 289, 113 S.E.2d 427 (1960).

This section did not change the elements prerequisite to liability under the doctrine of respondeat superior. To establish liability under this doctrine, the injured plaintiff must allege and prove that the operator was the agent of the owner, and that this relationship existed at the time and in respect of the very transaction out of which the injury arose. Whiteside v. McCarson, 250 N.C. 673, 110 S.E.2d 295 (1959); Belmany v. Overton, 270 N.C. 400, 154 S.E.2d 538 (1967).

Allegations to the effect that the car involved in the accident was owned by the mother of the driver are insufficient to charge the mother with liability under this section, since the effect of the statute is solely to provide a ready means of proving agency and does not dispense with the necessity of allegations that the driver was the agent of the owner. Lynn v. Clark, 252 N.C. 289, 113 S.E.2d 427 (1960).

Proof that one owns a motor vehicle which is operated in a negligent manner, causing injury to another, is not sufficient to impose liability on the owner. The injured party, if he is to recover from the owner, must allege and prove facts (1) calling for an application of the doctrine of respondeat superior, or (2) negligence of the owner himself in (a) providing the driver with a vehicle known to be dangerous because of its defective condition, or (b) permitting a known incompetent driver to use the vehicle on the highway. Beasley v. Williams, 260 N.C. 561, 133 S.E.2d 227 (1963).

Non constat the statute, it is still necessary for the party aggrieved to allege both negligence and agency in his pleading and to prove both at the trial. Branch v. Dempsey, 265 N.C. 733, 145 S.E.2d 395 (1965); Belmany v. Overton, 270 N.C. 400, 154 S.E.2d 538 (1967).

Proof of registration is prima facie evidence of ownership and that the agent was acting for the owner's benefit and in the scope of his employment, but there must be allegation of agency to make evidence of agency admissible against the principal. Dupree v. Batts, 276 N.C. 68, 170 S.E.2d 918 (1969).

Proof of ownership or proof of registration under this section shall be prima facie evidence of ownership. However, evidence, direct, circumstantial, or prima facie, does not take away the necessity of alleging agency if the principal is to be held liable. Dupree v. Batts, 276 N.C. 68, 170 S.E.2d 918 (1969).

Defendant's admission and stipulation that the automobile involved in the accident was registered in her name is sufficient evidence to support, but not compel, a finding for the plaintiffs that defendant was legally responsible for the acts and omissions of the codefendant in the operation and parking of the automobile; but before the plaintiffs can recover, they must prove by evidence competent against the owner defendant that the codefendant was negligent and that her negligence was the proximate cause of plaintiffs' damages. Tuttle v. Beck, 7 N.C. App. 337, 172 S.E.2d 90 (1970).

And Section Creates No Presumption That Owner Was Driver. — This section does not provide that proof of ownership of an automobile, or proof of the registration of an automobile in the name of any person, shall be prima facie evidence that the owner of the automobile, or the person in whose name it was registered, was the driver of the automobile at the time of a wreck. Parker v. Wilson, 247 N.C. 47, 100 S.E.2d 258 (1957), declining to adopt a rule holding that upon the facts of the instant case a rebuttable presumption or inference arose that defendant's testate was driving his automobile at the time of the fatal crash; Johnson v. Fox, 254 N.C. 454, 119 S.E.2d 185 (1961).

This section makes no reference to any authority of the driver to affect the owner's liability to other persons otherwise than by the driver's conduct in the operation and control of the vehicle. Branch v. Dempsey, 265 N.C. 733, 145 S.E.2d 395 (1965).

Admission by defendant truck owner that his truck was being operated by codefendant is sufficient, as against such owner, to permit a finding that codefendant was driving the truck and, therefore, to bring into operation this section making such fact prima facie proof that codefendant was the agent of the truck owner and was driving the truck in the course of his employment as such agent. Branch v. Dempsey, 265 N.C. 733, 145 S.E.2d 395 (1965).

Necessity for Evidence that Defendant Was Registered Owner. — Where plaintiff offered no evidence to support her allegation that a parent was the registered owner of an

automobile operated by his son, she could not benefit by the presumption of agency created by this section. Griffin v. Pancoast, 257 N.C. 52, 125 S.E.2d 310 (1962).

In the absence of evidence that defendant is the owner of the vehicle, plaintiff is not entitled to the benefit of this section. Freeman v. Biggers Bros., 260 N.C. 300, 132 S.E.2d 626 (1963).

Owner-occupant of car ordinarily has the right to direct its operation by the driver. Randall v. Rogers, 262 N.C. 544, 138 S.E.2d 248 (1964).

Hence, he is responsible for driver's negligence irrespective of agency, as such, and the provisions of this section. Randall v. Rogers, 262 N.C. 544, 138 S.E.2d 248 (1964).

Presumption of Agency Rebuttable by Plaintiffs' Own Evidence. — Where defendant admits that, at the time of the accident, he was the owner of one of the vehicles involved in the collision, but plaintiff elicits testimony from her own witnesses of declarations made by defendant to the effect that, at the time in question, the driver had taken defendant's automobile without defendant's authorization, knowledge, or consent, and was not at the time defendant's agent or employee or acting in the course and scope of any employment by defendant, plaintiff's own evidence rebuts the presumption created by this section, and such evidence not being contradicted by any other evidence of either plaintiff or defendant, nonsuit on the issue of agency is proper. Taylor v. Parks, 254 N.C. 266, 118 S.E.2d 779 (1961).

Departure from Course of Employment. — It is elementary that a principal or employer is not liable for injury due to a negligent act or omission of his agent or employee when such agent or employee has departed from the course of his employment and embarked upon a mission or frolic of his own. Duckworth v. Metcalf, 268 N.C. 340, 150 S.E.2d 485 (1966).

The test is whether the employee or agent was, at the time of the negligent act or omission, about his master's business. Duckworth v. Metcalf, 268 N.C. 340, 150 S.E.2d 485 (1966).

If there has been a total departure from the course of the master's business, the employer or principal is not liable for the negligent act or omission of the employee during such departure from the employment relation. Duckworth v. Metcalf, 268 N.C. 340, 150 S.E.2d 485 (1966).

But it is not sufficient to take the servant out of the course of his employment, and thus to relieve the employer from responsibility for the negligent act or omission of the servant, that the servant at the time of such act or omission was violating an instruction or rule of the employer or principal. Duckworth v. Metcalf, 268 N.C. 340, 150 S.E.2d 485 (1966).

Effect of Evidence that Driver Was Co-Owner with Registered Owner. — Evidence that a vehicle operated by a woman was registered in the name of her husband is prima facie evidence that she was driving as his agent, but even so, parol evidence is competent to show that the husband and wife were in fact co-owners, and when there is such evidence, it is error for the court to peremptorily instruct the jury to answer the issue of agency in the affirmative. Rushing v. Polk, 258 N.C. 256, 128 S.E.2d 675 (1962).

Name on Vehicle Is Prima Facie Evidence of Ownership. — Where common carriers of freight are operating tractor-trailer units on public highways, such equipment bears the insignia or name of such carrier, and the motor vehicle is involved in a collision or inflicts injury upon another, evidence that the name of the defendant was painted or inscribed on the motor vehicle which inflicted the injury constitutes prima facie evidence that the defendant whose name or identifying insignia appears thereon was the owner of such vehicle and that the driver thereof was operating it for and on behalf of the defendant. Freeman v. Biggers Bros., 260 N.C. 300, 132 S.E.2d 626 (1963).

Provided Name Is Identified with Defendant. — Evidence of the color and size of a truck which struck plaintiff, and that it had on its doors signs reading "Biggers Brothers Wholesale Fruit and Produce," without evidence tending to identify the signs on the truck with defendant or with other trucks owned by defendant, or any evidence of the nature of defendant's business, was insufficient to establish ownership and invoke the benefit of this section. Freeman v. Biggers Bros., 260 N.C. 300, 132 S.E.2d 626 (1963).

License Plates as Prima Facie Evidence of Ownership. — A prima facie case of ownership is made out by virtue of this section when license plates issued to driver are on the vehicle, even though the car described on the registration does not have the same body style as the vehicle actually being driven. Rick v. Murphy, 251 N.C. 162, 110 S.E.2d 815 (1959).

Where title to an automobile stands in the wife's name, the imputation of her alleged negligence to her husband, who was riding as a passenger in the automobile driven by the wife, cannot be predicated upon evidence showing that the husband made the deferred payments on the purchase price of the car, paid the expenses incident to maintaining the car, and treated the car for tax purposes as a depreciable asset of his business enterprise. Guilford Nat'l Bank v. Southern Ry., 319 F.2d 825 (4th Cir. 1963).

Liability of Merchants and Mechanics. — This section does not make the merchant who supplies parts, or the mechanic who performs work and supplies parts, responsible for the operation of a repaired or rebuilt motor vehicle. Rick v. Murphy, 251 N.C. 162, 110 S.E.2d 815 (1959), holding garage operator who supplied

body from wrecked car he owned to be used with parts from customer's wrecked car to make a motor vehicle for the customer was not owner of such motor vehicle.

Joinder for Contribution. — Where, in an action by a passenger against the drivers involved in a collision, plaintiff makes out a prima facie case of negligence on the part of the driver of the car, proof or admissions that the additional defendant was the registered owner of the car establishes prima facie that the driver was such owner's agent and was acting in the course and scope of the employment, and entitles the defendants to have the owner of the car joined for contribution. McPherson v. Haire, 262 N.C. 71, 136 S.E.2d 224 (1964).

Applied, as to institution of action within one year, in Hensley v. Harris, 242 N.C. 599, 89 S.E.2d 155 (1955); Knight v. Associated Transp., Inc., 255 N.C. 462, 122 S.E.2d 64 (1961); Tharpe v. Newman, 257 N.C. 71, 125 S.E.2d 315 (1962); Hawley v. Indemnity Ins. Co. of North America, 257 N.C. 381, 126 S.E.2d 161 (1962); Salter v. Lovick, 257 N.C. 619, 127 S.E.2d 273 (1962); Smith v. Simpson, 260 N.C. 601, 133 S.E.2d 474 (1963); Yates v. Chappell, 263 N.C. 461, 139 S.E.2d 728 (1965); Passmore v. Smith, 266 N.C. 717, 147 S.E.2d 238 (1966); Jackson v. Baldwin, 268 N.C. 149, 150 S.E.2d 37 (1966); Morris v. Bigham, 6 N.C. App. 490, 170 S.E.2d 534 (1969); Nolan v. Boulware, 21 N.C. App. 347, 204 S.E.2d 701 (1974).

Quoted in State v. Scoggin, 236 N.C. 19, 72 S.E.2d 54 (1952); Chatfield v. Farm Bureau Mut. Auto. Ins. Co., 208 F.2d 250 (4th Cir. 1953); Perkins v. Cook, 272 N.C. 477, 158 S.E.2d 584 (1968).

Cited in Northwest Cas. Co. v. Kirkman, 119 F. Supp. 828 (M.D.N.C. 1954); Ransdell v. Young, 243 N.C. 75, 89 S.E.2d 773 (1955); Williamson v. Varner, 252 N.C. 446, 114 S.E.2d 92 (1960); Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962); Parlier v. Barnes, 260 N.C. 341, 132 S.E.2d 684 (1963).

Part 4. Transfer of Title or Interest.

§ 20-72. Transfer by owner. — (a) Whenever the owner of a registered vehicle transfers or assigns his title or interests thereto, he shall remove the license plates. The registration card and plates shall be forwarded to the Division unless the plates are to be transferred to another vehicle as provided in G.S. 20-64. If they are to be transferred to and used with another vehicle, then the endorsed registration card and the plates shall be retained and preserved by the owner. If such registration plates are to be transferred to and used with another vehicle, then the owner shall make application to the Division for assignment of the registration plates to such other vehicle under the provisions of G.S. 20-64. Such application shall be made within 20 days after the date on which such plates are last used on the vehicle to which theretofore assigned.

(b) In order to assign or transfer title or interest in any motor vehicle registered under the provisions of this Article, the owner shall execute in the presence of a person authorized to administer oaths an assignment and warranty of title on the reverse of the certificate of title in form approved by the Division, including in such assignment the name and address of the transferee; and no title to any motor vehicle shall pass or vest until such assignment is executed and the motor vehicle delivered to the transferee. The provisions of this section shall not apply to any foreclosure or repossession under a chattel mortgage or conditional sales contract or any judicial sale.

Any person transferring title or interest in a motor vehicle shall deliver the certificate of title duly assigned in accordance with the foregoing provision to the transferee at the time of delivering the vehicle, except that where a security interest is obtained in the motor vehicle from the transferee in payment of the purchase price or otherwise, the transferor shall deliver the certificate of title to the lienholder and the lienholder shall forward the certificate of title together with the transferee's application for new title and necessary fees to the Division within 20 days. Any person who delivers or accepts a certificate of title assigned in blank shall be guilty of a misdemeanor.

The title to a salvage vehicle shall be forwarded to the Division as provided in G.S. 20-109.1.

(c) When the Division finds that any person other than the registered owner of a vehicle has in his possession a certificate of title to the vehicle on which there appears an endorsement of an assignment of title but there does not

appear in the assignment any designation to show the name and address of the assignee or transferee, the Division shall be authorized and empowered to seize and hold said certificate of title until the assignor whose name appears in the assignment appears before the Division to complete the execution of the assignment or until evidence satisfactory to the Division is presented to the Division to show the name and address of the transferee. (1937, c. 407, s. 36; 1947, c. 219, ss. 4, 5; 1955, c. 554, ss. 5, 6; 1961, c. 360, s. 8; c. 835, s. 8; 1963, c. 552, ss. 3, 4; 1971, c. 678; 1973, c. 1095, s. 2; 1975, c. 716, s. 5.)

Cross Reference. — As to fees, see § 20-85.

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout the section.

For note as to the requirements of §§ 20-72 to 20-78, see 32 N.C.L. Rev. 545 (1954). For case law survey on time of acquisition of title to motor vehicles, see 41 N.C.L. Rev. 444 (1963).

Requirements Mandatory. — By explicit terms of this section and by interpretation of the Supreme Court, there are definite and mandatory requirements governing transfer of legal title and ownership to a motor vehicle. Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970).

Strict Compliance Required. — Strict compliance with the requirements of assignment and warranty of title and a statement of all liens and encumbrances is necessary in every sale of motor vehicles. Seymour v. W.S. Boyd Sales Co., 257 N.C. 603, 127 S.E.2d 265 (1962), decided under this section as it stood before the 1963 amendment.

Section Not Repealed by Uniform Commercial Code. — The provisions of the Uniform Commercial Code do not override the earlier motor vehicle statutes relating to the transfer of ownership of a motor vehicle for the purpose of tort law and liability insurance coverage. Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970).

The legislature did not intend to repeal the Motor Vehicles Act in the general repealer section of the Uniform Commercial Code. Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970).

The provisions of subsection (b) of this section contain specific, definite and comprehensive terms concerning the transfer of ownership of a motor vehicle. Conversely, the Uniform Commercial Code does not refer to transfer of ownership of motor vehicles, but only refers to the passing of title to property generally described as "goods." Although the word "automobile" comes within the general term of "goods," automobiles are a special class of goods which have long been heavily regulated by public regulatory acts. Subsection (b) is a special statute and the Uniform Commercial Code is a general statute. Thus, the special statute, even though earlier in point of time, must prevail. Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970).

Purchaser Must Secure Old Certificate of Title and Apply for New One. — This section and § 20-75 make it the duty of the purchaser to secure from his vendor the old certificate of title duly endorsed or assigned and to apply for a new certificate. They do not relate to the duty of the Department (now Division) to issue a new certificate. Community Credit Co. of Lenoir, Inc. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962).

"Title" as Used in Subsection (b) Is Synonymous with "Ownership". — The words "title" and "ownership" are words that may be used interchangeably, and the legislature in enacting the 1963 amendment to subsection (b) of this section used the word "title" as a synonym for the word "ownership." Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970).

In enacting the 1963 amendment to subsection (b) of this section (which provides that title to a motor vehicle cannot be transferred from one owner to another until the certificate of title has been duly executed and the vehicle delivered to the transferee), the legislature used the word "title" as a synonym for the word "ownership." Nationwide Mut. Ins. Co. v. Fireman's Fund Ins. Co., 279 N.C. 240, 182 S.E.2d 571 (1971).

The definition of "owner" in former § 20-279.1 (now in § 20-4.01) as the holder of the legal title is compatible with subsection (b) of this section, requiring the vendor to execute an assignment and warranty of title on the reverse of the certificate of title in order to assign or transfer any interest in the motor vehicle. Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970).

No material conflict will arise between the Financial Responsibility Act and subsection (b) of this section, as amended by the legislature of 1963, by holding subsection (b) of this section to be controlling as to ownership of a motor vehicle for purposes of tort liability and insurance coverage. Rather, such an interpretation would strengthen and complement the purposes of the Financial Responsibility Act of 1953. Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970).

Vesting of Title. — No title passes to the purchaser of a motor vehicle until (1) the certificate of title has been assigned by the

vendor, (2) delivered to the vendee or his agent, and (3) application made for a new certificate of title. International Serv. Ins. Co. v. Iowa Nat'l Mut. Ins. Co., 276 N.C. 243, 172 S.E.2d 55 (1970).

After July 1, 1961, the effective date of the 1961 amendments, no title passes to the purchaser of a motor vehicle until (1) the certificate of title has been assigned by the vendor, (2) delivered to the vendee or his agent, and (3) application made for a new certificate of title. Younts v. State Farm Mut. Auto. Ins. Co., 281 N.C. 582, 189 S.E.2d 137 (1972).

Same; For Purposes of Tort Law and Insurance Coverage. — After July 1, 1963 (the effective date of the 1963 amendment to this section), for purposes of tort law and liability insurance coverage, no ownership passes to the purchaser of a motor vehicle which requires registration under the Motor Vehicle Act of 1937 until (1) the owner executes, in the presence of a person authorized to administer oaths, an assignment and warranty of title on the reverse of the certificate of title, including the name and address of the transferee, (2) there is an actual or constructive delivery of the motor vehicle, and (3) the duly assigned certificate of title is delivered to the transferee. In the event a security interest is obtained in the motor vehicle from the transferee, the requirement of delivery of the duly assigned certificate of title is met by delivering it to the lienholder. Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970).

Same; Former Law. — Prior to 1961, a purchaser of a motor vehicle acquired title notwithstanding the vendor's failure to deliver a certificate of title or the purchaser's failure to make application for a new certificate to the Department of Motor Vehicles. International Serv. Ins. Co. v. Iowa Nat'l Mut. Ins. Co., 276 N.C. 243, 172 S.E.2d 55 (1970); Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970).

The 1961 amendments to subsection (b) of this section and § 20-75 were intended to and did change the law with respect to transfer of ownership of motor vehicles. International Serv. Ins. Co. v. Iowa Nat'l Mut. Ins. Co., 276 N.C. 243, 172 S.E.2d 55 (1970).

Under subsection (b) of this section as amended in 1961 and before its amendment in 1963, the vesting of title was deferred until the purchaser had the old certificate endorsed to him and made application for a new certificate. Community Credit Co. of Lenoir, Inc. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962). See Home Indem. Co. v. West Trade Motors, Inc., 258 N.C. 647, 129 S.E.2d 248 (1963).

Warranty of Title and Statement of Liens and Encumbrances Required under Former Law. — Prior to the 1963 amendment to this section subsection (b) made it the duty of the vendor of a registered vehicle to endorse his certificate of title to the transferee with a statement of all liens or encumbrances, to be verified by the oath of the owner. Home Indem. Co. v. West Trade Motors, Inc., 258 N.C. 647, 129 S.E.2d 248 (1963).

The seller of a motor vehicle was required to endorse, and deliver to or for the buyer, an assignment and warranty of title and a statement of all liens and encumbrances, even where a conditional sale was involved. Seymour v. W.S. Boyd Sales Co., 257 N.C. 603, 127 S.E.2d 265 (1962), decided under this section as it stood before the 1963 amendment.

The effect of failure to list liens as required by this section before the 1963 amendment was a warranty that such liens did not exist. Seymour v. W.S. Boyd Sales Co., 257 N.C. 603, 127 S.E.2d 265 (1962).

No Lien Created by Chattel Mortgage prior to Acquisition of Title. — Where the purchaser of a motor vehicle executes a chattel mortgage which is registered prior to the acknowledgment of the assignment of the certificate of title by the seller and the forwarding of an application for a new certificate to the Department (now Division) of Motor Vehicles, the chattel mortgage does not create a lien on the vehicle, since the purchaser, at the time it was executed, did not have title, and the instrument can operate only as a contract to execute a chattel mortgage upon the acquisition of title. National Bank v. Greensboro Motor Co., 264 N.C. 568, 142 S.E.2d 166 (1965). As to perfecting security interest, see § 20-58 et seq.

When a sale is made to a dealer, it is not necessary to transmit the certificate of title to the Department (now Division) of Motor Vehicles until the dealer resells. Home Indem. Co. v. West Trade Motors, Inc., 258 N.C. 647, 129 S.E.2d 248 (1963).

Applied in Hawkins v. M & J Fin. Corp., 238 N.C. 174, 77 S.E.2d 669 (1953) (as to subsection (b)); Gaddy v. State Farm Mut. Auto. Ins. Co., 32 N.C. App. 714, 233 S.E.2d 613 (1977).

Cited in Manning v. State Farm Mut. Auto. Ins. Co., 243 F. Supp. 619 (W.D.N.C. 1965); Younts v. State Farm Mut. Auto. Ins. Co., 13 N.C. App. 426, 185 S.E.2d 730 (1972); Moser v. Employers Com. Union Ins. Co. of America, 25 N.C. App. 309, 212 S.E.2d 664 (1975).

§ 20-73. New owner to secure new certificate of title. — The transferee, within 20 days after the purchase of any vehicle, shall present the certificate of title endorsed and assigned as hereinbefore provided, to the Division and make application for a new certificate of title for such vehicle except as otherwise permitted in G.S. 20-75 and 20-76. Any transferee willfully failing or refusing to make application for title shall be guilty of a misdemeanor. (1937, c. 407, s. 37; 1939, c. 275; 1947, c. 219, s. 6; 1961, c. 360, s. 9; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

Burden Is on Vendee to Apply for New Certificate of Title. — The burden is imposed on the vendee, or as this section describes him, transferee, to present the certificates and make application for a new certificate of title within 20 days, and a willful failure to do so is expressly declared to be a misdemeanor. When the certificate of title is delivered to a lienholder, it is nonetheless the duty of the purchaser to see that the certificate is forwarded to the Department (now Division) of Motor Vehicles. Home Indem. Co. v. West Trade Motors, Inc., 258 N.C. 647, 129 S.E.2d 248 (1963).

And Vendor Should Not Be Penalized for Vendee's Failure. — There is nothing in the 1961 amendments to this Part which suggests that dealer, a vendor, should be penalized and held liable because of the failure of a purchaser to perform his statutory duty. Home Indem. Co. v. West Trade Motors, Inc., 258 N.C. 647, 129 S.E.2d 248 (1963).

There is nothing in the statute which suggests dealer, a vendor, should be penalized and held liable because of the failure of a purchaser to perform his statutory duty. International Serv. Ins. Co. v. Iowa Nat'l Mut. Ins. Co., 5 N.C. App. 236, 168 S.E.2d 66 (1969).

Application Must Be in Proper Form. — The statute necessarily implies that the application for a new certificate should be in proper form. Community Credit Co. of Lenoir, Inc. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962).

Cited in International Serv. Ins. Co. v. Iowa Nat'l Mut. Ins. Co., 276 N.C. 243, 172 S.E.2d 55 (1970).

§ 20-74. Penalty for failure to make application for transfer within the time specified by law. — It is the intent and purpose of this Article that every new owner or purchaser of a vehicle previously registered shall make application for transfer of title within 20 days after acquiring same, or see that such application is sent in by the lienholder with proper fees, and responsibility for such transfer shall rest on the purchaser. Any person, firm or corporation failing to do so shall pay a penalty of two dollars ($2.00) in addition to the fees otherwise provided in this Article. It is further provided that any dealer or owner who shall knowingly make any false statement in any application required by this Division as to the date a vehicle was sold or acquired shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars ($50.00) or imprisoned not more than 30 days. All moneys collected under this section shall go to the State Highway Fund. (1937, c. 407, s. 38; 1939, c. 275; 1961, c. 360, s. 10; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

Compliance with Registration Statutes Mandatory. — It is manifest both from the express language of the registration statutes and from this companion penal enforcement provision that compliance with the registration statutes is mandatory and calls for substantial observance. Hawkins v. M & J Fin. Corp., 238 N.C. 174, 77 S.E.2d 669 (1953).

Burden Is on Vendee to Apply for New Certificate of Title. — See note to § 20-73.

Cited in Community Credit Co. of Lenoir, Inc. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962); International Serv. Ins. Co. v. Iowa Nat'l Mut. Ins. Co., 276 N.C. 243, 172 S.E.2d 55 (1970); Nationwide Mut. Ins. Co. v. Hayes, 7 N.C. App. 294, 172 S.E.2d 269 (1970).

§ 20-75. When transferee is dealer or insurance company. — When the transferee of any vehicle registered under the foregoing provision of this Article is a licensed dealer who holds the same for resale and operates the same only for purpose of demonstration under a dealer's number plate, or a duly licensed insurance company taking such vehicle for sale or disposal for salvage purposes where such title is taken as a part of a bona fide claim settlement transaction and only for the purpose of resale, such transferee shall not be required to register such vehicle nor forward the certificate of title to the Division as provided in G.S. 20-73. To assign or transfer title or interest in such vehicle, the dealer or insurance company shall execute in the presence of a person authorized to administer oaths a reassignment and warranty of title on the reverse of the certificate of title in form approved by the Division, including in such reassignment the name and address of the transferee, and title to such vehicle shall not pass or vest until such reassignment is executed and the motor vehicle delivered to the transferee.

The dealer transferring title or interest in a motor vehicle shall deliver the certificate of title duly assigned in accordance with the foregoing provision to the transferee at the time of delivering the vehicle, except that where a security interest in the motor vehicle is obtained from the transferee in payment of the purchase price or otherwise, the dealer shall deliver the certificate of title to the lienholder and the lienholder shall forward the certificate of title together with the transferee's application for new certificate of title and necessary fees to the Division within 20 days. Any person who delivers or accepts a certificate of title assigned in blank shall be guilty of a misdemeanor.

The title to a salvage vehicle shall be forwarded to the Division as provided in G.S. 20-109.1. (1937, c. 407, s. 39; 1961, c. 835, s. 9; 1963, c. 552, s. 5; 1967, c. 760; 1973, c. 1095, s. 3; 1975, c. 716, s. 5.)

Cross Reference. — See notes to §§ 20-72, 20-73.

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout the section.

The 1961 amendments to this section and § 20-72(b) were intended to and did change the law with respect to transfer of ownership of motor vehicles. International Serv. Ins. Co. v. Iowa Nat'l Mut. Ins. Co., 276 N.C. 243, 172 S.E.2d 55 (1970).

The custom of used car dealers to accept a blank endorsement of the title by the owner and to transfer title directly to a purchaser upon an anonymous notarization is violative of the letter and spirit of the motor vehicle registration statutes and may not be asserted as ground for equitable estoppel. Hawkins v. M & J Fin. Corp., 238 N.C. 174, 77 S.E.2d 669 (1953).

Cited in Rushing v. Polk, 258 N.C. 256, 128 S.E.2d 675 (1962); Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970).

§ 20-76. Title lost or unlawfully detained; bond as condition to issuance of new certificate. — (a) Whenever the applicant for the registration of a vehicle or a new certificate of title thereto is unable to present a certificate of title thereto by reason of the same being lost or unlawfully detained by one in possession, or the same is otherwise not available, the Division is hereby authorized to receive such application and to examine into the circumstances of the case, and may require the filing of affidavits or other information; and when the Division is satisfied that the applicant is entitled thereto and that G.S. 20-72 has been complied with, it is hereby authorized to register such vehicle and issue a new registration card, registration plate or plates and certificates of title to the person entitled thereto, upon payment of proper fees.

(b) Whenever the applicant for a new certificate of title is unable to satisfy the Division that he is entitled thereto as provided in subsection (a) of this section, the applicant may nevertheless obtain issuance of a new certificate of title by filing a bond with the Division as a condition to the issuance thereof. The bond shall be in the form prescribed by the Division and shall be executed by the applicant. It shall be accompanied by the deposit of cash with the Division,

be executed as surety by a person, firm or corporation authorized to conduct a surety business in this State or be in the nature of a real estate bond as described in G.S. 20-279.24(a). The bond shall be in an amount equal to one and one-half times the value of the vehicle as determined by the Division and conditioned to indemnify any prior owner or lienholder, any subsequent purchaser of the vehicle or person acquiring any security interest therein, and their respective successors in interest, against any expense, loss or damage, reason of the issuance of the certificate of title to the vehicle or on account of any defect in or undisclosed security interest in the right, title and interest of the applicant in and to the vehicle. Any person damaged by issuance of the certificate of title shall have a right of action to recover on the bond for any breach of its conditions, but the aggregate liability of the surety to all persons shall not exceed the amount of the bond. The bond, and any deposit accompanying it, shall be returned at the end of three years or prior thereto if the vehicle is no longer registered in this State and the currently valid certificate of title is surrendered to the Division, unless the Division has been notified of the pendency of an action to recover on the bond. (1937, c. 407, s. 40; 1947, c. 219, s. 7; 1961, c. 360, s. 11; c. 835, s. 10; 1975, c. 716, s. 5.)

Cross Reference. — As to proper fee, see § 20-85.

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout the section.

§ 20-77. Transfer by operation of law; sale under mechanic's or storage lien; unclaimed vehicles. — (a) Whenever the title or interest of an owner in or to a vehicle shall pass to another by operation of law, as upon order in bankruptcy, execution sale, repossession upon default in performing the terms of a lease or executory sales contract, or otherwise than by voluntary transfer, the transferee shall secure a new certificate of title upon proper application, payment of the fees provided by law, and presentation of the last certificate of title, if available and such instruments or documents of authority or certified copies thereof as may be sufficient or required by law to evidence or effect a transfer of interest in or to chattels in such cases.

(b) In the event of transfer as upon inheritance, devise or bequest, the Division shall, upon a receipt of a certified copy of a will, letters of administration and/or a certificate from the clerk of the superior court showing that the motor vehicle registered in the name of the decedent owner has been assigned to his widow as part of her year's support, transfer both title and license as otherwise provided for transfers. If a decedent dies intestate and no administrator has qualified or the clerk of superior court has not issued a certificate of assignment as part of the widow's year's allowance, or if a decedent dies testate with a small estate and leaving a purported will, which, in the opinion of the clerk of superior court, does not justify the expense of probate and administration and probate and administration is not demanded by any interested party entitled by law to demand same, and provided that the purported will is filed in the public records of the office of the clerk of the superior court, the Division may upon affidavit executed by all heirs effect such transfer. The affidavit shall state the name of the decedent, date of death, that the decedent died intestate or testate and no administration is pending or expected, that all debts have been paid or that the proceeds from the transfer will be used for that purpose, the names, ages and relationship of all heirs and devisees (if there be a purported will), and the name and address of the transferee of the title. A surviving spouse may execute the affidavit and transfer the interest of the decedent's minor or incompetent children where such minor

or incompetent does not have a guardian. A transfer under this subsection shall not affect the validity nor be in prejudice of any creditor's lien.

(c) Mechanic's or Storage Lien. — In any case where a vehicle is sold under a mechanic's or storage lien, or abandoned property, the Division shall be given a 20-day notice as provided in G.S. 20-114.

(d) An operator of a place of business for garaging, repairing, parking or storing vehicles for the public in which a vehicle remains unclaimed for 30 days, or the landowners upon whose property a motor vehicle has been abandoned for more than 60 days, shall, within five days after the expiration of that period, report the vehicle as unclaimed to the Division. Failure to make such report shall constitute a misdemeanor punishable by fine not to exceed fifty dollars ($50.00) or imprisonment not to exceed 30 days, or both, in the discretion of the court.

Any vehicle which remains unclaimed after report is made to the Division may be sold by such operator or landowner in accordance with the provisions relating to the enforcement of liens and the application of proceeds of sale of Article 1 of Chapter 44A.

(e) Any person, who shall sell a vehicle to satisfy a mechanic's or storage lien or any person who shall sell a vehicle as upon order in bankruptcy, execution sale, repossession upon default in performing the terms of a lease or executory sales contract, or otherwise by operation of law, shall remove any license plates attached thereto and return them to the Division. (1937, c. 407, s. 41; 1943, c. 726; 1945, cc. 289, 714; 1955, c. 296, s. 1; 1959, c. 1264, s. 3; 1961, c. 360, ss. 12, 13; 1967, c. 562, s. 8; 1971, cc. 230, 512, 876; 1973, c. 1386, ss. 1, 2; c. 1446, s. 21; 1975, c. 438, s. 2; c. 716, s. 5.)

Cross Reference. — As to fees required, see § 20-85.

Editor's Note. — The first 1975 amendment rewrote the second paragraph of subsection (d), which formerly detailed the procedure for sale of vehicles.

The second 1975 amendment substituted "Division" for "Department" in subsections (a), (b), (c), (d) and (e).

For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

Cited in Younts v. State Farm Mut. Auto. Ins. Co., 281 N.C. 582, 189 S.E.2d 137 (1972).

§ 20-78. When Division to transfer registration and issue new certificate; recordation. — (a) The Division, upon receipt of a properly endorsed certificate of title, application for transfer thereof and payment of all proper fees, shall issue a new certificate of title as upon an original registration. The Division, upon receipt of an application for transfer of registration plates, together with payment of all proper fees, shall issue a new registration card transferring and assigning the registration plates and numbers thereon as upon an original assignment of registration plates.

(b) The Division shall maintain a record of certificates of title issued, maintaining at all times the records of the last two owners.

The Commissioner is hereby authorized and empowered to provide for the photographic or photostatic recording of certificate of title records in such manner as he may deem expedient. The photographic or photostatic copies herein authorized shall be sufficient as evidence in tracing of titles of the motor vehicles designated therein, and shall also be admitted in evidence in all actions and proceedings to the same extent that the originals would have been admitted. (1937, c. 407, s. 42; 1943, c. 726; 1947, c. 219, s. 8; 1961, c. 360, s. 14; 1971, c. 1070, s. 4; 1975, c. 716, s. 5.)

Cross Reference. — As to required fees, see § 20-85.

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsections (a) and (b).

Applied in Hawkins v. M & J Fin. Corp., 238 N.C. 174, 77 S.E.2d 669 (1953).

Cited in Morrisey v. Crabtree, 143 F. Supp. 105 (M.D.N.C. 1956).

Part 5. Issuance of Special Plates.

§ 20-79. Registration by manufacturers and dealers. — (a) Every manufacturer of or dealer in motor vehicles, trailers or semitrailers shall apply to the Motor Vehicle Division for a license as such upon official forms and shall in his application give the name of the manufacturer or dealer and his bona fide address of each partner; if a corporation, the name of the corporation and the state of incorporation; the bona fide address of the place of business; whether a dealer in new vehicles or in used vehicles and shall state how long in business. Upon receipt of said application the Division shall upon the payment of fees as required by law issue a license to such applicant, together with number plates, which plates shall bear thereon a distinctive number, the name of this State, which may be abbreviated, the year for which issued, together with the word dealer or a distinguishing symbol indicating that such plate or plates are issued to a dealer. The plates so issued may during the calendar year for which issued be transferred from one vehicle to another owned and operated by such manufacturer or dealer. The license and plates issued under this section shall be in lieu of the registration of such vehicle.

Any person to whom license and number plates are issued under the provisions of this subsection upon discontinuing business as a dealer or manufacturer shall forthwith surrender to the Division license and all number plates so issued to him.

No person, firm, or corporation shall engage in the business of buying, selling, distributing or exchanging motor vehicles, trailers or semitrailers in this State unless he or it qualifies for and obtains the license required by this section.

Any person, firm, or corporation violating any provision of this subsection shall be guilty of a misdemeanor and for each offense shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000).

(b) Every manufacturer of or dealer in motor vehicles shall obtain and have in his possession a certificate of title issued by the Division to such manufacturer or dealer of each vehicle owned and operated upon the highways by such manufacturer or dealer, except that a certificate of title shall not be required or issued for any new vehicle to be sold as such by a manufacturer or dealer prior to the sale of such vehicle by the manufacturer or dealer; and except that any dealer or any employee of any dealer may operate any motor vehicle, trailer or semitrailer, the property of the dealer, for the purpose of furthering the business interest of the dealer in the sale, demonstration and servicing of motor vehicles, trailers and semitrailers, of collecting accounts, contacting prospective customers and generally carrying out routine business necessary for conducting a general motor vehicle sales business: Provided, that no use shall be made of dealer's demonstration plates on vehicles operated in any other business dealers may be engaged in: Provided further, that dealers may allow the operation of motor vehicles owned by dealers and displaying dealer's demonstration plates in the personal use of persons other than those employed in the dealer's business: Provided further, that said persons shall, at all times while operating a motor vehicle under the provisions of this section, have in their possession a certificate on such form as approved by the Commissioner from the dealer, which shall be valid for not more than 96 hours.

(c) No manufacturer of or dealer in motor vehicles, trailers or semitrailers shall cause or permit any such vehicle owned by such person to be operated or moved upon a public highway without there being displayed upon such vehicle a number plate or plates issued to such person, either under G.S. 20-63 or under this section.

(d) No manufacturer of or dealer in motor vehicles, trailers or semitrailers shall cause or permit any such vehicle owned by such person or by any person in his employ, which is in the personal use of such person or employee, to be operated or moved upon a public highway with a "dealer" plate attached to such vehicle.

(e) Transfer of Dealer Registration. — No change in the name of a firm, partnership or corporation, nor the taking in of a new partner, nor the withdrawal of one or more of the firm, shall be considered a new business; but if any one or more of the partners remain in the firm, or if there is change in ownership of less than a majority of the stock, if a corporation, the business shall be regarded as continuing and the dealers' plates originally issued may continue to be used. (1937, c. 407, s. 43; 1947, c. 220, s. 2; 1949, c. 583, s. 3; 1951, c. 985, s. 2; 1959, c. 1264, s. 3.5; 1961, c. 360, s. 15; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsections (a) and (b).

Applied in Brinkley v. Nationwide Mut. Ins. Co., 271 N.C. 301, 156 S.E.2d 225 (1967).

Cited in Hawkins v. M & J Fin. Corp., 238 N.C. 174, 77 S.E.2d 669 (1953); Smart Fin. Co. v. Dick, 256 N.C. 669, 124 S.E.2d 862 (1962).

§ 20-79.1. Use of temporary registration plates or markers by purchasers of motor vehicles in lieu of dealers' plates. — (a) The Division may, subject to the limitations and conditions hereinafter set forth, deliver temporary registration plates or markers designed by said Division to a dealer duly registered under the provisions of this Article who applies for at least 25 such plates or markers and who encloses with such application a fee of one dollar ($1.00) for each plate or marker for which application is made. Such application shall be made upon a form prescribed and furnished by the Division. Dealers, subject to the limitations and conditions hereinafter set forth, may issue such temporary registration plates or markers to owners of vehicles, provided that such owners shall comply with the pertinent provisions of this section.

(b) Every dealer who has made application for temporary registration plates or markers shall maintain in permanent form a record of all temporary registration plates or markers delivered to him, and shall also maintain in permanent form a record of all temporary registration plates or markers issued by him, and in addition thereto, shall maintain in permanent form a record of any other information pertaining to the receipt or the issuance of temporary registration plates or markers that the Division may require. Each record shall be kept for a period of at least one year from the date of entry of such record. Every dealer shall allow full and free access to such records during regular business hours, to duly authorized representatives of the Division and to peace officers.

(c) Every dealer who issues temporary registration plates or markers shall also issue a temporary registration certificate upon a form furnished by the Division and deliver with the registration plate or marker to the owner and shall on the day that he issued such plate or marker, send to the Division a copy of the temporary registration issuance.

(d) A dealer shall not issue, assign, transfer, or deliver temporary registration plates or markers to anyone other than a bona fide purchaser or owner of a vehicle being sold by such dealer, nor shall a dealer issue a temporary registration plate or marker without first obtaining from said purchaser or owner a written application for the titling and registration of the purchased vehicle with the prescribed fees therefor, which application and fees the said dealer shall immediately forward to the Division by mail or messenger or by messenger to a local license agency; nor shall a dealer issue a temporary registration plate to anyone purchasing a vehicle that has unexpired registration

plates, which registration plates are to be transferred to such purchaser; nor shall a dealer lend to anyone or use on any vehicle that he may own, temporary registration plates or markers: Provided that dealers are hereby authorized to issue temporary markers to nonresidents for the purpose of removing a vehicle purchased in this State, without collecting a registration fee or requiring an application for titling and registration. It shall be unlawful for any person to issue any temporary registration plate or marker containing any misstatement of fact or knowingly insert any false information upon the face thereof.

(e) Every dealer who issues temporary plates or markers shall insert clearly and indelibly on the face of each temporary registration plate or marker the date of issuance and expiration, the make, motor and serial numbers of the vehicle for which issued and such other information as the Division may require.

(f) If the Division finds that the provisions of this section or the directions of the Division are not being complied with by the dealer, he may suspend, after a hearing, the right of a dealer to issue temporary registration plates or markers.

(g) Every person to whom temporary registration plates or markers have been issued shall permanently destroy such temporary registration plates or markers immediately upon receiving the annual registration plates from the Division: Provided, that if the annual registration plates are not received within 20 days of the issuance of the temporary registration plates or markers, the owner shall, notwithstanding, immediately upon the expiration of such 20-day period, permanently destroy the temporary registration plates or markers.

(h) Temporary registration plates or markers shall expire and become void upon the receipt of the annual registration plates from the Division, or upon the rescission of a contract to purchase a motor vehicle, or upon the expiration of 20 days from the date of issuance, depending upon whichever event shall first occur. No refund or credit or fees paid by dealers to the Division for temporary registration plates or markers shall be allowed, except in the event that the Division discontinues the issuance of temporary registration plates or markers or unless the dealer discontinues business. In this event the unissued registration plates or markers with the unissued registration certificates shall be returned to the Division and the dealer may petition for a refund.

(i) A temporary registration plate or marker may be used on the vehicle for which issued only and may not be transferred, loaned, or assigned to another. In the event a temporary registration plate or marker or temporary registration certificate is lost or stolen, the owner shall permanently destroy the remaining plate or marker or certificate and no operation of the vehicle for which the lost or stolen registration certificate, registration plate or marker has been issued shall be made on the highways until the regular license plate is received and attached thereto.

(j) The Commissioner of Motor Vehicles shall have the power to make such rules and regulations, not inconsistent herewith, as he shall deem necessary for the purpose of carrying out the provisions of this section.

(k) The provisions of G.S. 20-63, 20-71, 20-110 and 20-111 shall apply in like manner to temporary registration plates or markers as is applicable to nontemporary plates. (1957, c. 246, s. 1; 1963, c. 552, s. 8; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsections (a), (b), (c), (d), (e), (f), (g) and (h).

Cited in Home Indem. Co. v. West Trade Motors, Inc., 258 N.C. 647, 129 S.E.2d 248 (1963).

§ 20-79.2. Transporter registration. — (a) A person engaged in a business requiring the limited operation of motor vehicles to facilitate the manufacture or construction of cabs or bodies or the foreclosure or repossession of such motor vehicles may apply to the Commissioner for special registration to be issued to and used by such person upon the following conditions:

(1) Application for Registration. — Only one application shall be required from each person, and such application for registration under this section shall be filed with the Commissioner of Motor Vehicles in such form and detail as the Commissioner shall prescribe, setting forth:

a. The name and residence address of applicant; if an individual, the name under which he intends to conduct business; if a partnership, the name and residence address of each member thereof, and the name under which the business is to be conducted; if a corporation, the name of the corporation and the name and residence address of each of its officers.

b. The complete address or addresses of the place or places where the business is to be conducted.

c. Such further information as the Commissioner may require.

(2) Applications for registration under this section shall be verified by the applicant, and the Commissioner may require the applicant for registration to appear at such time and place as may be designated by the Commissioner for examination to enable him to determine the accuracy of the facts set forth in the written application, either for initial registration or renewal thereof.

(3) Fees. — The annual fee for such registration under this section or renewal thereof shall be nineteen dollars ($19.00), plus an annual fee of six dollars ($6.00) for each set of plates. The application for registration and number plates shall be accompanied by the required annual fee. There shall be no refund of registration fee or fees for number plates in the event of suspension, revocation or voluntary cancellation of registration. There shall be no quarterly reduction in fees under this section.

(4) Issuance of Certificate. — If the Commissioner approves the application, he shall issue a registration certificate in such form as he may prescribe. A registrant shall notify the Commissioner of any change of address of his principal place of business within 30 days after such change is made, and the Commissioner shall be authorized to cancel the registration upon failure to give such notice.

(5) Use. — Transporter number plates issued under this section may be transferred from vehicle to vehicle, but shall be used only for the limited operation of vehicles in connection with the manufacture or construction of cabs or bodies or with the foreclosure or repossession of vehicles owned or controlled by the registrant.

(6) Suspension, Revocation or Refusal to Issue or to Renew a Registration. — The Commissioner may deny the application of any person for registration under this section and may suspend or revoke a registration or refuse to issue a renewal thereof if he determines that such applicant or registrant has:

a. Made a material false statement in his application;

b. Used or permitted the use of number plates contrary to law;

c. Been guilty of fraud or fraudulent practices; or

d. Failed to comply with any of the rules and regulations of the Commissioner for the enforcement of this section or with any provisions of this Chapter applicable thereto.

(b) The Commissioner of Motor Vehicles may make all rules and regulations he may deem necessary for the proper administration of this section, particularly

with regard to the requirements of evidence of financial responsibility of applicants for transporter plates. (1961, c. 360, s. 21; 1969, c. 600, s. 1; 1975, c. 222.)

Editor's Note. — The 1975 amendment inserted "the manufacture or construction of cabs or bodies or" following "facilitate" in the introductory paragraph, and "the manufacture or construction of cabs or bodies or with the" preceding "foreclosure" in subdivision (5), of subsection (a).

§ 20-79.3. Transporter registration — house trailer and mobile home movers. — Notwithstanding the provisions of G.S. 20-79.2 any person with authority from the Utilities Commission to move house trailers or mobile homes within this State may be issued "transporter plates" as provided in G.S. 20-79.2 upon application and payment of the fees prescribed under G.S. 20-79.2(a)(3). Transporter plates issued pursuant to this section shall be used only on house trailers or mobile homes while being towed by a properly licensed vehicle. (1977, c. 304.)

§ 20-80. National guard plates. — The Commissioner shall cause to be made each year a sufficient number of motor vehicle license plates to furnish each member of the North Carolina national guard with one thereof, said license plates to be in the same form and character as other license plates now or hereafter authorized by law to be used upon private passenger vehicles registered in this State, except that such license plates shall bear on the face thereof the following words "National Guard." The said license plates shall be issued only to members of the North Carolina national guard, and for which license plates the Commissioner shall collect fees in an amount equal to the fees collected for the licensing and registering of private vehicles not registered for more than 4,000 pounds. The Adjutant General of North Carolina shall furnish the Commissioner annually with an estimate of the number of such distinctive plates required. In addition, the Adjutant General of North Carolina shall furnish to the Commissioner each year, prior to the date that licenses are issued, a list of the officers of the North Carolina national guard, which said list shall contain the rank of each officer listed in the order of his seniority in the North Carolina national guard, and the said license plates to be set aside for officer personnel shall be numbered beginning with the number one and in numerical sequence thereafter up to and including the number 1600, according to seniority, the senior officer being issued the license bearing the numeral one. Enlisted personnel applying for such distinctive plates shall present to the Division of Motor Vehicles proof of membership in the North Carolina national guard by means of certificate signed by the commanding officer of applicant on forms as may be agreed upon by the Adjutant General of North Carolina and the Division of Motor Vehicles. If a holder of such distinctive license plate shall be discharged from the North Carolina national guard under other than honorable conditions, he shall within 30 days exchange such distinctive plate for a standard plate. (1937, c. 407, s. 44; 1941, c. 36; 1949, c. 1130, s. 7; 1955, c. 490; 1961, c. 360, s. 16; 1967, c. 700; 1973, c. 1432; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the next-to-the-last sentence.

§ 20-81. Official license plates. — Official license plates issued to State officials shall be subject to the same fees and transfer provisions as provided in G.S. 20-87 and G.S. 20-64 respectively and shall be issued as follows:

(1) Senate and Congressional. — Official license plates issued to the United States Senators shall bear the words "U.S. Senate," be numbered 1 and 2, and shall be issued on the basis of seniority. The official plates issued to United States Congressmen shall bear the words "U.S. House" and be numbered 1 through 11 and shall be issued on the basis of congressional districts.

(2) North Carolina General Assembly. — Official plates issued to members of the North Carolina State Senate or House of Representatives shall bear the words "Senate" or "State House" followed by the Senator's or Representative's assigned seat number.

(3) Judicial. — Official plates issued to the judiciary shall be issued as follows:

a. Appellate division. — Official plates that shall be issued upon request to the Chief Justice and Associate Justices of the Supreme Court of North Carolina and the Chief Judge and Associate Judges of North Carolina Court of Appeals shall bear the letter "J" followed by numerical designation from 1 through 19. The Chief Justice upon request shall be issued the plate bearing number 1 and the remaining plates shall first be issued upon request to the Associate Justices on the basis of seniority. The Chief Judge shall be issued upon request the next such judicial plate and the remaining plates shall be issued upon request to the Associate Judges on the basis of seniority. Retired members of the Supreme Court and the Court of Appeals shall receive an official plate upon request similar in every respect to the plate issued to the regular justices and judges bearing the numerical designation of his or her position of seniority at the time of retirement except that the numerical designation shall be followed with the letter "X." Official plate J-20 may be issued upon request to the Director of the Administrative Office of the Courts.

b. Superior court. — Official plates shall be issued to the various senior resident judges of the superior court upon request and shall bear the letter "J" followed by a numerical designation equal to the sum of the numerical designation of their respective judicial districts plus 20. Where there is more than one resident judge of the superior court within a district, official plates shall upon request be issued to other resident judges serving within the district similar to the official plate to be issued upon request to the senior resident judge of the district except the numerical designation on each subsequent plate shall be followed by a letter of the alphabet beginning with the letter "A," which shall be indicative of the recipient's position as to seniority. Special judges and emergency judges of the superior court shall be issued an official plate bearing the letter "J" with a numerical designation as designated by the Administrative Office of the Courts with the approval of the Chief Justice of the Supreme Court of North Carolina. Retired judges shall be issued a similar plate except that the numerical designation shall be followed by the letter "X."

c. North Carolina district court judges. — An official plate shall be issued upon request to each chief judge of the district courts of North Carolina which shall bear the letter "J" followed by a numerical designation equal to the sum of the numerical designation of their respective judicial districts plus 100 and all other judges of the district courts serving within the same judicial district shall, upon request, be issued an official plate bearing the same letter and numerical designation as appears on the official

plate issued to the chief district judge of the judicial district except that on each subsequent official plate issued within a district, the numerical designation shall be followed by a letter of the alphabet beginning with the letter "A" which shall be indicative of the recipient's position as to seniority. Retired judges shall be issued a similar plate except that the numerical designation shall be followed by the letter "X."

d. District attorneys. — Official plates shall be issued upon request to the various district attorneys which plates shall bear the letters "DA" followed by a numerical designation indicative of their judicial district.

e. United States judges. — Official plates shall be issued upon request to Justices of the United States Supreme Court, Judges of the United States Circuit Court of Appeals and to the District Judges of the United States District Courts residing in North Carolina and shall bear the words "U.S. Judge" followed by a numerical designation beginning with the number "1" which shall be indicative of the judge's seniority position as to the date he began continuous service as a United States Judge as designated by the Secretary of State. Retired judges and judges who have taken senior status shall be issued similar plates except that the numerical designation shall be based upon the date of such retirement or assumption of senior status and shall follow the numerical designation of active justices and judges.

f. United States attorneys. — Official plates shall be issued upon request to the United States Attorneys, which plates shall bear the letters, "U.S. Attorney," followed by a numerical designation indicative of their district, with 1 being the Eastern District, 2 being the Middle District, and 3 being the Western District.

(4) Elective and Appointive. — Official plates issued to elective and appointive members of State government shall bear number designations beginning with number 1 which shall be assigned to the Governor of North Carolina and numbers following thereafter shall be issued to in the following order:

2. Lieutenant Governor of North Carolina.
3. Speaker of the House of Representatives.
4. President Pro Tempore of the Senate.
5. Secretary of State.
6. State Auditor.
7. State Treasurer.
8. Superintendent of Public Instruction.
9. Attorney General.
10. Commissioner of Agriculture.
11. Commissioner of Labor.
12. Commissioner of Insurance.
13. Speaker Pro Tempore of the House.
14. Legislative Services Officer.
15. Secretary of Administration.
16. Secretary of Natural Resources and Community Development.
17. Secretary of Revenue.
18. Secretary of Human Resources.
19. Secretary of Commerce.
20. Secretary of the Department of Correction.
21. Secretary of Cultural Resources.
22. Secretary of Crime Control and Public Safety.

23-29. To be reserved for and assigned to members of the Governor's staff at the direction of the Governor.
30. State Budget Officer.
31. State Personnel Director.
32-41. To be reserved for and assigned to nonlegislative members of the Advisory Budget Commission at the direction of the Governor.
42. Chairman, State Board of Education.
43. President, U. N. C. System.
44. Chairman, A.B.C. Board.
45. Member, A.B.C. Board.
46. Member, A.B.C. Board.
47. Assistant Commissioner of Agriculture.
48. Assistant Commissioner of Agriculture.
49. Deputy Secretary of State.
50. Deputy State Treasurer.
51. Assistant State Treasurer.
52. Deputy Commissioner, Department of Labor.
53. Chief Deputy, Department of Insurance.
54. Assistant Commissioner of Insurance.
55-65. Shall be reserved for and assigned to the Attorney General's deputies and assistants only. Specific number assignments shall be at the direction of the Attorney General.
66-88. Shall be reserved for and assigned upon request to nonlegislative members of the Board of Economic Development. Specific number assignments to such members shall be at the direction of the Governor.
89-96. Shall be reserved for and assigned upon request to nonlegislative members of the State Ports Authority. Specific number assignments to such members shall be at the direction of the Governor.
97-104. Shall be reserved for and assigned upon request to members of the Utilities Commission. Number 97 to be upon request assigned to the Chairman of the Utilities Commission with remaining numbers to be assigned upon request to the remaining members of the Utilities Commission on the basis of seniority.
105-109. Shall be reserved for and assigned upon request to members of the Parole Commission. Number 105 to be upon request assigned to the Chairman of the Parole Commission with remaining numbers to be assigned upon request to the remaining members of the Parole Commission on the basis of seniority.
110-200. Shall be reserved for and assigned upon request to members of State boards and commissions and State employees at the direction of the Governor.

(5) Department of Transportation. — Official plates shall be issued upon request to various members of the Divisions of the Department of Transportation which shall bear the letters "DOT" followed by a number designated from 1 through 85. Specific number assignments to members of the Divisions of the Department of Transportation shall be at the direction of the Governor.

License plates issued to State officials by the Division of Motor Vehicles of the Department of Transportation pursuant to this section shall be assessed a fee of ten dollars ($10.00), in addition to any fees charged under G.S. 20-87 and 20-88. These plates will be subject to the same transfer provisions as provided in G.S. 20-64.

The revenue derived from the additional fee for such plates shall be placed in a separate fund designated the "Officials Registration Plate Fund." After

deducting the cost of the plates, plus budgetary requirements for handling an issuance, to be determined by the Commissioner of Motor Vehicles, any remaining moneys derived from the additional fee for such plate shall be periodically transferred in accordance with G.S. 20-81.3(c). (1937, c. 407, s. 45; 1961, c. 360, s. 17; 1975, cc. 432, 865; 1977, c. 762, s. 1.)

Editor's Note. — Session Laws 1975, c. 432, ratified May 28, 1975, and effective Jan. 1, 1976, and Session Laws 1975, c. 865, ratified June 26, 1975, and effective July 1, 1975, rewrote this section, which formerly provided only that official license plates should be subject to the transfer provisions in § 20-64. The two 1975 acts were in conflict, and there was a possibility that c. 865, having the later ratification date, could have been interpreted as repealing c. 432, or that c. 432, having the later effective date, could have been interpreted as repealing c. 865 as of Jan. 1, 1976. The two 1975 acts were therefore repealed by Session Laws 1977, c. 762, which rewrote this section to read as set out above.

§ 20-81.1. Special plates for amateur radio operators. — (a) Every owner of a motor vehicle which is primarily used for pleasure or communication purposes who holds an unrevoked and unexpired amateur radio license of a renewable nature, issued by the Federal Communications Commission, shall, upon payment of registration and licensing fees for such vehicle as required by law and an additional fee of four dollars ($4.00), be issued plates of similar size and design as the regular registration plates provided for by G.S. 20-63 or other provisions of law, upon which shall be inscribed, in lieu of the usual registration number, the official amateur radio call letters of such persons as assigned by the Federal Communications Commission.

(b) Application for special registration plates shall be made on forms which shall be provided by the Division of Motor Vehicles and shall contain proof satisfactory to the Division that the applicant holds an unrevoked and unexpired official amateur radio license and shall state the call letters which have been assigned to the applicant. Applications must be filed prior to 60 days before the day when regular registration plates for the year are made available to motor vehicle owners.

(c) Special registration plates issued pursuant to this section shall be replaced annually to the same extent as regular registration plates are replaced. These plates shall be valid during the year for which issued. If the amateur radio license of a person holding a special plate issued pursuant to this section shall be cancelled or rescinded by the Federal Communications Commission, such person shall immediately return the special plates to the Division of Motor Vehicles.

(d) The provisions of this section shall apply to calendar years beginning after December 31, 1974. The Division of Motor Vehicles is authorized to, and shall, make such provisions prior to January 1, 1975, as are necessary for the issuance for the year 1975 of the special plates provided for in this section.

(e) The revenue derived from the additional fee for the amateur radio plates shall be placed in a separate fund designated the "Amateur Radio Registration Plate Fund." After deducting the cost of the plates, plus budgetary requirements for handling and issuance to be determined by the Commissioner of Motor Vehicles, any remaining moneys derived from the additional fee for such plates shall be periodically transferred to the Department of Transportation as provided in G.S. 20-81.3(c)(2). (1951, c. 1099; 1955, c. 291; 1961, c. 360, s. 18; 1971, c. 589, ss. 1, 2; c. 829, ss. 1, 2, 4; 1973, c. 507, s. 5; c. 1395, s. 1; 1975, c. 716, s. 5; 1977, c. 464, s. 34.)

Cross Reference. — For present provisions as to special plates for Class D citizens radio station operators, see § 20-81.6.

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsections (b), (c) and (d).

The 1977 amendment substituted "Department of Transportation" for "Board of Transportation" in the second sentence of subsection (e).

§ 20-81.2. Special plates for historic vehicles. — Notwithstanding any other provisions of this Chapter, special license plates shall be issued upon application with respect to any motor vehicle of the age of 35 years or more from the date of manufacture. Such license plates shall be of the same colors as the regular license plates and shall be issued in a separate numerical series. On the plate there shall be printed the words "Antique Auto," the license plate serial number, the words "North Carolina" or the letters "N.C.," and the appropriate calendar year. In lieu of other registration fees, the annual license registration fee for such vehicle shall be six dollars ($6.00). All other provisions of this Chapter not inconsistent herewith shall be applicable to such motor vehicles.

Notwithstanding any other provisions of this Chapter, a special permanent license plate shall be issued upon application of the owner of any motor vehicle of the age of 50 years or older from the date of manufacture. On the plate there shall be printed the words "Horseless Carriage" in addition to the other requisites established by the Commissioner of Motor Vehicles. The sole fee for the issuance of this permanent license plate shall be fifteen dollars ($15.00). All other provisions of this Chapter not inconsistent herewith shall be applicable to such motor vehicles.

The Commissioner of Motor Vehicles is hereby authorized to make such rules as, in his discretion, may seem necessary with respect to applications for special plates, time for making applications and other matters necessary for the efficient administration of this section. (1955, c. 1339; 1969, c. 600, s. 2; 1977, c. 572, ss. 1, 2.)

Editor's Note. — The 1977 amendment substituted " 'Antique Auto' " for " 'Horseless Carriage' " in the third sentence of the first paragraph and added the present second paragraph.

§ 20-81.3. Special personalized registration plates. — (a) The Commissioner may issue under such regulation as he shall deem appropriate a special personalized registration plate to the owner of a private passenger motor vehicle or private trucks not to exceed one ton manufacturer's rated capacity in lieu of another number plate. Such personalized registration plate shall be of such design and shall bear such letter or letters and numerals as the Commissioner shall prescribe, but there shall be no duplication of a registration plate. The Commissioner shall in his discretion refuse the issue of such letter combinations which might carry connotations offensive to good taste and decency.

(b) An owner who desires personalized registration plates shall make application for such plates on forms which shall be provided by the Division of Motor Vehicles and pay the sum of ten dollars ($10.00) annually, which shall be in addition to the regular motor vehicle registration fee. Once an owner has obtained personalized plates, he, where possible, will have first priority on those plates for the following years provided he makes timely and appropriate application; provided, however, that the Commissioner shall not issue a personalized license plate pursuant to this section except upon written application therefor on a form furnished by the Commissioner in which the applicant certifies that his operator's or chauffeur's license has not been revoked or suspended under Article 2 of Chapter 20 of the General Statutes within two years prior to the date of the application; and provided, further, that any personalized license plate issued pursuant to this section shall be cancelled and recalled by the Commissioner and the application fee forfeited in the event that the Commissioner determines that a false application has been submitted.

(c) The revenue derived from the additional fee for such plates shall be placed in a separate fund designated the "Personalized Registration Plate Fund." After deducting the cost of the plates, plus budgetary requirements for handling and issuance to be determined by the Commissioner of Motor Vehicles, any remaining moneys derived from the additional fee for such plates shall be periodically transferred as follows:

(1) One half to the account of the Department of Natural Resources and Community Development to aid in financing out-of-state advertising under the North Carolina program for the promotion of travel and industrial development in North Carolina.

(2) One half to the Department of Transportation to be used solely for the purpose of beautification of highways other than those designated as interstate. Such funds shall be administered by the Department of Transportation for beautification purposes not inconsistent with good landscaping and engineering principles.

(d) Repealed by Session Laws 1975, c. 716, s. 5.

(e) Special personalized registration plate shall mean any registration plate bearing any combination of letters or numerals, or both, other than that which the Division determines would normally be issued sequentially to an applicant for original or renewal vehicle registration.

(f) In the event a personalized registration plate is lost, stolen or mutilated, the owner may not obtain another such plate bearing the same letter, letters or numerals until the next registration year. He may, upon proper application and payment of a fee of one dollar ($1.00), obtain a plate of the regular series. Provided, further, that a special personalized registration plate revoked for violation of the motor vehicle laws shall not be reissued, but in lieu thereof a plate of the regular series will be issued upon payment of the appropriate fee for the new registration plate. (1967, c. 413; 1971, c. 42; 1973, c. 507, s. 5; c. 1262, s. 86; 1975, c. 716, s. 5; 1977, c. 464, s. 3; c. 771, s. 4.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsections (b) and (e) and repealed subsection (d), which provided that the Governor's Advisory Committee on Beautification should act in an advisory capacity to the Board of Transportation and make recommendation concerning beautification of highways.

The first 1977 amendment substituted "Department of Transportation" for "Board of Transportation" in two places in subdivision (2) of subsection (c).

The second 1977 amendment substituted "Department of Natural Resources and Community Development" for "Department of Natural and Economic Resources" in subdivision (1) of subsection (c).

Cited in Hodgson v. Hyatt Realty & Inv. Co., 353 F. Supp. 1363 (M.D.N.C. 1973).

§ 20-81.4. Free registration plates to disabled veterans; special plates for former prisoners of war. — (a) From and after January 1, 1970, the North Carolina Division of Motor Vehicles shall provide and issue free of charge to each disabled veteran in this State registration and registration plates for either one automobile or one pickup truck, where a pickup truck is the disabled veteran's only mode of transportation and is not used for hire, a disabled veteran being, for the purpose of this section, a veteran of World War I, World War II or Korean service or Vietnam service, having served in the military, naval, marines or air services of the United States, who is a resident of North Carolina and who is entitled to compensation under the laws administered by the Veterans Administration and who is rated as one hundred percent (100%) service-connected disabled or has suffered one or more of the following due to disability incurred in or aggravated by active military, naval, marine or air service of the United States during one or more conflicts:

(1) Loss or permanent loss of use of one or both feet;
(2) Loss or permanent loss of use of one or both hands;
(3) Permanent impairment of vision of both eyes of the following status: Central visual acuity of 20/200 or less in the better eye, with corrective glasses, or central visual acuity of more than 20/200 if there is a field defect in which the peripheral field has contracted to such an extent that the widest diameter of visual field subtends an angular distance no greater than 20 degrees in the better eye.

(a1) From and after January 1, 1976, the North Carolina Division of Motor Vehicles shall provide and issue on a first-come first-serve basis to each ex-prisoner of war in this State registration and special P.O.W. registration plates for either one automobile or one pickup truck, where a pickup truck is the ex-prisoner of war's only mode of transportation and is not used for hire, an ex-prisoner of war being, for the purpose of this subsection, an American service person captured and held prisoner by forces hostile to the United States while serving in the armed forces of the United States in World War I, World War II, Korean service or Vietnam service.

(b) The registration plates provided for by this section shall be red, white and blue with colors in such order as prescribed by the Division of Motor Vehicles.

(c) The registration plate provided for by this section shall be issued to disabled veterans only upon proof of disabled status, proof of financial responsibility as required by the motor vehicle laws of North Carolina and if the vehicle is to be operated by such disabled veteran that the vehicle is properly equipped to compensate for his disability in the operation thereof and that he has submitted to and passed the driver's license examination required by the motor vehicle laws of North Carolina.

(c1) The registration plate provided for by this section for ex-prisoners of war shall be issued at no additional fee and only upon proof as may be required by the Division of Motor Vehicles as to ex-prisoners of war's status and proof of financial responsibility as required by the motor vehicle laws of North Carolina.

(d) The registration plate provided for by this section once issued shall be subject to all laws and policies that govern and control registration plates in North Carolina and such plate shall be cancelled for violation of same. (1969, c. 461; 1975, cc. 221, 584; c. 716, s. 5; 1977, c. 227.)

Editor's Note. — The first 1975 amendment substituted "red, white and blue with colors in such order" for "in colors" in subsection (b).

The second 1975 amendment added subsections (a1) and (c1).

The third 1975 amendment substituted "Division" for "Department" in subsections (a), (a1), (b) and (c1).

The 1977 amendment deleted, at the end of subsection (a1), "who was a resident of North Carolina at the time he entered that period of service during which he became a prisoner of war."

Veterans Entitled to Free Registration Plates. — See opinion of Attorney General to Mr. Charles A. Beddingfield, Assistant Director, N.C. Department of Veterans Affairs, 40 N.C.A.G. 439 (1970).

§ 20-81.5. Civil Air Patrol plates. — (a) The Commissioner shall cause to be made each year sufficient number of automobile license plates to furnish each member of the North Carolina Wing of the Civil Air Patrol with not more than two thereof, said license plates to be in the same form and character as other license plates now or hereinafter authorized by law to be used upon private passenger vehicles registered in this State, except that such license plates shall bear on the face thereof the following: the words "North Carolina," the year designation, and the words "Civil Air Patrol." The said license plates shall be issued only to members of the North Carolina Wing of the Civil Air Patrol and for each license plate the Commissioner shall collect a fee of five dollars ($5.00) in addition to the fees in an amount equal to the fees collected for the licensing

and registering of private vehicles. The Commander of the North Carolina Wing of the Civil Air Patrol shall furnish the Commissioner annually with a list of the number of such distinctive plates required accompanied by the five dollar ($5.00) fee referred to hereinabove and such list shall contain the rank of each officer listed in order of his seniority in the North Carolina Civil Air Patrol. The said license plates to be set aside for officer personnel shall be numbered beginning with the number 201 and running in numerical sequence thereafter up to and including the number 500, according to seniority; the senior officer being issued the plate bearing the number 201. Enlisted personnel, senior members and cadet members applying for such distinctive plates shall, upon application and payment of the required fee, receive such plates in numerical sequence beginning with the number 501. Applications for such distinctive license plates shall be on forms as may be agreed upon by the Wing Commander of the North Carolina Civil Air Patrol and the Division of Motor Vehicles. If a holder of such a distinctive license plate shall be discharged from the North Carolina Civil Air Patrol under other than honorable conditions, he shall within 30 days exchange such distinctive plate for a standard plate.

(b) The revenue derived from the additional fee for such plates shall be placed in a separate fund designated the "Civil Air Patrol Registration Plate Fund." After deducting the cost of the plates, plus budgetary requirements for handling and issuance to be determined by the Commissioner of Motor Vehicles, any remaining moneys derived from the additional fee for such plates shall be periodically transferred to the Department of Transportation as provided in G.S. 20-81.3(c)(2). (1971, c. 601; c. 829, s. 3; 1973, c. 52; c. 507, s. 5; 1975, c. 716, s. 5; 1977, c. 464, s. 34.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsection (a).

The 1977 amendment substituted "Department of Transportation" for "Board of Transportation" near the end of subsection (b).

§ 20-81.6. Special plates for Class D citizens radio station operators. — (a) Every owner of a motor vehicle which is primarily used for pleasure or communication purposes who holds an unrevoked and unexpired Class D citizens radio station license of a renewable nature, issued by the Federal Communications Commission, shall, upon payment of registration and licensing fees for such vehicle as required by law and an additional fee of ten dollars ($10.00), be issued plates of similar size and design as the regular registration plates provided for by G.S. 20-63 or other provisions of law, upon which shall be inscribed, in lieu of the usual registration number, the official Class D citizens radio station call letters of such persons as assigned by the Federal Communications Commission; provided, however, that in addition to the payment of registration and licensing fees, a fee of ten dollars ($10.00) shall be required to purchase a Class D citizens radio station license.

(b) Application for special registration plates shall be made on forms which shall be provided by the Division of Motor Vehicles and shall contain proof satisfactory to the Division that the applicant holds an unrevoked and unexpired official Class D citizens radio station license and shall state the call letters which have been assigned to the applicant. Applications must be filed prior to 60 days before the day when regular registration plates for the year are made available to motor vehicle owners.

(c) Special registration plates issued pursuant to this section shall be replaced annually to the same extent as regular registration plates are replaced. These plates shall be valid during the year for which issued. If the Class D citizens radio station license of a person holding a special plate issued pursuant to this section shall be cancelled or rescinded by the Federal Communications

Commission, such person shall immediately return the special plates to the Division of Motor Vehicles.

(d) The provisions of this section shall apply to calendar years beginning after December 31, 1974. The Division of Motor Vehicles is authorized to, and shall, make such provisions prior to January 1, 1975, as are necessary for the issuance for the year 1975 of the special plates provided for in this section.

(e) The revenue derived from the additional fee for the Class D citizens radio plates shall be placed in a separate fund designated the "Class D Citizens Radio Registration Plate Fund." After deducting the cost of the plates, plus budgetary requirements for handling and issuance to be determined by the Commissioner of Motor Vehicles, any remaining moneys derived from the additional fee for such plates shall be periodically transferred to the Department of Transportation as provided in G.S. 20-81.3(c)(2). (1973, c. 1395, s. 2; 1975, c. 716, s. 5; 1977, c. 464, s. 34.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsections (b), (c) and (d). The 1977 amendment substituted "Department of Transportation" for "Board of Transportation" near the end of subsection (e).

§ 20-81.7. Special plates for members of fire departments and rescue squads. — (a) Every owner of a private passenger motor vehicle or pickup truck not exceeding a gross weight of 4,000 pounds, who is an active regular or volunteer member of a fire department or rescue squad, upon payment of registration and licensing fees for such vehicle as required by law and an additional fee of ten dollars ($10.00), shall be issued license plates of the same form and character as other license plates now or hereinafter authorized by law to be issued upon such vehicles except that such license plates shall in addition bear on the face thereof the following words: either "fireman"; "rescue squad" or "fireman-rescue squad."

(b) Application for special registration plates pursuant to this section shall be made on forms provided by the Division of Motor Vehicles and shall contain proof satisfactory to the Division that the applicant is an active regular or volunteer member of a fire department or rescue squad. Applications must be filed prior to 60 days before the day when regular registration plates for the year are made available to motor vehicle owners.

(c) The provisions of this section shall apply to calendar years beginning after December 31, 1977. The Division of Motor Vehicles is authorized to, and shall make such provisions prior to January 1, 1978, as are necessary for the issuance of the special plates provided for in this section for the year 1978. Registration plates issued pursuant to this section shall be replaced annually to the same extent as regular registration plates are replaced. (1977, c. 773.)

§ 20-82. Manufacturer or dealer to keep record of vehicles received or sold. — Every manufacturer or dealer shall keep a record of all vehicles received or sold containing such information regarding same as the Division may require. (1937, c. 407, s. 46; 1965, c. 106; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

Part 6. Vehicles of Nonresidents of State, etc.

§ 20-83. Registration by nonresidents. — (a) When a resident carrier of this State interchanges a properly licensed trailer or semitrailer with another carrier who is a resident of another state, and adequate records are on file in his office to verify such interchanges, the North Carolina licensed carrier may use the

trailer licensed in such other state the same as if it is his own during the time the nonresident carrier is using the North Carolina licensed trailer.

(b) Motor vehicles duly registered in a state or territory which are not allowed exemptions by the Commissioner, as provided for in the preceding paragraph, desiring to make occasional trips into or through the State of North Carolina, or operate in this State for a period not exceeding 30 days, may be permitted the same use and privileges of the highways of this State as provided for similar vehicles regularly licensed in this State, by procuring from the Commissioner trip licenses upon forms and under rules and regulations to be adopted by the Commissioner, good for use for a period of 30 days upon the payment of a fee in compensation for said privilege equivalent to one tenth of the annual fee which would be chargeable against said vehicle if regularly licensed in this State: Provided that only one such permit allowed by this section shall be issued for the use of the same vehicle within the same registration year. Provided, however, that nothing in this provision shall prevent the extension of the privileges of the use of the roads of this State to vehicles of other states under the reciprocity provisions provided by law: Provided further, that nothing herein contained shall prevent the owners of vehicles from other states from licensing such vehicles in the State of North Carolina under the same terms and the same fees as like vehicles are licensed by owners resident in this State.

(c) Every nonresident, including any foreign corporation carrying on business within this State and owning and operating in such business any motor vehicle, trailer or semitrailer within this State, shall be required to register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this State. (1937, c. 407, s. 47; 1941, cc. 99, 365; 1957, c. 681, s. 1; 1961, c. 642, s. 4; 1967, c. 1090.)

Editor's Note. — For comment on the 1941 amendments to this section, see 19 N.C.L. Rev. 514.

§ 20-84. Vehicles owned by State, municipalities or orphanages, etc.; certain vehicles operated by local chapters of American National Red Cross. — The Division upon proper proof being filed with it that any motor vehicle for which registration is herein required is owned by the State or any department thereof, or by any county, township, city or town, or by any board of education, or by any orphanage or civil air patrol, or incorporated emergency rescue squad, shall collect one dollar ($1.00) for the registration of such motor vehicles, but shall not collect any fee for application for certificate of title in the name of the State or any department thereof, or by any county, township, city or town, or by any board of education or orphanage: Provided, that the term "owned" shall be construed to mean that such motor vehicle is the actual property of the State or some department thereof or of the county, township, city or town, or of the board of education, and no motor vehicle which is the property of any officer or employee of any department named herein shall be construed as being "owned" by such department. Provided, that the above exemptions from registration fees shall also apply to any church-owned bus used exclusively for transporting children and parents to Sunday School and church services and for no other purpose.

In lieu of the annual one dollar ($1.00) registration provided for in this section, the Division may for the license year 1950 and thereafter provide for a permanent registration of the vehicles described in this section and issue permanent registration plates for such vehicles. The permanent registration plates issued pursuant to this paragraph shall be of a distinctive color and shall bear thereon the word "permanent." Such plates may be transferred as provided in G.S. 20-78 to a replacement vehicle of the same classification. For the

permanent registration and issuance of permanent registration plates provided for in this paragraph, the Division shall collect a fee of one dollar ($1.00) for each vehicle so registered and licensed.

The provisions of this section are hereby made applicable to vehicles owned by a rural fire department, agency or association.

The Division of Motor Vehicles shall issue to the North Carolina Tuberculosis Association, Incorporated, or any local chapter or association of said corporation, for a fee of one dollar ($1.00) for each plate a permanent registration plate which need not be thereafter renewed for each motor vehicle in the form of a mobile X-ray unit which is owned by said North Carolina Tuberculosis Association, Incorporated, or any local chapter or local association thereof and operated exclusively in this State for the purpose of diagnosis, treatment and discovery of tuberculosis. The initial one dollar ($1.00) fee required by this section and for this purpose shall be in full payment of the permanent registration plates issued for such vehicle operated as a mobile X-ray unit, and such plates need not thereafter be renewed, and such plates may be transferred as provided in G.S. 20-78 to replacement vehicles to be used for the purposes above described and for which the plates were originally issued.

The Division of Motor Vehicles shall issue to the American National Red Cross, upon application of any local chapter thereof and payment of a fee of one dollar ($1.00) for each plate, a permanent registration plate, which need not be thereafter renewed, for all disaster vans, bloodmobiles, handivans, and such sedans and station wagons as are used for emergency or disaster work, and operated by a local chapter in this State in the business of the American National Red Cross. Such plates may be transferred as provided in G.S. 20-78 to a replacement vehicle to be used for the purposes above described and for which the plates were originally issued. In the event of transfer of ownership to any other person, firm or corporation, or transfer or reassignment of any vehicle bearing such registration plate to any chapter or association of the American National Red Cross in any other state, territory or country, the registration plate assigned to such vehicle shall be surrendered to the Division of Motor Vehicles.

In lieu of all other registration requirements, the Commissioner shall each year assign to the State Highway Patrol, upon payment of one dollar ($1.00) per registration plate, a sufficient number of regular registration plates of the same letter prefix and in numerical sequence beginning with number 100 to meet the requirements of the State Highway Patrol for use on Division vehicles assigned to the State Highway Patrol. The commander of the Patrol shall, when such plates are assigned, issue to each member of the State Highway Patrol a registration plate for use upon the Division vehicle assigned to him pursuant to G.S. 20-190 and assign a registration plate to each Division service vehicle operated by the Patrol. An index of such assignments of registration plates shall be kept at each State Highway Patrol radio station and a copy thereof shall be furnished to the registration division of the Division. Information as to the individual assignments of such registration plates shall be made available to the public upon request to the same extent and in the same manner as regular registration information. The commander, when necessary, may reassign registration plates provided that such reassignment shall be made to appear upon the index required herein within 20 days after such reassignment.

The Division of Motor Vehicles shall upon appropriate certification of financial responsibility issue to sheltered workshops recognized or approved by the Division of Vocational Rehabilitation Services of the Department of Human Resources upon application and payment of a fee of one dollar ($1.00) for each plate, a permanent registration plate for vehicles registered to and operated by such sheltered workshops. The initial one dollar ($1.00) fee required by this section and for this purpose shall be in full payment of the permanent registration plate issued for such vehicle operated by a sheltered workshop and

such plates need not thereafter be renewed, and such plates may be transferred as provided in G.S. 20-78 to a replacement vehicle to be used by the sheltered workshop designated on the registration card.

On and after January 1, 1972, permanent registration plates used on all vehicles owned by the State of North Carolina or a department thereof shall be of a distinctive color and design which shall be readily distinguishable from all other permanent registration plates issued pursuant to this section or G.S. 20-84.1. For the purpose of carrying out the intent of this paragraph, all vehicles owned by the State of North Carolina or a department thereof in operation as of October 1, 1971, and bearing a permanent registration shall be reregistered during the months of October, November and December, 1971, and upon reregistration, registration plates issued for such vehicles shall be of a distinctive color and design as provided for hereinabove. (1937, c. 407, s. 48; 1939, c. 275; 1949, c. 583, s. 1; 1951, c. 388; 1953, c. 1264; 1955, cc. 368, 382; 1967, c. 284; 1969, c. 800; 1971, c. 460, s. 1; 1975, c. 548; c. 716, s. 5; 1977, c. 370, s. 1.)

Cross Reference. — As to school trucks, etc., exempt, see § 115-128.

Editor's Note. — The first 1975 amendment added the seventh paragraph.

The second 1975 amendment substituted "Division" for "Department" throughout the section.

The 1977 amendment rewrote the third sentence of the second paragraph, which formerly read "Such plates shall not be subject to renewal and shall be valid only on the vehicle for which issued," substituted "may be transferred as provided in G.S. 20-78 to replacement vehicles to be used" for "should be valid only on the vehicle for which issued and then only so long as the vehicle shall be operated" in the second sentence of the fourth paragraph, rewrote the second sentence of the fifth paragraph, which formerly read "Such registration plate shall be valid only for the vehicle for which issued and then only so long as the vehicle shall be operated as above described," and substituted "may be transferred as provided in G.S. 20-78 to a replacement vehicle to be used" for "shall be valid only when attached to the vehicle for which issued and then only so long as the vehicle is operated" in the second sentence of the seventh paragraph.

Session Laws 1971, c. 460, s. 1.1, provides that the addition of the last paragraph to this section "shall not be construed as abrogating or modifying the provisions of G.S. 14-250."

Permanent Registration of Motor Vehicle Leased to Municipality Improper. — See opinion of Attorney General to Mr. James H. Stamey, Department of Motor Vehicles, 41 N.C.A.G. 798 (1972).

§ 20-84.1. Permanent plates for city buses. — The Division may for the license year 1950 and thereafter provide for a permanent registration and issue permanent registration plates for city buses and trackless trolleys when such buses and trolleys are operated under franchises authorizing the use of city streets, but no bus or trackless trolley shall be registered or licensed under this section if it is operated under a franchise authorizing an intercity operation. The permanent registration plates issued pursuant to the provisions of this section shall be of a distinctive color and shall bear thereon the word "permanent." Such plates may be transferred as provided in G.S. 20-78 to a replacement vehicle of the same classification. For the permanent registration and issuance of permanent registration plates as provided for in this section, the Division shall collect a fee of one dollar ($1.00) for each vehicle so registered and licensed. (1949, c. 583, s. 6; 1975, c. 716, s. 5; 1977, c. 370, s. 2.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in two places.

The 1977 amendment rewrote the third sentence, which formerly read "Such plates shall not be subject to renewal and shall be valid only on the vehicle for which issued."

Part 6.1. Rental Vehicles.

§ 20-84.2. Definition; reciprocity; Commissioner's powers. — (a) The term rental vehicle when used herein shall mean and include any motor vehicle which is rented or leased to another by its owner for a period of not more than 30 days solely for the transportation of the lessee or the private hauling of the lessee's personal property.

(b) Rental vehicles owned or operated by any nonresident person engaged in the business of leasing such vehicles for use in intrastate or interstate commerce shall be extended full reciprocity and exempted from registration fees only in instances where:

(1) Such person has validly licensed all rental vehicles owned by him in the state wherein the owner actually resides; provided, that such state affords equal recognition, either in fact or in law to such vehicles licensed in the State of North Carolina and operating similarly within the owner's state of residence; and further provided, that such person is not engaged in this State in the business of leasing rental vehicles; or where

(2) Such person operates vehicles which are a part of a common fleet of vehicles which are easily identifiable as a part of such fleet and such person has validly licensed in the State of North Carolina a percentage of the total number of vehicles in each weight classification in such fleet which represents the percentage of total miles travelled in North Carolina by all vehicles in each weight classification of such fleet to total miles travelled in all jurisdictions in which such fleet is operated by all vehicles in each weight classification of such fleet.

(c) The Commissioner of Motor Vehicles requires such person to submit under oath such information as is deemed necessary for fairly administering this section. The Commissioner's determination, after hearing, as to the number of vehicles in each weight classification to be licensed in North Carolina shall be final.

Any person who licenses vehicles under subsection (b)(2) above shall keep and preserve for three years the mileage records on which the percentage of the total fleet is determined. Upon request these records shall be submitted or made available to the Commissioner of Motor Vehicles for audit or review, or the owner or operator shall pay reasonable costs of an audit by the duly appointed representative of the Commissioner at the place where the records are kept.

If the Commissioner determines that the person licensing vehicles under subsection (b)(2) above should have licensed more vehicles in North Carolina or that such person's records are insufficient for proper determination the Commissioner may deny that person the right or any further benefits under this subsection until the correct number of vehicles have been licensed, and all taxes determined by the Commissioner to be due have been paid.

(d) Upon payment by the owner of the prescribed fee, the Division shall issue registration certificates and plates for the percentage of vehicles determined by the Commissioner. Thereafter, all rental vehicles properly identified and licensed in any state, territory, province, country or the District of Columbia, and belonging to such owner, shall be permitted to operate in this State on an interstate or intrastate basis. (1959, c. 1066; 1971, c. 808; 1973, c. 1446, s. 23; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the first sentence of subsection (d).

Part 7. Title and Registration Fees.

§ 20-85. Schedule of fees. — There shall be paid to the Division for the issuance of certificates of title, transfer of registration and replacement of registration plates fees according to the following schedules:

(1) Each application for certificate of title $2.00
(2) Each application for duplicate or corrected certificate of title .. 2.00
(3) Each application of repossessor for certificate of title 2.00
(4) Each transfer of registration 2.00
(5) Each set of replacement registration plates 5.00
(6) Each application for duplicate registration certificate ..... .50
(7) Each application for recording supplementary lien 2.00
(8) Each application for removing a lien from a certificate of title . 2.00

(1937, c. 407, s. 49; 1943, c. 648; 1947, c. 219, s. 9; 1955, c. 554, s. 4; 1961, c. 360, s. 19; c. 835, s. 11; 1975, c. 430; c. 716, s. 5; c. 727; c. 875, s. 4; c. 879, s. 46.)

Editor's Note. — The first 1975 amendment increased the fees in subdivisions (1) through (5), (7) and (8) from $1.00 to $2.00.

The second 1975 amendment substituted "Division" for "Department" in the introductory paragraph.

The third 1975 amendment increased the fee in subdivision (5) from $1.00 to $5.00.

The fourth 1975 amendment deleted the former last sentence, which required fees collected under subdivisions (7) and (8) to be placed in a "Lien Recording Fund," to be used for the administration of the laws relating to perfection of security interests in vehicles.

The fifth 1975 amendment substituted "Secretary of Administration" for "Assistant Director of the Budget" in the second paragraph.

§ 20-86. Penalty for engaging in a "for-hire" business without proper license plates. — Any person, firm or corporation engaged in the business of transporting persons or property for compensation, except as otherwise provided in this Article, shall, before engaging in such business, pay the license fees prescribed by this Article and secure the license plates provided for vehicles operated for hire. Any person, firm or corporation operating vehicles for hire without having paid the tax prescribed or using private plates on such vehicles shall be liable for an additional tax of twenty-five dollars ($25.00) for each vehicle in addition to the normal fees provided in this Article; provided, that when the vehicle subject to for-hire license has attached thereto a trailer or semitrailer, each unit in the combination, including the tractor, trailer and/or semitrailer, shall be subject to the additional tax as herein prescribed; provided, further that the additional tax herein provided shall not apply to trailers having a gross weight of 3,000 pounds or less. (1937, c. 407, s. 50; 1965, c. 659.)

§ 20-86.1. International Registration Plan. — (a) The registration fees required under this Article may be proportioned for vehicles which qualify and are licensed under the provisions of the International Registration Plan.

(b) Notwithstanding any other provisions of this Chapter, the Commissioner is hereby authorized to promulgate and enforce such rules and regulations as may be necessary to carry out the provisions of any agreement entered pursuant to the International Registration Plan. (1975, c. 767, s. 2.)

§ 20-87. Passenger vehicle registration fees. — There shall be paid to the Division annually, as of the first day of January, for the registration and licensing of passenger vehicles, fees according to the following classifications and schedules:

(1) Common Carriers of Passengers. — Common carriers of passengers shall pay an annual license tax of fifty-six cents (56¢) per hundred pounds weight of each vehicle unit, and in addition thereto one and nine-tenths percent (1$^{9}/_{10}$%) of the gross revenue derived from such operation: Provided, said additional one and nine-tenths percent

(1 9/10%) shall not be collectible unless and until and only to the extent that such amount exceeds the license tax of fifty-six cents (56) per hundred pounds: Provided further, that common carriers of passengers operating from a point or points in this State to another point or other points in this State shall be liable for a tax of one and nine-tenths percent (1 9/10%) on the gross revenue earned in such intrastate hauls. Common carriers of passengers operating between a point or points within this State and a point or points without this State shall be liable for a one and nine-tenths percent (1 9/10%) tax only on that proporation of the gross revenue earned between terminals in this State and terminals outside this State that the mileage in North Carolina bears to the total mileage between the respective terminals. Common carriers of passengers operating through this State from a point or points outside this State to a point or points outside this State shall be liable for a one and nine-tenths percent (1 9/10%) tax on that proportion of the gross revenue earned between such terminals as the mileage in North Carolina bears to the total mileage between the respective terminals. In no event shall the tax paid by such common carriers of passengers be less than fifty-six cents (56¢) per hundred pounds weight for each vehicle. The tax prescribed in this subdivision is levied as compensation for the use of the highways of this State and for the special privileges extended such common carriers of passengers by this State.

(2) U-Drive-It Passenger Vehicles. — U-drive-it passenger vehicles shall pay the following tax:

Motorcycles:	1-passenger capacity	$15.00
	2-passenger capacity	19.00
	3-passenger capacity	23.00

Automobiles: Thirty-eight dollars ($38.00) per year for each vehicle of nine-passenger capacity or less, and vehicles of over nine-passenger capacity shall be classified as buses and shall pay two dollars and forty cents ($2.40) per hundred pounds empty weight of each vehicle.

(3) Contract Carrier and Exempt For-Hire Passenger Carrier Vehicles. — For-hire passenger vehicles shall be taxed at the rate of seventy-five dollars ($75.00) per year for each vehicle of nine-passenger capacity or less and vehicles of over nine-passenger capacity shall be classified as buses and shall be taxed at a rate of two dollars and forty cents ($2.40) per hundred pounds of empty weight per year for each vehicle; provided, however, no license shall issue for the operation of any taxicab until the governing body of the city or town in which such taxicab is principally operated, if the principal operation is in a city or town, has issued a certificate showing

a. That the operator of such taxicab has provided liability insurance or other form of indemnity for injury to persons or damage to property resulting from the operation of such taxicab, in such amount as required by the city or town, and

b. That the convenience and necessity of the public requires the operation of such taxicab.

All persons operating taxicabs on January 1, 1945, shall be entitled to a certificate of necessity and convenience for the number of taxicabs operated by them on such date, unless since said date the license of such person or persons to operate a taxicab or taxicabs has been revoked or their right to operate has been withdrawn or revoked; provided that all persons operating taxicabs in Edgecombe, Lee, Nash and Union Counties on January 1, 1945, shall be entitled to certificates of necessity

and convenience only with the approval of the governing authority of the town or city involved.

A taxicab shall be defined as any motor vehicle, seating nine or fewer passengers, operated upon any street or highway on call or demand, accepting or soliciting passengers indiscriminately for hire between such points along streets or highways as may be directed by the passenger or passengers so being transported, and shall not include motor vehicles or motor vehicle carriers as defined in G.S. 62-121.5 through 62-121.79. Such taxicab shall not be construed to be a common carrier nor its operator a public service corporation.

(4) Limousine Vehicles. — For-hire passenger vehicles on call or demand which do not solicit passengers indiscriminately for hire between points along streets or highways, shall be taxed at the same rate as for-hire passenger vehicles under G.S. 20-87(3) but shall be issued appropriate registration plates to distinguish such vehicles from taxicabs.

(5) Private Passenger Vehicles. — There shall be paid to the Division annually, as of the first day of January, for the registration and licensing of private passenger vehicles, fees according to the following classifications and schedules:

Private passenger vehicles of not more than nine passengers $13.00
Private passenger vehicles over nine passengers $16.00

provided, that a fee of only one dollar ($1.00) shall be charged for any vehicle given by the federal government to any veteran on account of any disability suffered during war so long as such vehicle is owned by the original donee or other veteran entitled to receive such gift under Title 38, section 252, United States Code Annotated.

(6) Private Motorcycles. — The tax on private passenger motorcycles shall be six dollars ($6.00); except that when a motorcycle is equipped with an additional form of device designed to transport persons or property, the tax shall be thirteen dollars ($13.00).

(7) Manufacturers and Motor Vehicle Dealers. — Manufacturers and dealers in motor vehicles, trailers and semitrailers for license and for one set of dealer's plates for each place of business licensed under Article 12 of Chapter 20 of the General Statutes shall pay the sum of thirty-five dollars ($35.00), and for each additional set of dealer's plates the sum of one dollar ($1.00).

(8) Driveaway Companies. — Any person, firm or corporation engaged in the business of driving new motor vehicles from the place of manufacture to the place of sale in this State for compensation shall pay as a registration fee and for one set of plates one hundred twenty-five dollars ($125.00) and for each additional set of plates six dollars ($6.00).

(9) House Trailers. — In lieu of other registration and license fees levied on house trailers under this section or G.S. 20-88, the registration and license fee on house trailers shall be four dollars ($4.00) for the license year or any portion thereof.

(10) Special Mobile Equipment. — The tax for special mobile equipment shall be four dollars ($4.00) for the license year or any portion thereof; provided, that vehicles on which are permanently mounted feed mixers, grinders and mills and on which are also transported molasses or other similar type feed additives for use in connection with the feed mixing, grinding or milling process shall be taxed an additional sum of thirty dollars ($30.00) for the license year or any portion thereof, in addition to the basic four dollars ($4.00) tax provided for herein. (1937, c. 407, s. 51; 1939, c. 275; 1943, c. 648; 1945, c. 564, s. 1; c. 576, s. 2; 1947, c. 220, s. 3; c. 1019, ss. 1-3; 1949, c. 127; 1951, c. 819, ss. 1, 2; 1953, c. 478;

c. 826, s. 4; 1955, c. 1313, s. 2; 1957, c. 1340, s. 3; 1961, c. 1172, s. 1a; 1965, c. 927; 1967, c. 1136; 1969, c. 600, ss. 3-11; 1971, c. 952; 1973, c. 107; 1975, c. 716, s. 5.)

Cross Reference. — As to liability insurance required of persons engaged in the business of renting motor vehicles, see § 20-281 et seq.

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the introductory paragraph and in subdivision (5).

The subject matter of former §§ 62-121.5 through 62-121.79, referred to in subdivision (3) of this section, is now covered by §§ 62-259 through 62-279.

Former Law. — For case citing corresponding provisions of former law, see Safe Bus v. Maxwell, 214 N.C. 12, 197 S.E. 567 (1938).

Cited in Victory Cab Co. v. City of Charlotte, 234 N.C. 572, 68 S.E.2d 433 (1951); Airlines Transp. v. Tobin, 198 F.2d 249 (4th Cir. 1952); Pilot Freight Carriers, Inc. v. Scheidt, 263 N.C. 737, 140 S.E.2d 383 (1965).

§ 20-87.1. Reciprocity; passenger buses operated by common carrier of passengers. — (a) Passenger buses operated by any common carrier of passengers for use in intrastate or interstate commerce shall be extended full reciprocity and exempted from registration fees only in such instances where such common carriers of passengers have validly licensed in the State of North Carolina the average number of buses required to operate the total miles operated by it in and through the State during the preceding year. The average number of buses required will be determined by applying the average miles traveled of each bus owned by it into the total miles operated in North Carolina by such carrier during the preceding year. The Division may, in its discretion, verify the average number of buses required by the common carrier of passengers during the licensing year in and through the State. Upon payment by the common carrier of passengers of the prescribed fees or taxes, the Division shall issue registration certificates and license plates for the average number of buses required by such common carrier of passengers. Thereafter, all buses properly identified and licensed in any state, territory, province, county or the District of Columbia, and used by such common carrier of passengers shall be permitted to operate on an interstate or intrastate basis.

(b) When a resident common carrier of passengers of this State interchanges a properly licensed bus with another common carrier of passengers who is a resident of another state, and adequate records are on file in its office to verify such interchanges, the North Carolina licensed common carrier of passengers may use the bus licensed in such other state the same as if it is its own during the time the nonresident carrier is using the North Carolina licensed bus. (1971, c. 871, s. 1; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsection (a).

§ 20-88. Property-hauling vehicles. — (a) Determination of Weight. — For the purpose of licensing, the weight of self-propelled property-carrying vehicles shall be the empty weight and heaviest load to be transported, as declared by the owner or operator; provided, that any determination of weight shall be made only in units of 1,000 pounds or major fraction thereof, weights of over 500 pounds counted as 1,000 and weights of 500 pounds or less disregarded. The declared gross weight of self-propelled property-carrying vehicles operated in conjunction with trailers or semitrailers shall include the empty weight of the vehicles to be operated in the combination and the heaviest load to be transported by such combination at any time during the registration period, except that the gross weight of a trailer or semitrailer is not required to be included when the

operation is to be in conjunction with a self-propelled property-carrying vehicle which is licensed for 6,000 pounds or less gross weight and the gross weight of such combination does not exceed 9,000 pounds, except wreckers as defined under G.S. 20-4.01(50). Those property-hauling vehicles registered for 4,000 pounds shall be permitted a tolerance of 500 pounds above the weight permitted under the table of weights and rates appearing in subsection (b) of this section.

(b) There shall be paid to the Division annually, as of the first day of January, for the registration and licensing of self-propelled property-carrying vehicles, fees according to the following classification and schedule and upon the following conditions:

SCHEDULE OF WEIGHTS AND RATES

Rates Per Hundred Pound Gross Weight

	Farmer
Not over 4,500 pounds	$0.20
4,501 to 8,500 pounds inclusive	.25
8,501 to 12,500 pounds inclusive	.32
12,501 to 16,500 pounds inclusive	.44
Over 16,500 pounds	.50

SCHEDULE OF WEIGHTS AND RATES

Rates Per Hundred Pound Gross Weight

	Private Hauler Contract Carriers, Flat Rate Common Carriers and Exempt for-Hire Carriers
Not over 4,500 pounds	$0.40
4,501 to 8,500 pounds inclusive	.50
8,501 to 12,500 pounds inclusive	.63
12,501 to 16,500 pounds inclusive	.88
Over 16,500 pounds	1.00

	Common Carrier of Property (Deposit)
Not over 4,500	$0.75
4,501 to 8,750 pounds inclusive	.75
8,501 to 12,500 pounds inclusive	.75
12,501 to 16,500 pounds inclusive	.75
Over 16,500 pounds	.75

(1) The minimum fee for a vehicle licensed under this subsection shall be twelve dollars and fifty cents ($12.50) at the farmer rate and sixteen dollars ($16.00) at the private hauler, contract carrier and common carrier rates.

(2) The term "farmer" as used in this subsection means any person engaged in the raising and growing of farm products on a farm in North Carolina not less than 10 acres in area, and who does not engage in the business of buying products for resale.

(3) License plates issued at the farmer rate shall be placed upon trucks and truck-tractors that are operated exclusively in the carrying or transportation of applicant's farm products, raised or produced on his farm, and farm supplies and not operated in hauling for hire.

(4) "Farm products" means any food crop, cattle, hogs, poultry, dairy products, flower bulbs, or other nursery products and other agricultural products designed to be used for food purposes, including in the term "farm products" also cotton, tobacco, logs, bark, pulpwood, tannic acid wood and other forest products grown, produced, or processed by the farmer.

(5) The Division shall issue necessary rules and regulations providing for the recall, transfer, exchange or cancellation of "farmer" plates, when vehicle bearing such plates shall be sold or transferred.

(6) There shall be paid to the Division annually as of the first of January, the following fees for "wreckers" as defined under G.S. 20-38(39): a wrecker fully equipped weighing 7,000 pounds or less, sixty-two dollars and fifty cents ($62.50); wreckers weighing in excess of 7,000 pounds shall pay one hundred twenty-five dollars ($125.00). Fees to be prorated quarterly. Provided, further, that nothing herein shall prohibit a licensed dealer from using a dealer's license plate to tow a vehicle for a customer.

(c) There shall be paid to the Division annually, as of the first day of January, for the registration and licensing of trailers or semitrailers, four dollars ($4.00) for any part of the license year for which said license is issued.

(d) Rates on trucks, trailers and semitrailers wholly or partially equipped with solid tires shall be double the above schedule.

(e) Common Carriers of Property. — Common carriers of property shall pay an annual license tax as per the above schedule of rates for each vehicle unit, and in addition thereto seven and one-half percent (7½%) of the gross revenue derived from such operations: Provided, said additional seven and one-half percent (7½%) shall not be collectible unless and until and only to the extent that such amount exceeds the license tax or deposit per the above schedule: Provided, further, common carriers of property operating from a point or points in this State to another point or points in this State shall be liable for a tax of seven and one-half percent (7½%) on the gross revenue earned in such intrastate hauls. Common carriers of property operating between a point or points within this State and a point or points without this State shall be liable for a seven and one-half percent (7½%) tax only on that proportion of the gross revenue earned between terminals in this State and terminals outside this State that the mileage in North Carolina bears to the total mileage between the respective terminals. Common carriers of property operating through this State from a point or points outside this State to a point or points outside this State shall be liable for a seven and one-half percent (7½%) tax on that proportion of the gross revenue earned between such terminals as the mileage in North Carolina bears to the total mileage between the respective terminals. In no event shall the tax paid by such common carriers of property be less than the license tax or deposit shown on the above schedule, except where a franchise is hereafter issued by the Utilities Commission for service over a route within the State which is not now served by any common carrier of property the seven and one-half percent (7½%) gross revenue tax may be reduced to five percent (5%) for the first two years only. The tax prescribed in this subsection is levied as compensation for the use of the highways of this State and for the special privileges extended such common carriers of property by this State. Common carriers of property operating from a point in this State to a point in another state over two or more routes, shall compute their mileage from the point of origin to the point of destination on the basis of the average mileage of all routes used by them from the point in this State to the point outside of this State and this figure shall be used as the mileage between said points in determining the percentage of miles operated in North Carolina between said points.

In lieu of the seven and one-half percent (7½%) gross revenue tax levied by this subsection and the deposit required by subsection (b) of this section, common carriers of property may elect to pay a flat rate according to the highest rate provided by subsection (b) of this section for vehicles and loads of the same gross weight operated by contract carriers. The election to so pay must be made at the time license plates are applied for and may not thereafter be changed during the license year except that for the license year 1949 such election, if one is made, must be made on or before July 1, 1949. Vehicles registered and licensed during the license year and after the election herein provided for has been made, must be registered and licensed and the operator shall pay taxes on the operation thereof according to the election made. A failure by a common carrier of property to make an election under this paragraph shall render such common carrier of property liable for the deposit required by subsection (b) of this section and the seven and one-half percent (7½%) gross revenue tax levied by this subsection.

(f) Nonresident motor vehicle carriers which do not operate in intrastate commerce in this State, and the title to whose vehicles are not required to be registered under the provisions of this Article, shall be taxed for the use of the roads in this State and shall pay the same fees therefor as are required with reference to like vehicles owned by residents of this State: Provided, that if any such fees as applied to nonresidents shall at any time become inoperative, such carriers shall be taxed for the use of the roads of this State as common carriers of property as provided above: Provided, further, that this provision shall not prevent the extension to vehicles of other states of the benefits of the reciprocity provisions provided by law.

(g) Repealed by Session Laws 1969, c. 600, s. 17.

(h) Every person operating a motor vehicle upon the highways of the State equipped with motors of the diesel type shall make a report to the Commissioner upon forms to be prescribed and furnished by the Commissioner at least four times a year on dates to be designated by the Commissioner; and such reports shall show, among other things, the purchases of motor fuel for use in said diesel-type motor and whether or not the tax levied upon motor fuels has been paid or assumed by the person from whom bought; and it shall be unlawful to operate any such motor equipment upon the highways of this State except with fuel upon which the tax has been paid. It shall be unlawful for any person, firm, or corporation operating such diesel-type motor to fail, refuse, or neglect to make returns in accordance with the forms prescribed by the Commissioner; and any person knowingly making false returns shall be guilty of a felony. (1937, c. 407, s. 52; 1939, c. 275; 1941, cc. 36, 227; 1943, c. 648; 1945, c. 569, s. 1; c. 575, s. 1; c. 576, s. 3; c. 956, ss. 1, 2; 1949, cc. 355, 361; 1951, c. 583; c. 819, ss. 1, 2; 1953, c. 568; c. 694, s. 1; c. 1122; 1955, c. 554, s. 8; 1957, c. 681, s. 2; c. 1215; 1959, c. 571; 1961, c. 685; 1963, c. 501; c. 702, ss. 2, 3; 1967, c. 1095, ss. 1, 2; 1969, c. 600, ss. 12-17; c. 1056, s. 1; 1973, c. 154, ss. 1, 2; c. 291; 1975, c. 716, s. 5; 1977, c. 638.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsections (b) and (c).

The 1977 amendment substituted "G.S. 20-4.01(50)" for "G.S. 20-38(39)" at the end of the second sentence of subsection (a) and added the third sentence of that subsection.

For comment on the 1941 amendment, see 19 N.C.L. Rev. 514.

"Terminals". — The word "terminals," as used in subsection (e), means the point of origin or place where the carrier took possession of the shipment, or the point to which the transportation company makes delivery, the final destination of the shipment. Pilot Freight Carriers, Inc. v. Scheidt, 263 N.C. 737, 140 S.E.2d 383 (1965).

Computation of Tax. — Until the legislature prescribes some other rule for measurement, the tax must be computed by ascertaining the miles actually traveled by outbound shipments from the place where the carrier takes possession of the shipment, the point of origin, to the State line; and for inbound shipments, the miles

actually traveled from the State line to the place where the carrier surrenders possession of the shipment to the consignee, the point of destination. The miles the shipment actually moves in this State is the numerator. The total miles actually traveled by the shipment from the point of origin to the point of destination is the denominator. That fraction determines the portion of the revenue derived from each shipment which is subject to North Carolina's six percent tax. Pilot Freight Carriers, Inc. v. Scheidt, 263 N.C. 737, 140 S.E.2d 383 (1965).

Large Lumber and Paper Companies Engaged in Tree Farming as Farmer License Holder. — See opinion of Attorney General to Gonzalie Rivers, Department of Motor Vehicles, 41 N.C.A.G. 273 (1971).

Method of Reporting in Certain Circumstances May Be Changed at Other than Beginning of Tax Year. — See opinion of Attorney General to Mr. Victor J. Hines, Director, Common Carrier Tax Division, N.C. Department of Motor Vehicles, 43 N.C.A.G. 106 (1973).

Common Carrier Filing Hereunder May Not Report Only Loaded Miles for Purpose of Determining Gross Receipts for Tax Due. — See opinion of Attorney General to Mr. Victor J. Hines, Director, Common Carrier Tax Division, N.C. Department of Motor Vehicles, 43 N.C.A.G. 106 (1973).

Cited in Equipment Fin. Corp. v. Scheidt, 249 N.C. 334, 106 S.E.2d 555 (1959).

§ 20-88.1. Driver Training and Safety Education Fund. — Beginning July 1, 1958, each and every passenger or property-carrying vehicle registering with the Division of Motor Vehicles, for which the registration tax is now being paid as provided in this Chapter, shall pay an annual registration tax of three dollars ($3.00) in addition to all other amounts provided in this Chapter. The revenue derived from the additional tax of three dollars ($3.00) shall be placed in a separate fund to finance a program of driver training and safety education at the public high schools of the State, and the amounts so collected shall be transferred periodically to the account of the State Board of Education. In accordance with criteria and standards approved by the State Board of Education, the State Superintendent of Public Instruction shall organize and administer a program of driver education to be offered at the public high schools of the State for all persons of provisional license age. Such courses as shall be developed shall be made available to all physically and mentally qualified persons of provisional license age, including public school students, nonpublic school students and out-of-school youths under 18 years of age. In addition to the revenue derived from the annual additional registration tax of three dollars ($3.00), the State Board of Education shall use for such purpose all funds appropriated to it for said purpose, and may use all other funds which may become available for its use for said purpose; provided that any program supported in whole or in part from the fund established herein shall include instructions as to rights and privileges of the handicapped and the signs and symbols used to assist the handicapped relative to motor vehicles including but not limited to the "international symbol of accessibility" and symbols and devices as provided in Article 2A of this Chapter. (1957, c. 682, s. 1; 1965, c. 410, s. 1; 1975, c. 431; c. 716, s. 5; 1977, c. 340, s. 4; c. 1002.)

Editor's Note. — The first 1975 amendment substituted "as provided in this Chapter, shall pay an annual registration tax of two dollars ($2.00) in addition to all other amounts provided in this Chapter" for "at the annual rate of ten dollars ($10.00) or more, shall pay an additional annual registration tax of one dollar ($1.00)" at the end of the first sentence. The amendment also substituted "two dollars ($2.00)" for "one dollar ($1.00)" in the second and last sentences.

The second 1975 amendment substituted "Division" for "Department" in the first sentence.

The first 1977 amendment added the proviso at the end of the section.

The second 1977 amendment substituted "three dollars ($3.00)" for "two dollars ($2.00)" in the first, second and fifth sentences.

Section 2 of the act inserting this section, which provided that no credit for courses in driver training should be allowed towards meeting graduation requirements, was repealed by s. 2 of c. 410, Session Laws 1965.

§ 20-89. Method of computing gross revenue of common carriers of passengers and property. — In computing the gross revenue of common carriers of passengers and common carriers of property, revenue derived from the transportation of United States mail or other United States government services shall not be included. All revenue earned both within and without this State from the transportation of persons or property, except as herein provided, by common carriers of passengers and common carriers of property, whether on fixed schedule routes or by special trips or by auxiliary vehicles not licensed as common carriers of property, whether owned by the common carrier of property or hired from another for the transportation of persons or property within the limits of the designated franchise route shall be included in the gross revenue upon which said tax is based. Provided, however, that whenever any person licensed as a common carrier of property transports his own property, other than for his own use, he shall be liable for a tax on such transportation, computed at seven and one-half percent (7½%) of the gross charges authorized by the Utilities Commission or Interstate Commerce Commission on such operation if it had been for hire; and common carriers of property shall maintain accurate records of all operations involving transportation of their own property, in order that said tax may be correctly computed, paid and audited.

When vehicles are leased from other operators who are licensed in this State as contract carriers, for-hire passenger or common carriers of property any amounts paid to such operators under said lease may be deducted by the lessees from gross revenue on which tax is based in the event a copy of the lease and adequate records and receipts are maintained so as to clearly reflect such payments. Any revenue earned by a common carrier of property under a lease or rental shall be included in the gross revenue upon which said tax is based but revenue earned by a common carrier of passengers from coach rentals shall not be included in gross revenue on which tax is based. (1937, c. 407, s. 53; 1943, c. 726; 1945, c. 414, s. 2; c. 575, s. 2; 1951, c. 819, ss. 1, 2½; 1969, c. 600, s. 18.)

§ 20-90. Due date of franchise tax. — The additional tax on common carriers of passengers and common carriers of property shall become due and payable on or before the thirtieth day of the month following the month in which it accrues.

Whenever a contract carrier or a flat rate common carrier of property becomes a regular common carrier of property subject to the seven and one-half percent (7½%) gross revenue tax under this Chapter during the license renewal period, January 1 to February 15, said carrier's gross revenue for the seven and one-half percent (7½%) tax purpose shall be all the revenue earned from operations on and after the January 1 preceding the carrier's change to a regular common carrier during the renewal period January 1 to February 15.

Whenever a regular common carrier of property subject to the seven and one-half percent (7½%) gross revenue tax under this Chapter becomes a flat rate common carrier of property or a contract carrier during the license renewal period, January 1 to February 15, said carrier's gross revenue for the seven and one-half percent (7½%) tax purposes shall be all the revenue earned from operations up to and including operations on the December 31 preceding the carrier's change to a flat rate common carrier of property or a contract carrier if such change is made during the renewal period January 1 to February 15. (1937, c. 407, s. 54; 1951, c. 729; c. 819, s. 1; 1955, c. 1313, s. 2; 1967, c. 1079, s. 1; 1969, c. 600, s. 19.)

§ 20-91. Records and reports required of franchise carriers. — (a) Every common carrier of passengers and common carrier of property shall keep a record of all business transacted and all revenue received on such forms as may be prescribed by or satisfactory to the Commissioner.

Any owner or lessee applying for proportional registration of vehicles shall maintain records of the total number of miles operated by such vehicles in all jurisdictions during the preceding year and the total number of miles operated in this State during the preceding year. As used in this section, "preceding year" shall mean a period of 12 consecutive months fixed by the Division, which is within 16 months immediately preceding the commencement of the registration or license year in which proportional registration is sought.

All records required by this section shall be preserved for a period of three years, and shall at all times during the business hours of the day be subject to inspection by the Commissioner or his deputies or such other agents as may be duly authorized by the Commissioner. Any owner or lessee failing to comply with or violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court.

(b) All common carriers of passengers and common carriers of property shall, on or before the thirtieth day of each month, make a report to the Division of gross revenue earned and gross mileage operated during the month previous, in such manner as the Division may require and on such forms as the Division shall furnish. If reports are not filed by the thirtieth day of the month following the month for which the report is made, a penalty of five percent (5%) of gross receipts tax reported will be due. This five percent (5%) penalty must be paid in addition to the gross receipts tax and may not be claimed as a credit against the tag deposit. Provided that the Commissioner may, in his discretion, waive the five percent (5%) penalty upon proof by the carrier that late filing of report was due to extenuating circumstances beyond the control of the carrier.

(c) It shall be the duty of the Commissioner, by competent auditors, to have the books and records of every common carrier of passengers and common carrier of property examined at least once each year to determine if such operators are keeping complete records as provided by this section of this Article, and to determine if correct reports have been made to the State Division of Motor Vehicles covering the total amount of tax liability of such operators.

(d) If any carrier of passengers or property shall fail, neglect, or refuse to keep such records or to make such reports or pay tax due as required, and within the time provided in this Article, the Commissioner shall immediately inform himself as best he may as to all matters and things required to be set forth in such records and reports, and from such information as he may be able to obtain, determine and fix the amount of the tax due the State from such delinquent operator for the period covering the delinquency, adding to the tax so determined and as a part thereof an amount equal to five percent (5%) of the tax, to be collected and paid. The said Commissioner shall proceed immediately to collect the tax including the additional five percent (5%). Any such carrier of passengers or property, having no records on the basis of which the Commissioner can determine the amount of the tax due by such carrier, shall be assessed on each vehicle at the rate applicable for contract carriers, and any bonds or deposits theretofore made shall be applied on such assessment and any further amount shall be collected as provided by law.

(e) Except in accordance with proper judicial order, or as otherwise provided by law, it shall be unlawful for the Commissioner of Motor Vehicles, any deputy, assistant, agent, clerk, other officer, employee, or former officer or employee, to divulge or make known in any manner the amount of gross revenue or tax paid by any common carrier of passengers or common carrier of property as set forth or disclosed in any report or return required in remitting said tax, or as otherwise disclosed. Nothing in this section shall be construed to prohibit the publication of statistics, so classified as to prevent the identification of particular reports or returns, and the items thereof; the inspection of such reports or returns by the Governor, Attorney General, Utilities Commission, or their or its

duly authorized representatives; or the inspection by a legal representative of the State of the report or return of any common carrier of passengers or common carrier of property which shall bring an action to set aside or review the tax based thereon, or against which action or proceeding has been instituted to recover any tax or penalty imposed by this Article. Any person, officer, agent, clerk, employee, or former officer or employee violating the provisions of this section shall be guilty of a misdemeanor. Nothing in this subsection or in any other law shall prevent the exchange of information between the Division of Motor Vehicles and the Department of Revenue when such information is needed by either or both of said departments for the purposes of properly enforcing the laws with the administration of which either or both of said departments is charged. (1937, c. 407, s. 55; 1939, c. 275; 1941, c. 36; 1943, c. 726; 1945, c. 575, s. 3; 1947, c. 914, s. 2; 1951, c. 190, s. 1; c. 819, s. 1; 1955, c. 1313, s. 2; 1967, c. 1079, s. 2; 1975, c. 716, s. 5; c. 767, s. 3.)

Editor's Note. — The first 1975 amendment substituted "Division" for "Department" in subsections (b), (c) and (e). Pursuant to Session Laws 1975, c. 716, s. 5, "Division" has also been substituted for "Department" in subsection (a) as rewritten by the second 1975 amendment.

The second 1975 amendment rewrote subsection (a), substituted "carrier of passengers or property" for "common carrier of passengers or common carrier of property" near the beginning of the first sentence in subsection (d) and substituted "carrier of passengers or property" for "common carrier of property or common carrier of passengers" near the beginning of the third sentence of that subsection.

§ 20-91.1. Taxes to be paid; suits for recovery of taxes. — No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Article. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and notify such officer in writing that he pays the same under protest. Such payment shall be without prejudice to any defense or rights he may have in the premises, and he may, at any time within 30 days after such payment, demand the same in writing from the Commissioner of Motor Vehicles; and if the same shall not be refunded within 90 days thereafter, may sue such official in the courts of the State for the amount so demanded. Such suit must be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides. (1951, c. 1011, s. 1.)

Constitutionality. — The bar to suits created by this section is constitutional since the taxpayer is afforded an opportunity to be heard and is accorded due process. Cedar Creek Enterprises, Inc. v. State Dep't of Motor Vehicles, 290 N.C. 450, 226 S.E.2d 336 (1976).

Applicability. — This section is applicable when there has been a "tax" or penalty assessed pursuant to § 20-96. Cedar Creek Enterprises, Inc. v. State Dep't of Motor Vehicles, 290 N.C. 450, 226 S.E.2d 336 (1976).

The penalties prescribed in § 20-118 which are deemed a "tax" under § 20-96 qualify as "any tax" as used in this section. Cedar Creek Enterprises, Inc. v. State Dep't of Motor Vehicles, 290 N.C. 450, 226 S.E.2d 336 (1976).

§ 20-91.2. Overpayment of taxes to be refunded with interest. — If the Commissioner of Motor Vehicles discovers from the examination of any report, or otherwise, that any taxpayer has overpaid the correct amount of tax (including penalties, interest and costs, if any), such overpayment shall be refunded to the taxpayer within 60 days after it is ascertained together with interest thereon at the rate of six percent (6%) per annum: Provided, that interest on any such refund shall be computed from a date 90 days after date tax was originally paid by the taxpayer. Provided, further, that demand for such refund is made by the taxpayer within three years from the date of such overpayment or the due date of the report, whichever is later. (1951, c. 1011, s. 1.)

Cited in Cedar Creek Enterprises, Inc. v. State Dep't of Motor Vehicles, 290 N.C. 450, 226 S.E.2d 336 (1976).

§ 20-92. Revocation of franchise registration. — The failure of any common carrier of passengers or any common carrier of property to pay any tax levied under this Article, and/or to make reports as is required, shall constitute cause for revocation of registration and franchise, and the Commissioner is hereby authorized to seize the registration plates of any such delinquent carrier and require the cessation of the operation of such vehicles, and the Utilities Commission may revoke any franchise or permit issued such carrier. (1937, c. 407, s. 56; 1945, c. 575, s. 4; 1951, c. 819, s. 1.)

§ 20-93. Bond or deposit required. — The Commissioner, before issuing any registration plates to a common carrier of passengers or a common carrier of property, shall either satisfy himself of the financial responsibility of such carrier or require a bond or deposit in such amount as he may deem necessary to insure the collection of the tax imposed by this section. (1937, c. 407, s. 57; 1951, c. 819, s. 1.)

§ 20-94. Partial payments. — In the purchase of licenses, where the gross amount of the license to any one owner amounts to more than four hundred dollars ($400.00), half of such payment may, if the Commissioner is satisfied of the financial responsibility of such owner, be deferred until June 1 in any calendar year upon the execution to the Commissioner of a draft upon any bank or trust company upon forms to be provided by the Commissioner in an amount equivalent to one half of such tax, plus a carrying charge of one half of one percent (½ of 1%): Provided, that any person using any tag so purchased after the first day of June in any such year without having first provided for the payment of such draft, shall be guilty of a misdemeanor. No further license plates shall be issued to any person executing such a draft after the due date of any such draft so long as such draft or any portion thereof remains unpaid. Any such draft being dishonored and not paid shall be subject to the penalties prescribed in G.S. 20-178 and shall be immediately turned over by the Commissioner to his duly authorized agents and/or the State Highway Patrol, to the end that this provision may be enforced. When the owner of the vehicles for which a draft has been given sells or transfers ownership to all vehicles covered by the draft, such draft shall become payable immediately, and such vehicles shall not be transferred by the Division until the draft has been paid. Any one owner whose gross license amounts to more than two hundred dollars ($200.00) but not more than four hundred dollars ($400.00) may also be permitted to sign a draft in accordance with the foregoing provisions of this section provided such owner makes application for the draft on or before February 1 during the license renewal period. (1937, c. 407, s. 58; 1943, c. 726; 1945, c. 49, ss. 1, 2; 1947, c. 219, s. 10; 1953, c. 192; 1967, c. 712; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the next-to-the-last sentence.

§ 20-95. Licenses for less than a year. — Licenses issued on or after April 1 of each year and before July 1 for all vehicles, except two-wheel trailers under 1,500 pounds weight pulled by passenger cars, shall be three fourths of the annual fee. Licenses issued on or after July 1 and before October 1, except two-wheel trailers under 1,500 pounds weight pulled by passenger cars, shall be one half the annual fee. Licenses issued on or after October 1, except on

two-wheel trailers under 1,500 pounds weight pulled by passenger cars, shall be one fourth of the annual fee. (1937, c. 407, s. 59; 1947, c. 914, s. 3.)

§ 20-96. Overloading. — It is the intent of this section that every owner of a motor vehicle shall procure license in advance to cover the empty weight and maximum load which may be carried. Any owner failing to do so, and whose vehicle shall be found in operation on the highway over the weight for which such vehicle is licensed, shall pay the penalties prescribed in G.S. 20-118. Nonresidents operating under the provisions of G.S. 20-83 shall be subject to the additional tax provided in this section when their vehicles are operated in excess of the licensed weight or, regardless of the licensed weight, in excess of the maximum weight provided for in G.S. 20-118. Any resident or nonresident owner of a vehicle that is found in operation on a highway designated by the Board of Transportation as a light traffic highway, and along which signs are posted showing the maximum legal weight on said highway with a load in excess of the weight posted for said highway, shall be subject to the penalties provided in G.S. 20-118. Any person who shall willfully violate the provisions of this section shall be guilty of a misdemeanor in addition to being liable for the additional tax herein prescribed.

Any peace officer who discovers a property-hauling vehicle being operated on the highways with an overload as described in this section or which is equipped with improper registration plates, or the owner of which is liable for any overload penalties or assessments applicable to the vehicle and due and unpaid for more than 30 days, is hereby authorized to seize said property-hauling vehicle and hold the same until the overload has been removed or proper registration plates therefor have been secured and attached thereto and the overloading penalty provided in this section and G.S. 20-118 has been paid. Any peace officer seizing a property-hauling vehicle under this provision, may, when necessary, store said vehicle and the owner thereof shall be responsible for all reasonable storage charges thereon. When any property-hauling vehicle is seized, held, unloaded or partially unloaded under this provision, the load or any part thereof shall be cared for by the owner or operator of the vehicle without any liability on the part of the officer or of the State or any municipality because of damage to or loss of such load or any part thereof. (1937, c. 407, s. 60; 1943, c. 726; 1949, c. 583, s. 8; c. 1207, s. 4½; c. 1253; 1951, c. 1013, ss. 1-3; 1953, c. 694, ss. 2, 3; 1955, c. 554, s. 9; 1957, c. 65, s. 11; 1959, c. 1264, s. 5; 1973, c. 507, s. 5.)

Monetary Charge of Section Is "Tax" Subject to § 20-91.1. — By using the word "tax" to include penalties, § 20-91.2 indicates that the monetary charge prescribed in this section is defined as a "tax" and is therefore subject to § 20-91.1. Cedar Creek Enterprises, Inc. v. State Dep't of Motor Vehicles, 290 N.C. 450, 226 S.E.2d 336 (1976).

By labeling the required payment for overloading as an "additional tax," this section effectively defines the "penalties prescribed in G.S. 20-118" that must be paid upon a violation of this section as a "tax." Cedar Creek Enterprises, Inc. v. State Dep't of Motor Vehicles, 290 N.C. 450, 226 S.E.2d 336 (1976).

The phrase "additional tax provided in this section when their vehicles are operated in excess of the licensed weight or . . . in excess of the maximum weight provided in G.S. 20-118" refers to the overloading charge set out in this section. Cedar Creek Enterprises, Inc. v. State Dep't of Motor Vehicles, 290 N.C. 450, 226 S.E.2d 336 (1976).

§ 20-97. Taxes compensatory; no additional tax. — (a) All taxes levied under the provisions of this Article are intended as compensatory taxes for the use and privileges of the public highways of this State, and shall be paid by the Commissioner to the State Treasurer, to be credited by him to the State Highway Fund; and no county or municipality shall levy any license or privilege tax upon the use of any motor vehicle licensed by the State of North Carolina, except that cities and towns, other than the City of Charlotte and all incorporated cities and

towns in the counties of Buncombe, Cumberland, Davidson, Johnston, Madison, McDowell, New Hanover, Pender, and Yancey, may levy not more than one dollar ($1.00) per year upon any such vehicle resident therein, and the City of Charlotte and all incorporated cities and towns in the counties of Buncombe, Cumberland, Davidson, Johnston, Madison, McDowell, New Hanover, Pender, and Yancey, may levy not more than five dollars ($5.00) per year upon any such vehicle resident therein: Provided, however, that cities and towns may levy, in addition to the amounts hereinabove provided for, a sum not to exceed fifteen dollars ($15.00) per year upon each vehicle operated in such city or town as a taxicab.

(c) In addition to the appropriation carried in the appropriations act there shall be appropriated to the Motor Vehicle Division the additional sum of fifteen thousand dollars ($15,000) from the State highway fund: Provided, that such additional sum shall be made available only in the event that the regular appropriation is insufficient and it shall be determined by the Director of the Budget that such additional amount is necessary to carry out the provisions of this Article. (1937, c. 407, s. 61; 1941, c. 36; 1943, c. 639, ss. 3, 4; 1975, c. 716, s. 5; 1977, c. 433, s. 1; c. 880, s. 1.)

Local Modification. — Caswell: 1977, c. 420.

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsection (c).

The first 1977 amendment, in subsection (a), inserted "other than the City of Charlotte and all incorporated cities and towns in the counties of Buncombe, Cumberland, Davidson, Johnston, Madison, McDowell, New Hanover, Pender, Transylvania, and Yancey" and "and the City of Charlotte and all incorporated cities and towns in the counties of Buncombe, Cumberland, Davidson, Johnston, Madison, McDowell, New Hanover, Pender, Transylvania, and Yancey," substituted "five dollars ($5.00)" for "one dollar ($1.00)," and substituted "amounts hereinabove provided for" for "the one dollar ($1.00) per year, herein set forth."

The second 1977 amendment deleted "Transylvania" from the counties listed in the first sentence of subsection (a) as amended by the first 1977 amendment.

Session Laws 1977, c. 433, s. 2, as amended by Session Laws 1977, c. 880, s. 2, provides: "This act applies only to the City of Charlotte and to the incorporated cities and towns in the counties of Buncombe, Cumberland, Davidson, Johnston, Madison, McDowell, New Hanover, Pender, and Yancey."

For comment on the 1943 amendment, see 21 N.C.L. Rev. 358.

Municipalities are prohibited by this section from levying a license or privilege tax for use of its streets by motor trucks. C.D. Kenny Co. v. Town of Brevard, 217 N.C. 269, 7 S.E.2d 542 (1940).

Historical Background for Subsections (a) and (b). — See Victory Cab Co. v. City of Charlotte, 234 N.C. 572, 68 S.E.2d 433 (1951).

May Not Impose Additional License Tax on Vehicles for Hire. — This section expressly prohibits a municipality from levying a license or privilege tax in excess of $1.00 upon the use of any motor vehicle licensed by the State, and must be construed with and operates as an exception to, and limitation upon the general power to levy license and privilege taxes upon businesses, trades and professions granted by charter and former § 160-56, and provisions of a municipal ordinance imposing a license tax upon the operation of passenger vehicles for hire in addition to the $1.00 theretofore imposed by it upon motor vehicles generally, is void, nor may the additional municipal tax be sustained upon the theory that it is a tax upon the business of operating a motor vehicle for hire rather than ownership of the vehicle, since the word "business" and the word "use" as used in the sections mean the same thing. Cox v. Brown, 218 N.C. 350, 11 S.E.2d 152 (1940).

An examination of the legislative history of this section shows a fixed and unvarying legislative policy to curb the powers of municipalities in taxing motor vehicles of all kinds, including taxicabs. Victory Cab Co. v. City of Charlotte, 234 N.C. 572, 68 S.E.2d 433 (1951).

In view of the limitations imposed by subsections (a) and (b) of this section fees collected by a city in excess of $16.00 for each cab may not be justified as items of revenue. Victory Cab Co. v. City of Charlotte, 234 N.C. 572, 68 S.E.2d 433 (1951).

Taxes Finance Construction and Maintenance of Highways. — The construction and maintenance of this State's highways is financed, in part, by taxes based on the use of the highways by motor vehicles. Pilot Freight Carriers, Inc. v. Scheidt, 263 N.C. 737, 140 S.E.2d 383 (1965).

Those commissioned to sell license plates are not dealing in interstate commerce, but perform a general tax collecting effort, since

this section and § 20-63 do not earmark the funds for any specific project or road, and not all of the tax even goes to the Department of Highways. Hodgson v. Hyatt Realty & Inv. Co., 353 F. Supp. 1363 (M.D.N.C. 1973).

When a Vehicle Is "Resident" in a Municipality. — The considerations determinative of when a vehicle is "resident" in a municipality as the term is used in subsection (a) of this section are the residence of the owner, the "residence" of the vehicle, whether the owner is an individual person or other than an individual person, type of vehicle and use. Opinion of Attorney General to Gillam & Gillam, 45 N.C.A.G. 185 (1975).

Applicability of License Tax and License Plate Display Requirement under Section. — Under the provisions of this section, the license tax and the requirement that license plates be displayed are applicable to vehicles which become "resident" in the town after January 1 of any year. Opinion of Attorney General to Gillam & Gillam, 45 N.C.A.G. 185 (1975).

License Tax Liability Where Vehicle Becomes Resident in Another Municipality in Same Year. — If a license plate is once issued for a motor vehicle during a particular year by a municipality, the owner is liable for another one dollar ($1.00) license tax during the same year if the vehicle becomes "resident" in another municipality. Opinion of Attorney General to Gillam & Gillam, 45 N.C.A.G. 185 (1975).

Former Law. — For cases decided under the corresponding provisions of the former law, see State v. Fink, 179 N.C. 712, 103 S.E. 16 (1920); Southeastern Express Co. v. City of Charlotte, 186 N.C. 668, 120 S.E. 475 (1923); State v. Jones, 191 N.C. 371, 131 S.E. 734 (1926).

§ 20-98. Tax lien. — In the distribution of assets in case of receivership or insolvency of the owner against whom the tax herein provided is levied and in the order of payment thereof, the State shall have priority over all other debts or claims except prior recorded liens or liens given by statute an express priority. (1937, c. 407, s. 62.)

§ 20-99. Remedies for the collection of taxes. — (a) If any tax imposed by this Chapter, or any other tax levied by the State and payable to the Commissioner of Motor Vehicles, or any portion of such tax, be not paid within 30 days after the same becomes due and payable, and after the same has been assessed, the Commissioner of Motor Vehicles shall issue an order under his hand and official seal, directed to the sheriff of any county of the State, commanding him to levy upon and sell the real and personal property of the taxpayer found within his county for the payment of the amount thereof, with the added penalties, additional taxes, interest, and cost of executing the same, and to return to the Commissioner of Motor Vehicles the money collected by virtue thereof within a time to be therein specified, not less than 60 days from the date of the order. The said sheriff shall, thereupon, proceed upon the same in all respects with like effect and in the same manner prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the order, to be collected in the same manner. Upon the issuance of said order to the sheriff, in the event the delinquent taxpayer shall be the operator of any common carrier of passengers or common carrier of property vehicle, the franchise certificate issued to such operator shall become null and void and shall be canceled by the Utilities Commissioner, and it shall be unlawful for any such common carrier of passengers or the operator of any common carrier of property vehicle to continue the operation under said franchise.

(b) Bank deposits, rents, salaries, wages, and all other choses in action or property incapable of manual levy or delivery, hereinafter called the intangible, belonging, owing, or to become due to any taxpayer subject to any of the provisions of this Chapter, or which has been transferred by such taxpayer under circumstances which would permit it to be levied upon if it were tangible, shall be subject to attachment or garnishment as herein provided, and the person owing said intangible, matured or unmatured, or having same in his possession or control, hereinafter called the garnishee, shall become liable for all sums due by the taxpayer under this Chapter to the extent of the amount of the intangible belonging, owing, or to become due to the taxpayer subject to the setoff of any

matured or unmatured indebtedness of the taxpayer to the garnishee. To effect such attachment or garnishment the Commissioner of Motor Vehicles shall serve or cause to be served upon the taxpayer and the garnishee a notice as hereinafter provided, which notice may be served by any deputy or employee of the Commissioner of Motor Vehicles or by any officer having authority to serve summonses. Said notice shall show:

(1) The name of the taxpayer and his address, if known;

(2) The nature and amount of the tax, and the interest and penalties thereon, and the year or years for which the same were levied or assessed, and

(3) Shall be accompanied by a copy of this subsection, and thereupon the procedure shall be as follows:

If the garnishee has no defense to offer or no setoff against the taxpayer, he shall, within 10 days after service of said notice, answer the same by sending to the Commissioner of Motor Vehicles by registered mail a statement to that effect, and if the amount due or belonging to the taxpayer is then due or subject to his demand, it shall be remitted to the Commissioner with said statement, but if said amount is to mature in the future, the statement shall set forth that fact and the same shall be paid to the Commissioner upon maturity, and any payment by the garnishee hereunder shall be a complete extinguishment of any liability therefor on his part to the taxpayer. If the garnishee has any defense or setoff, he shall state the same in writing under oath, and, within 10 days after service of said notice, shall send two copies of said statement to the Commissioner by registered mail; if the Commissioner admits such defense or setoff, he shall so advise the garnishee in writing within 10 days after receipt of such statement and the attachment or garnishment shall thereupon be discharged to the amount required by such defense or setoff, and any amount attached or garnished hereunder which is not affected by such defense or setoff shall be remitted to the Commissioner as above provided in cases where the garnishee has no defense or setoff, and with like effect. If the Commissioner shall not admit the defense or setoff, he shall set forth in writing his objections thereto and shall send a copy thereof to the garnishee within 10 days after receipt of the garnishee's statement, or within such further time as may be agreed on by the garnishee, and at the same time he shall file a copy of said notice, a copy of the garnishee's statement, and a copy of his objections thereto in the superior court of the county where the garnishee resides or does business where the issues made shall be tried as in civil actions.

If judgment is entered in favor of the Commissioner of Motor Vehicles by default or after hearing, the garnishee shall become liable for the taxes, interest and penalties due by the taxpayer to the extent of the amount over and above any defense or setoff of the garnishee belonging, owing, or to become due to the taxpayer, but payments shall not be required from amounts which are to become due to the taxpayer until the maturity thereof, nor shall more than ten percent (10%) of any taxpayer's salary or wages be required to be paid hereunder in any one month. The garnishee may satisfy said judgment upon paying said amount, and if he fails to do so, execution may issue as provided by law. From any judgment or order entered upon such hearing either the Commissioner of Motor Vehicles or the garnishee may appeal as provided by law. If, before or after judgment, adequate security is filed for the payment of said taxes, interest, penalties, and costs, the attachment or garnishment may be released or execution stayed pending appeal, but the final judgment shall be paid or enforced as

above provided. The taxpayer's sole remedies to question his liability for said taxes, interest, and penalties shall be those provided in G.S. 105-267, as now or hereafter amended or supplemented. If any third person claims any intangible attached or garnished hereunder and his lawful right thereto, or to any part thereof, is shown to the Commissioner, he shall discharge the attachment or garnishment to the extent necessary to protect such right, and if such right is asserted after the filing of said copies as aforesaid, it may be established by interpleader as now or hereafter provided by the General Statutes in cases of attachment and garnishment. In case such third party has no notice of proceedings hereunder, he shall have the right to file his petition under oath with the Commissioner at any time within 12 months after said intangible is paid to him and if the Commissioner finds that such party is lawfully entitled thereto or to any part thereof, he shall pay the same to such party as provided for refunds by G.S. 105-407 and if such payment is denied, said party may appeal from the determination of the Commissioner to the Superior Court of Wake County or to the superior court of the county wherein he resides or does business. The intangibles of a taxpayer shall be paid or collected hereunder only to the extent necessary to satisfy said taxes, interest, penalties, and costs. Except as hereinafter set forth, the remedy provided in this section shall not be resorted to unless a warrant for collection or execution against the taxpayer has been returned unsatisfied: Provided, however, if the Commissioner is of opinion that the only effective remedy is that herein provided, it shall not be necessary that a warrant for collection or execution shall be first returned unsatisfied, and in no case shall it be a defense to the remedy herein provided that a warrant for collection or execution has not been first returned unsatisfied: Provided, however, that no salary or wage at the rate of less than two hundred dollars ($200.00) per month, whether paid weekly or monthly, shall be attached or garnished under the provisions of this section.

(c) In addition to the remedy herein provided, the Commissioner of Motor Vehicles is authorized and empowered to make a certificate setting forth the essential particulars relating to the said tax, including the amount thereof, the date when the same was due and payable, the person, firm, or corporation chargeable therewith, and the nature of the tax, and under his hand and seal transmit the same to the clerk of the superior court of any county in which the delinquent taxpayer resides or has property; whereupon, it shall be the duty of the clerk of the superior court of the county [to] record the certificate in the same manner as a judgment, and execution may issue thereon with the same force and effect as an execution upon any other judgment of the superior court; said tax shall become a lien on realty only from the date of the docketing of such certificate in the office of the clerk of the superior court and on personalty only from the date of the levy on such personalty and upon execution thereon no homestead or personal property exemption shall be allowed.

(d) The remedies herein given are cumulative and in addition to all other remedies provided by law for the collection of said taxes.

(e) The provisions, procedures, and remedies provided in this section shall be applicable to the collection of penalties imposed under the provisions of G.S. 20-96, 20-118, or any other provisions of this Chapter imposing a tax or penalty for operation of a vehicle in excess of the weight limits provided in this Chapter and the Commissioner is authorized to collect such taxes or penalties by the use of the procedure established in subsections (a), (b), (c) and (d) of this section. (1937, c. 407, s. 63; 1945, c. 576, s. 4; 1951, c. 819, s. 1; 1955, c. 554, s. 10; 1971, c. 528, s. 12.)

Editor's Note. — Section 105-407, referred to in this section, was transferred to § 105-267.1 by Session Laws 1971, c. 806, s. 2.

§ 20-100. Vehicles junked or destroyed by fire or collision. — Upon satisfactory proof to the Commissioner that any motor vehicle, duly licensed, has been completely destroyed by fire or collision, or has been junked and completely dismantled so that the same can no longer be operated as a motor vehicle, the owner of such vehicle may be allowed on the purchase of a new license for another vehicle a credit equivalent to the unexpired proportion of the cost of the original license, dating from the first day of the next month after the date of such destruction. (1937, c. 407, s. 64; 1939, c. 369, s. 1.)

§ 20-101. For-hire vehicles to be marked. — All motor vehicles licensed as common carriers or contract carriers of passengers or property and all exempt for-hire motor carriers shall have printed on each side of the vehicle in letters not less than three inches in height the name and home address of the owner, the certificate number, permit number, or exemption number under which said vehicle is operated, and such other identification as may be required and approved by the Utilities Commission. (1937, c. 407, s. 65; 1951, c. 819, s. 1; 1967, c. 1132.)

Not Applicable to Taxicab Which Seats Nine or Fewer Passengers and Is Not Operated on a Regular Route or between Termini. — See opinion of Attorney General to Mr. W. Vance McCown, 41 N.C.A.G. 547 (1971).

Part 8. Anti-Theft and Enforcement Provisions.

§ 20-102. Report of stolen and recovered motor vehicles. — Every sheriff, chief of police, or peace officer upon receiving reliable information that any vehicle registered hereunder has been stolen shall immediately report such theft to the Division. Any said officer upon receiving information that any vehicle, which he has previously reported as stolen, has been recovered, shall immediately report the fact of such recovery to the Division. (1937, c. 407, s. 66; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in two places.

§ 20-102.1. False report of theft or conversion a misdemeanor. — A person who knowingly makes to a peace officer or to the Division a false report of the theft or conversion of a motor vehicle shall be guilty of a misdemeanor, punishable within discretion of the court. (1963, c. 1083; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

§ 20-103. Reports by owners of stolen and recovered vehicles. — The owner, or person having a lien or encumbrance upon a registered vehicle which has been stolen or embezzled, may notify the Division of such theft or embezzlement, but in the event of an embezzlement may make such report only after having procured the issuance of a warrant for the arrest of the person charged with such embezzlement. Every owner or other person who has given any such notice must notify the Division of the recovery of such vehicle. (1937, c. 407, s. 67; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in two places.

§ 20-104. Action by Division on report of stolen or embezzled vehicles. — (a) The Division, upon receiving a report of a stolen or embezzled vehicle as hereinbefore provided, shall file and appropriately index the same and shall immediately suspend the registration of the vehicle so reported, and shall not transfer the registration of the same until such time as it is notified in writing that such vehicle has been recovered.

(b) The Division shall at least once each month compile and maintain at its headquarters office a list of all vehicles which have been stolen or embezzled or recovered as reported to it during the preceding month, and such lists shall be open to inspection by any peace officer or other persons interested in any such vehicle. (1937, c. 407, s. 68; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

§ 20-105: Repealed by Session Laws 1973, c. 1330, s. 39.

Cross Reference. — For present provisions as to unauthorized use of a conveyance, see § 14-72.2.

§ 20-106. Receiving or transferring stolen vehicles. — Any person who, with intent to procure or pass title to a vehicle which he knows or has reason to believe has been stolen or unlawfully taken, receives or transfers possession of the same from or to another, or who has in his possession any vehicle which he knows or has reason to believe has been stolen or unlawfully taken, and who is not an officer of the law engaged at the time in the performance of his duty as such officer, is guilty of a felony. (1937, c. 407, s. 70.)

Cross Reference. — As to penalty for a violation of this Article declared to constitute a felony, see § 20-177.

This section is constitutional. State v. Lockamy, 31 N.C. App. 713, 230 S.E.2d 565 (1976).

The language "or has reason to believe has been stolen or unlawfully taken" does not create a matter of conjecture as to what is prohibited and is not unconstitutionally vague so as to deprive the defendant of due process of law. State v. Rook, 26 N.C. App. 33, 215 S.E.2d 159, appeal dismissed, 288 N.C. 250, 217 S.E.2d 674 (1975).

The purpose of this section is to discourage the possession of stolen vehicles by one who knows it is stolen or has reason to believe that it is stolen. State v. Rook, 26 N.C. App. 33, 215 S.E.2d 159, appeal dismissed, 288 N.C. 250, 217 S.E.2d 674 (1975); State v. Abrams, 29 N.C. App. 144, 223 S.E.2d 516 (1976).

The State attempts to accomplish the purpose of discouraging the possession of stolen automobiles by making the act of possessing a stolen automobile punishable as a felony. State v. Abrams, 29 N.C. App. 144, 223 S.E.2d 516 (1976).

No Felonious Intent Required. — Neither the construction of this section nor the purpose for which it was enacted compels a requirement that the doer of the act have a felonious intent. State v. Abrams, 29 N.C. App. 144, 223 S.E.2d 516 (1976).

§ 20-106.1. Fraud in connection with rental of motor vehicles. — Any person with the intent to defraud the owner of any motor vehicle or a person in lawful possession thereof, who obtains possession of said vehicle by agreeing in writing to pay a rental for the use of said vehicle, and further agreeing in writing that the said vehicle shall be returned to a certain place, or at a certain time, and who willfully fails and refuses to return the same to the place and at

the time specified, or who secretes, converts, sells or attempts to sell the same or any part thereof shall be guilty of a felony. (1961, c. 1067.)

§ 20-107. Injuring or tampering with vehicle. — (a) Any person who either individually or in association with one or more other persons willfully injures or tampers with any vehicles or breaks or removes any part or parts of or from a vehicle without the consent of the owner is guilty of a misdemeanor, and upon conviction shall be punished by a fine or imprisonment, or both, in the discretion of the court.

(b) Any person who with intent to steal, commit any malicious mischief, injury or other crime, climbs into or upon a vehicle, whether it is in motion or at rest, or with like intent attempts to manipulate any of the levers, starting mechanism, brakes, or other mechanism or device of a vehicle while the same is at rest and unattended or with like intent sets in motion any vehicle while the same is at rest and unattended, is guilty of a misdemeanor, and upon conviction shall be punished by a fine or imprisonment, or both, in the discretion of the court. (1937, c. 407, s. 71; 1965, c. 621, s. 1.)

§ 20-108. Vehicles without manufacturer's numbers. — Any person who knowingly buys, receives, disposes of, sells, offers for sale, conceals, or has in his possession any motor vehicle, or engine or transmission removed from a motor vehicle, from which the manufacturer's serial or engine number or other distinguishing number or identification mark or number placed thereon under assignment from the Division has been removed, defaced, covered, altered, or destroyed for the purpose of concealing or misrepresenting the identity of said motor vehicle or engine is guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than one thousand dollars ($1,000) or imprisonment, or both, in the discretion of the court. (1937, c. 407, s. 72; 1965, c. 621, s. 2; 1973, c. 1149, ss. 1, 2; 1975, c. 716, s. 5.)

Cross Reference. — For provision that § 14-160.1, relating to the alteration, destruction or removal of permanent identification marks from personal property, shall not affect this section, see § 14-160.1(d).

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

§ 20-109. Altering or changing engine or other numbers. — (a) It shall be unlawful and constitute a misdemeanor for:

(1) Any person to willfully deface, destroy, remove, cover, or alter the manufacturer's serial number, transmission number, or engine number; or

(2) Any vehicle owner to knowingly permit the defacing, removal, destroying, covering, or alteration of the serial number, transmission number, or engine number; or

(3) Any person except a licensed vehicle manufacturer as authorized by law to place or stamp any serial number, transmission number, or engine number upon a vehicle, other than one assigned thereto by the Division; or

(4) Any vehicle owner to knowingly permit the placing or stamping of any serial number or motor number upon a motor vehicle, except such numbers as assigned thereto by the Division.

A violation of this subsection shall be punishable by a fine or imprisonment not to exceed two years, or both, in the discretion of the court.

(b) It shall be unlawful and constitute a felony for:

(1) Any person, with intent to conceal or misrepresent the true identity of the vehicle, to deface, destroy, remove, cover, alter, or use any serial or motor number assigned to a vehicle by the Division; or

(2) Any vehicle owner, with intent to conceal or misrepresent the true identity of the vehicle, to permit the defacing, destruction, removal, covering, alteration, or use of a serial or motor number assigned to a vehicle by the Division; or

(3) Any vehicle owner, with the intent to conceal or misrepresent the true identity of a vehicle, to permit the defacing, destruction, removal, covering, alteration, use, gift, or sale of any manufacturer's serial number, serial number plate, or any part or parts of a vehicle containing the serial number or portions of the serial number.

A violation of this subsection shall be punishable by a fine of not less than two thousand dollars ($2,000) or imprisonment for not more than five years, or both, in the discretion of the court. (1937, c. 407, s. 73; 1943, c. 726; 1953, c. 216; 1965, c. 621, s. 3; 1967, c. 449; 1973, c. 1089; 1975, c. 716, s. 5.)

Cross Reference. — For provision that § 14-160.1, relating to the alteration, destruction or removal of permanent identification marks from personal property, shall not affect this section, see § 14-160.1(d).

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout the section.

§ 20-109.1. Surrender of titles to salvage vehicles. — (a) A vehicle shall be deemed to be a salvage vehicle:

(1) When an insurance company as a result of having paid a total loss claim acquires title to a vehicle, and obtains possession or control of a vehicle, for any cause other than theft; or

(2) When an insurance company has acquired title to and obtains possession of a vehicle in settlement of a theft loss claim, and upon recovery of the vehicle it is determined that the vehicle has been damaged to the extent that it would be considered a total loss under the provisions of comprehensive and collision insurance.

If the salvage vehicle was registered in North Carolina, or if the loss or damages occurred in North Carolina, or if the sale of the salvage vehicle takes place in North Carolina then the insurance company or their authorized agent shall within 10 days after payment of a total loss claim forward to the Division of Motor Vehicles the certificate of title or the comparable ownership document issued by the jurisdiction wherein the vehicle was last registered. The certificate of title or comparable ownership document shall be properly assigned to the insurance company by the vehicle owner. Subsequent transfers of ownership shall be on forms provided by the Division; and such forms shall be mailed by the Division to the insurance company at the address furnished in the assignment of title from the registered owner, unless otherwise requested in writing by the insurance company or their authorized agent. The insurance company shall make an assignment of ownership on the form and deliver it to the purchaser upon sale of the salvage vehicle. The forms shall be considered as proof of ownership for the purpose of G.S. 20-61. In the event the salvage vehicle is rebuilt, an application for reissuance of the title shall be made on a form prescribed by the Division, and the application shall be accompanied by such supporting information as the Division may require.

(b) Any person acquiring or having possession of any salvage vehicle, purchased in those states that do not require the surrender of titles to salvage vehicles shall within 10 days following delivery of the vehicle and title forward to the Division the certificate of title or comparable ownership document issued by the jurisdiction wherein the vehicle was last registered, with properly executed assignments and reassignments of such title or ownership document. Subsequent transfers of ownership and reissuance of the title shall be as provided for in subsection (a) hereof.

(c) Except when operated by or at the direction of the Commissioner or his designee, no person shall operate a salvage vehicle prior to compliance with Division requirements prerequisite to application for reissuance of a title. The rebuilt salvage vehicle may be operated following completion of the required examination and certification, provided the operation shall be in compliance with Chapter 20.

(d) A violation of any provision of this section shall constitute a misdemeanor punishable by a fine of not more than one hundred dollars ($100.00) or imprisonment for not more than two years, or both, in the discretion of the court. (1973, c. 1095, s. 1; 1975, c. 716, s. 5; c. 799.)

Editor's Note. — Session Laws 1975, c. 799, in the second paragraph of subsection (a), inserted "or their authorized agent" and substituted "within 10 days after payment of a total loss claim" for "within three days after sale of salvage vehicle" in the first sentence, deleted "and the insurance company shall execute an assignment of title designating the purchaser" at the end of the second sentence, substituted "to the insurance company" for "to the purchaser" and "from the registered owner, unless otherwise requested in writing by the insurance company or their authorized agent" for "from the insurance company" in the third sentence and added the fourth sentence. In subsection (b), c. 799 substituted "purchased in those states that do not require the surrender of titles to salvage vehicles shall within 10 days following delivery of the vehicle and title" for "regardless of the source and conditions of acquisition, shall immediately" near the beginning of the subsection. The amendment also rewrote subsection (c) and substituted "not more than" for "not less than" in subsection (d).

Pursuant to Session Laws 1975, c. 716, s. 5, "Division" has been substituted for "Department" throughout this section as amended by Session Laws 1975, c. 799.

§ 20-110. When registration shall be rescinded. — (a) The Division shall rescind and cancel the registration of any vehicle which the Division shall determine is unsafe or unfit to be operated or is not equipped as required by law.

(b) The Division shall rescind and cancel the registration of any vehicle whenever the person to whom the registration card or registration number plates therefor have been issued shall make or permit to be made any unlawful use of the said card or plates or permit the use thereof by a person not entitled thereto.

(c) The Division shall rescind and cancel the license of any dealer to whom such license has been issued when such dealer allows his registration number plates to be used for other than demonstration purposes except as provided by G.S. 20-79, fails to carry out the provisions of G.S. 20-79 and 20-82, or is convicted of a felony.

(d) The Division shall rescind and cancel the certificate of title to any vehicle which has been erroneously issued or fraudulently obtained or is unlawfully detained by anyone not entitled to possession.

(e) The Division shall rescind and cancel the license and dealer plates issued to any person when it is found that false or fraudulent statements have been made in the application for the same, and when and if it is found that the applicant does not have a bona fide place of business as provided by this Article.

(f) The Division shall rescind and cancel the dealer's license and dealer's license plates issued to any person who knowingly delivers a certificate of title to a vehicle purchased from him which does not show a proper or correct transfer of ownership or who willfully fails to deliver proper certificate of title to a motor vehicle sold by him.

(g) The Division shall rescind and cancel the registration plates issued to a common carrier of passengers or property which has been secured by such common carrier as provided under G.S. 20-50 when the license is being used on a vehicle other than the one for which it was issued or which is being used by the lessor-owner after the lease with such lessee has been terminated.

(h) The Division may rescind and cancel the registration or certificate of title on any vehicle on the grounds that the application therefor contains any false or fraudulent statement or that the holder of the certificate was not entitled to the issuance of a certificate of title or registration.

(i) The Division may rescind and cancel the registration or certificate of title of any vehicle when the Division has reasonable grounds to believe that the vehicle is a stolen or embezzled vehicle, or that the granting of registration or the issuance of certificate of title constituted a fraud against the rightful owner or person having a valid lien upon such vehicle.

(j) The Division may rescind and cancel the registration or certificate of title of any vehicle on the grounds that the registration of the vehicle stands suspended or revoked under the motor vehicle laws of this State.

(k) The Division shall rescind and cancel a certificate of title when the Division finds that such certificate has been used in connection with the registration or sale of a vehicle other than the vehicle for which the certificate was issued. (1937, c. 407, s. 74; 1945, c. 576, s. 5; 1947, c. 220, s. 4; 1951, c. 985, s. 1; 1953, c. 831, s. 4; 1955, c. 294, s. 1; c. 554, s. 11; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout the section.

§ 20-111. Violation of registration provisions. — It shall be unlawful for any person to commit any of the following acts:

(1) To operate or for the owner thereof knowingly to permit the operation upon a highway of any vehicle, trailer, or semitrailer required to be registered and which is not registered or for which a certificate of title has not been issued, or which does not have attached thereto and displayed thereon the registration number plate or plates assigned thereto by the Division for the current registration year, subject to the provisions of G.S. 20-64 and 20-72(a) and the exemptions mentioned in G.S. 20-65 and 20-79.

(2) To display or cause or permit to be displayed or to have in possession any registration card, certificate of title or registration number plate knowing the same to be fictitious or to have been canceled, revoked, suspended or altered, or to wilfully display an expired license or registration plate on a vehicle knowing the same to be expired.

(3) The giving, lending, or borrowing of a license plate for the purpose of using same on some motor vehicle other than that for which issued shall make the giver, lender, or borrower guilty of a misdemeanor, and upon conviction he shall be fined not more than fifty dollars ($50.00), or imprisoned not more than 30 days. Where license plate is found being improperly used, such plate or plates shall be revoked or canceled, and new license plates must be purchased before further operation of the motor vehicle.

(4) To fail or refuse to surrender to the Division, upon demand, any title certificate, registration card or registration number plate which has been suspended, canceled or revoked as in this Article provided.

(5) To use a false or fictitious name or address in any application for the registration of any vehicle or for a certificate of title or for any renewal or duplicate thereof, or knowingly to make a false statement or knowingly to conceal a material fact or otherwise commit a fraud in any such application. A violation of this subdivision shall constitute a misdemeanor punishable in the discretion of the court not to exceed two years.

(6) To give, lend, sell or obtain a certificate of title for the purpose of such certificate being used for any purpose other than the registration, sale, or other use in connection with the vehicle for which the certificate was issued. Any person violating the provisions of this subdivision shall be guilty of a misdemeanor. (1937, c. 407, s. 75; 1943, c. 592, s. 2; 1945, c. 576, s. 6; c. 635; 1949, c. 360; 1955, c. 294, s. 2; 1961, c. 360, s. 20; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subdivisions (1) and (4).

The maximum punishment for a violation of this section or § 20-63 would be that prescribed by § 20-176(b), namely, a fine of not more than $100.00 or imprisonment in the county or municipal jail for not more than 60 days, or both such fine and imprisonment. State v. Tolley, 271 N.C. 459, 156 S.E.2d 858 (1967).

Applied in State v. Green, 266 N.C. 785, 147 S.E.2d 377 (1966).

Cited in State v. White, 3 N.C. App. 31, 164 S.E.2d 36 (1968).

§ 20-112. Making false affidavit perjury. — Any person who shall knowingly make any false affidavit or shall knowingly swear or affirm falsely to any matter or thing required by the terms of this Article to be sworn or affirmed to shall be guilty of perjury, and upon conviction shall be punishable by a fine and imprisonment as other persons committing perjury are punishable. (1937, c. 407, s. 76.)

Cross References. — As to punishment for perjury, see § 14-209. As to revocation of license in event of conviction of perjury or the making of false affidavits, etc., see § 20-17.

§ 20-113. Licenses protected. — No person, partnership, association or corporation shall maintain an office or place of business in which or through which persons desiring transportation for themselves or their baggage are brought into contact by advertisement or otherwise with persons owning or operating motor vehicles and willing to transport other persons, or baggage, for compensation, or on a division of expense basis, unless the owner or operator of such motor vehicles furnishing the transportation has qualified under the tax provisions of this Article for the class of service he holds himself out to perform. (1937, c. 407, s. 77.)

§ 20-114. Duty of officers; manner of enforcement. — (a) For the purpose of enforcing the provisions of this Article, it is hereby made the duty of every police officer of any incorporated city or village, and every sheriff, deputy sheriff, and all other lawful officers of any county to arrest within the limits of their jurisdiction any person known personally to any such officer, or upon the sworn information of a creditable witness, to have violated any of the provisions of this Article, and to immediately bring such offender before any magistrate or officer having jurisdiction, and any such person so arrested shall have the right of immediate trial, and all other rights given to any person arrested for having committed a misdemeanor. Every officer herein named who shall neglect or refuse to carry out the duties imposed by this Chapter shall be liable on his official bond for such neglect or refusal as provided by law in like cases.

(b) It shall be the duty of all sheriffs, police officers, deputy sheriffs, deputy police officers, and all other officers within the State to cooperate with and render all assistance in their power to the officers herein provided for, and nothing in this Article shall be construed as relieving said sheriffs, police officers, deputy sheriffs, deputy police officers, and other officers of the duties imposed on them by this Chapter.

(c) It shall also be the duty of every sheriff of every county of the State and of every police or peace officer of the State to make immediate report to the Commissioner of all motor vehicles reported to him as abandoned or that are seized by him for being used for illegal transportation of intoxicating liquors or other unlawful purposes, and no motor vehicle shall be sold by any sheriff, police or peace officer, or by any person, firm or corporation claiming a mechanic's or storage lien, or under judicial proceedings, until notice on a form approved by the Commissioner shall have been given the Commissioner at least 20 days before the date of such sale. (1937, c. 407, s. 78; 1943, c. 726; 1967, c. 862; 1971, c. 528, s. 13.)

§ 20-114.1. Willful failure to obey traffic officer; firemen as traffic officers. — (a) No person shall willfully fail or refuse to comply with any lawful order or direction of any law-enforcement officer invested by law with authority to direct, control or regulate traffic, which order or direction related to the control of traffic.

(b) In addition to other law-enforcement officers, uniformed regular and volunteer firemen may direct traffic and enforce traffic laws and ordinances at the scene of fires in connection with their duties as firemen, and uniformed regular and volunteer members of a rescue squad may direct and enforce traffic laws and ordinances at the scene of accidents in connection with their duties. Except as herein provided, firemen and members of rescue squads shall not be considered law-enforcement officers. (1961, c. 879; 1969, c. 59.)

Quoted in Bland v. City of Wilmington, 278 N.C. 657, 180 S.E.2d 813 (1971); Warren v. Parks, 31 N.C. App. 609, 230 S.E.2d 684 (1976).

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

§ 20-115. Scope and effect of regulations in this title. — It shall be unlawful and constitute a misdemeanor for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or vehicles of a size or weight exceeding the limitations stated in this title, or any vehicle or vehicles which are not so constructed or equipped as required in this title, or the rules and regulations of the Department of Transportation adopted pursuant thereto and the maximum size and weight of vehicles herein specified shall be lawful throughout this State, and local authorities shall have no power or authority to alter said limitations except as express authority may be granted in this Article. (1937, c. 407, s. 79; 1973, c. 507, s. 5; 1977, c. 464, s. 34.)

Editor's Note. — The 1977 amendment, effective July 1, 1977, substituted "Department of Transportation" for "Board of Transportation" near the middle of the section.

§ 20-116. Size of vehicles and loads. — (a) The total outside width of any vehicle or the load thereon shall not exceed 96 inches, except as otherwise provided in this section: Provided that when hogsheads of tobacco are being transported, a tolerance of five inches shall be allowed.

(b) No passenger-type vehicle shall be operated on any highway with any load carried thereon extending beyond the line of the fenders on the left side of such vehicle nor extending more than six inches beyond the line of the fenders on the right side thereof.

(c) No vehicle, unladen or with load, shall exceed a height of 13 feet, six inches. Provided, however, that neither the State of North Carolina nor any agency or

subdivision thereof, nor any person, firm or corporation, shall be required to raise, alter, construct or reconstruct any underpass, wire, pole, trestle, or other structure to permit the passage of any vehicle having a height, unladen or with load, in excess of 12 feet, six inches. Provided further, that the operator or owner of any vehicle having an overall height, whether unladen or with load, in excess of 12 feet, six inches, shall be liable for damage to any structure caused by such vehicle having a height in excess of 12 feet, six inches. The term "automobile transport" as used in this subsection shall mean only vehicles engaged exclusively in transporting automobiles, trucks and other commercial vehicles.

(d) A vehicle having two axles shall not exceed 35 feet in length of extreme overall dimensions inclusive of front and rear bumpers. A vehicle having three axles shall not exceed 40 feet in length overall of dimensions inclusive of front and rear bumpers. A truck-tractor and semitrailer shall be regarded as two vehicles for the purpose of determining lawful length and license taxes.

(e) No combination of vehicles coupled together shall consist of more than two units and no such combination of vehicles shall exceed a total length of 55 feet inclusive of front and rear bumpers, subject to the following exceptions: Said length limitation shall not apply to vehicles operated in the daytime when transporting poles, pipe, machinery or other objects of a structural nature which cannot readily be dismembered, nor to such vehicles transporting such objects operated at nighttime by a public utility when required for emergency repair of public service facilities or properties, but in respect to such night transportation every such vehicle and the load thereon shall be equipped with a sufficient number of clearance lamps on both sides and marker lamps upon the extreme ends of said projecting load to clearly mark the dimensions of such load: Provided, that wreckers in an emergency may tow a combination tractor and trailer to the nearest feasible point for repair and/or storage: Provided, that the Department of Transportation shall have authority to designate any highways upon the State system as light-traffic roads when, in the opinion of the Department of Transportation, such roads are inadequate to carry and will be injuriously affected by the maximum load, size, and/or width of trucks or buses using such roads as herein provided for, and all such roads so designated shall be conspicuously posted as light-traffic roads and the maximum load, size and/or width authorized shall be displayed on proper signs erected thereon. Provided, however, that a combination of a house trailer used as a mobile home, together with its towing vehicle, shall not exceed a total length of 55 feet exclusive of front and rear bumpers. The operation of any vehicle whose gross load, size and/or width exceed the maximum shown on such signs over the roads thus posted shall constitute a misdemeanor: Provided further, that no standard concrete highway, or other highway built of material of equivalent durability, and not less than 18 feet in width, shall be designated as a light-traffic road: Provided further, that the limitations placed on any road shall not be less than eighty percent (80%) of the standard weight, unless there shall be available an alternate improved route of not more than twenty percent (20%) increase in the distance; provided, however, that such restriction of limitations shall not apply to any county road, farm-to-market road, or any other road of the secondary system: Provided further, that the said limitation that no combination of vehicles coupled together shall consist of more than two units shall not apply to trailers not exceeding three in number drawn by a motor vehicle used by municipalities for the removal of domestic and commercial refuse and street rubbish, but such combination of vehicles shall not exceed a total length of 50 feet inclusive of front and rear bumpers. Provided further, that the said limitation that no combination of vehicles coupled together shall consist of more than two units shall not apply to a combination of vehicles coupled together by a saddle mount device used to transport motor vehicles in a driveway service when no more than two saddle mounts are used and provided further that equipment used in said

combination is approved by the safety regulations of the Interstate Commerce Commission and the safety regulations of the North Carolina Division of Motor Vehicles and the Department of Transportation.

(f) The load upon any vehicle operated alone, or the load upon the front vehicle of a combination of vehicles, shall not extend more than three feet beyond the front wheels of such vehicle or the front bumper of such vehicle, if it is equipped with such a bumper.

(g) No vehicle shall be driven or moved on any highway unless such vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping therefrom, except that sand may be dropped for the purpose of securing traction, or water or other substance may be sprinkled on a roadway in cleaning or maintaining such roadway.

Trucks, trailers or other vehicles when loaded with rock, gravel, stone or other similar substances which could blow, leak, sift or drop shall not be driven or moved on any highway unless the height of the load against all four walls does not extend above a horizontal line six inches below their tops when loaded at the loading point, or if not so loaded, unless the load shall be securely covered by tarpaulin or some other suitable covering, or unless it is otherwise constructed so as to prevent any of its load from dropping, sifting, leaking, blowing, or otherwise escaping therefrom.

Provided this section shall not be applicable to or in any manner restrict the transportation of poultry or livestock or silage or other feed grain used in the feeding of poultry or livestock.

(h) Wherever there exist two highways of the primary State highway system of approximately the same distance between two or more points, the Department of Transportation shall have authority when in the opinion of the Department of Transportation, based upon engineering and traffic investigation, safety will be promoted or the public interest will be served thereby, to designate one of said highways the "truck route" between said points, and to prohibit the use of the other highway by heavy trucks or other vehicles of a gross vehicle weight or axle load limit in excess of a designated maximum. In such instances the highways so selected for heavy vehicle traffic shall be so designated as "truck routes" by signs conspicuously posted thereon, and the highways upon which heavy vehicle traffic is prohibited shall likewise be so designated by signs conspicuously posted thereon showing the maximum gross vehicle weight or axle load limits authorized for said highways. The operation of any vehicle whose gross vehicle weight or axle load exceeds the maximum limits shown on such signs over the highway thus posted shall constitute a misdemeanor: Provided, that nothing herein shall prohibit a truck or other motor vehicle whose gross vehicle weight or axle load exceeds that prescribed for such highways from using such highway when the destination of such vehicle is located solely upon said highway, road or street: Provided, further, that nothing herein shall prohibit passenger vehicles or other light vehicles from using any highways so designated for heavy truck traffic.

(i) Repealed by Session Laws 1973, c. 1330, s. 39.

(j) Self-propelled grain combines or other farm equipment self-propelled, pulled or otherwise, not exceeding 18 feet in width may be operated on any highway, except a highway or section of highway that is a part of the National System of Interstate and Defense Highways: Provided that all such combines or equipment which exceed 10 feet in width may be so operated only under the following conditions:

(1) Said equipment may only be so operated during daylight hours; and

(2) Said equipment must display a red flag on front and rear, said flags shall not be smaller than three feet wide and four feet long and be attached to a stick, pole, staff, etc., not less than four feet long and shall be so attached to said equipment as to be visible from both directions at all

times while being operated on the public highway for not less than 300 feet; and

(3) Equipment [covered] by this section, which by necessity must travel more than 10 miles or where by nature of the terrain or obstacles the flags referred to in subdivision (2) are not visible from both directions for 300 feet at any point along the proposed route, must be preceded at a distance of 300 feet and followed at a distance of 300 feet by a flagman in a vehicle having mounted thereon an appropriate warning light or flag.

(4) Every such piece of equipment so operated shall operate to the right of the center line when meeting traffic coming from the opposite direction and at all other times when possible and practical.

(5) Violation of this section shall not constitute negligence per se.

(6) When said equipment is causing a delay in traffic, the operator of said equipment shall move the equipment off the paved portion of the highway at the nearest practical location until the vehicles following said equipment have passed.

(k) Nothing in this section shall be construed to prevent the operation of passenger buses having an overall width of 102 inches, exclusive of safety equipment, upon the highways of this State which are 20 feet or wider and that are designated as the State primary system, or as municipal streets, when, and not until, the federal law and regulations thereunder permit the operation of passenger buses having a width of 102 inches or wider on the National System of Interstate and Defense Highways. (1937, c. 246; c. 407, s. 80; 1943, c. 213, s. 1; 1945, c. 242, s. 1; 1947, c. 844; 1951, c. 495, s. 1; c. 733; 1953, cc. 682, 1107; 1955, c. 296, s. 2; c. 729; 1957, c. 65, s. 11; cc. 493, 1183, 1190; 1959, c. 559; 1963, c. 356, s. 1; c. 610, ss. 1, 2; c. 702, s. 4; c. 1027, s. 1; 1965, c. 471; 1967, c. 24, s. 4; c. 710; 1969, cc. 128, 880; 1971, cc. 128, 680, 688, 1079; 1973, c. 507, s. 5; c. 546; c. 1330, s. 39; 1975, c. 148, ss. 1-5; c. 716, s. 5; 1977, c. 464, s. 34.)

Local Modification. — City of Charlotte: 1955, c. 317.

Editor's Note. — The first 1975 amendment inserted "pulled" near the beginning of the introductory language of subsection (j), deleted near the middle of that language a proviso relating to special permits as provided in § 20-119, deleted "further" following "Provided" near the end of that language, deleted at the end of subdivision (2) of subsection (j) "and said equipment shall travel only on routes designated by the special permit required under this section and for distances not to exceed 10 miles" and rewrote subdivision (3) of subsection (j). Section 5 of the first 1975 amendatory act has been added by the editors as subdivision (6) of subsection (j).

The second 1975 amendment substituted "Division" for "Department" near the end of subsection (e).

The word "covered" following "Equipment" at the beginning of subdivision (3) of subsection (j) was omitted, apparently through inadvertence, in that subdivision as it appears in the first 1975 amendatory act, and has been inserted by the editors in brackets.

The 1977 amendment substituted "Department of Transportation" for "Board of Transportation" in the second proviso in subsection (e), at the end of subsection (e), and in two places in the first sentence of subsection (h).

Height of Vehicle. — See Dennis v. City of Albemarle, 242 N.C. 263, 87 S.E.2d 561 (1955).

This section, prohibiting the extension of any part of the load of a passenger vehicle beyond the line of the fenders on the left side of such vehicle, imposes a duty for the safety of other vehicles on the highway, and is not conclusive on the question of contributory negligence of a passenger riding on the running board, with none of his body extending beyond the line of the fenders, who is injured by the negligent operation of another vehicle. Roberson v. Carolina Taxi Serv., 214 N.C. 624, 200 S.E. 363 (1939).

Transporting Pole in Daytime without Special Permit Is Not Negligence Per Se. — Vehicles transporting poles in the daytime are exempt from the requirements of subsection (e) of this section, and therefore during the daytime it is not negligence per se to transport without a special permit a 40-foot pole on a trailer. Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966).

Subsection (g) Does Not Require the Peak of a Load on a Truck, Trailer or Other Vehicle

to Be Six Inches below a Horizontal Line Six Inches below the Top of All Four Sidewalls. — See opinion of Attorney General to Colonel Edwin C. Guy, North Carolina State Highway Patrol, 41 N.C.A.G. 708 (1972).

Proviso to Subsection (g) Does Not Apply to Transportation of Empty, Unloaded Poultry Containers. — See opinion of Attorney General to Mr. Broxie Nelson, Raleigh City Attorney, 43 N.C.A.G. 340 (1974).

Evidence Insufficient to Sustain Violation of Subsection (j). — The defendant's contention that the plaintiff violated subsection (j) of this section, which constitutes negligence per se, was untenable because there was no evidence in the record that the plaintiff's combine exceeded 10 feet in width so as to bring the case within the purview of subsection (j), where the plaintiff's evidence, taken in the light most favorable to him, showed that the combine was nine feet 11 inches in width while being moved upon the road and the defendant's evidence tended only to show the width of the combine when in actual operation and not when being moved along the highway. Furr v. Overcash, 254 N.C. 611, 119 S.E.2d 465 (1961).

Quoted in Lyday v. Southern Ry., 253 N.C. 687, 117 S.E.2d 778 (1961).

Cited in Hobbs v. Drewer, 226 N.C. 146, 37 S.E.2d 121 (1946); State Hwy. Comm'n v. Raleigh Farmers Mkt., Inc., 263 N.C. 622, 139 S.E.2d 904 (1965).

§ 20-117. Flag or light at end of load. — Whenever the load on any vehicle shall extend more than four feet beyond the rear of the bed or body thereof, there shall be displayed at the end of such load, in such position as to be clearly visible at all times from the rear of such load, a red flag not less than 12 inches both in length and width, except that between one-half hour after sunset and one-half hour before sunrise there shall be displayed at the end of any such load a red light plainly visible under normal atmospheric conditions at least 200 feet from the rear of such vehicle. (1937, c. 407, s. 81.)

Purpose of Section. — The obvious purpose of this section is to promote the safety of one following a loaded vehicle upon the highway. Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966).

And Meaning. — The clear meaning of this section is that during daylight hours a red flag shall be displayed from the end of the projecting load so that there shall be visible to a user of the highway following the vehicle at least 12 inches of the flag's length and 12 inches of the flag's width. Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966).

Draping Flag over Load. — The requirement of this section is not met by draping over the top of the load a red flag of the required dimensions so that only a fringe of it is visible to one following the vehicle upon the highway. Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966).

Violation of Section Is Negligence. — The failure of the defendant to display a red light at the end of the lumber, which extended more than four feet beyond the rear of the bed or body of the truck, plainly visible under normal atmospheric conditions at least 200 feet from the rear of the truck, between one-half hour after sunset and one-half hour before sunrise, as required by this section, was negligence. Weavil v. Myers, 243 N.C. 386, 90 S.E.2d 733 (1956).

Violation of this section by failure to display at night a light, such as is required thereby, is negligence. Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966).

The violation of this section during the daylight hours, by failure to comply with its requirements applicable to such time, is negligence. Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966).

The former law was cited in Williams v. Frederickson Motor Express Lines, 198 N.C. 193, 151 S.E. 197 (1930).

Applied in Bumgardner v. Allison, 238 N.C. 621, 78 S.E.2d 752 (1953).

Cited in C.C.T. Equip. Co. v. Hertz Corp., 256 N.C. 277, 123 S.E.2d 802 (1962).

§ 20-117.1. Equipment required on all semitrailers operated by contract carriers or common carriers of property. — (a) Rear-Vision Mirror. — Every tractor shall be equipped with at least one rear-vision mirror, firmly attached to the motor vehicle and so located as to reflect to the driver a view of the highway to the rear.

(b) Fuel Container Not to Project. — No part of any fuel tank or container or intake pipe shall project beyond the sides of the motor vehicle. (1949, c. 1207, s. 1; 1951, c. 819, s. 1; 1955, c. 1157, ss. 1, 4.)

§ 20-118. Weight of vehicles and load. — No vehicle or combination of vehicles shall be moved or operated on any highway or bridge when the gross weight thereof exceeds the limits specified below:

(1) When the wheel is equipped with high-pressure pneumatic, solid rubber or cushion tire, 8,000 pounds.

(2) When the wheel is equipped with low-pressure pneumatic tire, 9,000 pounds.

(3) The gross weight on any one axle of the vehicle when the wheels attached to said axle are equipped with high-pressure solid rubber or cushion tires, 16,000 pounds.

(4) The single axle weight when the wheels attached to said axle are equipped with low-pressure pneumatic tires, 19,000 pounds, provided that the maximum weight per axle when in tandem shall remain at 18,000 pounds.

(5) For each violation of subdivisions (3) or (4), or for each violation of the maximum axle-weight limits established by the Department of Transportation in connection with light-traffic roads, the owner of the vehicle shall pay to the Division a penalty for each pound of weight of [on] such axle in excess of the said maximum weight in accordance with the following schedule: for the first 1,000 pounds or any part thereof, two cents (2¢) per pound; for the next 1,000 pounds or any part thereof, three cents (3¢) per pound; and for each additional pound, five cents (5¢) per pound. Provided, however, the penalty shall not apply if the excess weight on any one axle does not exceed 1,000 pounds. Said 1,000 pounds shall constitute a tolerance and no additional tolerance on axle weight shall be granted administratively or otherwise. In all cases of violation of the axle-weight limitation, the penalty shall be computed and assessed on each pound of weight in excess of the maximum permitted in subdivisions (3) and (4) including the 1,000-pound tolerance. The penalties herein provided shall constitute sole punishment for violation of this subdivision and violators thereof shall not be subject to criminal action. Provided, that a truck or other motor vehicle whose axle load exceeds that prescribed for light-traffic roads shall be exempt from such limitations when transporting supplies, material or equipment necessary to carry out a farming operation engaged in the production of meats and row crops when the destination of such vehicle and load is located solely upon said light-traffic road. Provided further that a truck or other motor vehicle whose axle load exceeds that prescribed for light-traffic roads shall be exempt from such limitations when transporting meats and row crop products originating from a farm on a light-traffic road to the nearest State maintained road which is not posted to prohibit the transportation of statutory legal load limits. Provided further that nothing herein contained shall be construed in order to raise the load limit heretofore or hereafter set by the Department of Transportation on any bridge. In the event of undue damage to any light-traffic road heretofore referred as a result of this action, such road or roads may then be restricted by the Division of Highways. Provided, that when it is discovered that a vehicle is in violation of subdivisions (3) or (4), or is in violation of the maximum axle-weight limits established by the Department of Transportation in connection with light-traffic roads, the owner of the vehicle shall be permitted to shift without penalty the weight from one axle to another to comply with the axle limits set forth in this section in the following instances, provided, that the gross weight of the vehicle is within the legal limit:

a. In cases where the single-axle load exceeds the statutory limits, but does not exceed 21,000 pounds.

b. In cases where the vehicle has tandem axles and the weight exceeds the statutory limits, but does not exceed 40,000 pounds for any two-axle combination or 60,000 pounds for any three-axle combination.

c. In cases where the axle weight does not exceed 15,500 pounds and the limit placed on the road or highway by the Department of Transportation is 13,000 pounds per axle.

(6) Axle Weights. — For the purposes of this section, the following definitions shall apply:

a. Single-axle weight. — The total load on all wheels whose centers are included within two parallel transverse planes less than 48 inches apart.

b. Tandem-axle weight. — The total load on all wheels whose centers are at least 48 inches apart but not more than 104 inches apart and are equipped with a connecting mechanism designed to equalize the load on all axles except that as to any vehicle equipped with tandem axles prior to July 1, 1969, the portion of this definition concerning a connecting mechanism designed to equalize the load on all axles shall not apply.

(7) For the purposes of this section every pneumatic tire designed for use and used when inflated with air to less than 100 pounds pressure shall be deemed a low-pressure pneumatic tire, and every pneumatic tire inflated to 100 pounds pressure or more shall be deemed a high-pressure pneumatic tire.

(8) The gross weight of any vehicle having two axles shall not exceed 30,000 pounds, unless used in connection with a combination consisting of four axles or more. For the purpose of determining the maximum weight to be allowed for passenger buses to be operated upon the highways of this State, the Commissioner of Motor Vehicles shall require, prior to the issuance of license, a certificate showing the weight of such bus when fully equipped for the road. No license shall be issued to any passenger bus with two axles having a weight, when fully equipped for operation on the highways, of more than 22,500 pounds, and no license shall be issued for any passenger bus with three axles having a weight, when fully equipped for operation on the highways, of more than 30,000 pounds, unless the bus for which application for license is made shall have been licensed in the State of North Carolina prior to the first day of February, 1949. No special permits shall be issued for any passenger buses exceeding the foregoing specified weights for each group.

(9) The gross weight of any vehicle or combination of vehicles having three axles shall not exceed 47,500 pounds. For the purpose of determining gross weight, no axle shall be considered unless the wheels thereof are equipped with adequate brakes. For the purposes of this subdivision, brakes shall not be required on the front wheels; provided, however, such vehicle must be capable of complying with the performance requirements of G.S. 20-124(e).

(10) The gross weight of any vehicle or combination of vehicles having four or more axles shall not exceed 64,000 pounds. For the purpose of determining gross weight, no axle shall be considered unless the wheels thereof are equipped with adequate brakes; provided, the gross weight of any vehicle or combination of vehicles having five or more axles shall not exceed the maximum weight given for the respective distance between the first and last axle of the group of axles measured longitudinally to the nearest foot as set forth in the following table:

Distance in feet between the extremes of any axles	*Maximum weight in pounds on any 5-axle group*
35 or under	70,000
36	70,500
37	71,000
38	72,000
39	72,500
40	73,000
41	73,500
42	74,000
43	75,000
44	75,500
45	76,000

For the purpose of determining gross weight, no axle shall be considered unless the wheels thereof are equipped with adequate brakes: Provided a wrecker towing a disabled vehicle or vehicles of an emergency nature, only the weight of the vehicle or combination of vehicles being towed shall be considered. For the purposes of this subdivision, brakes shall not be required on the front wheels; provided, however, such vehicle must be capable of complying with the performance requirements of G.S. 20-124(e).

(11) The gross weight with normal load of passengers of any vehicle propelled by electric power obtained from trolley wires, but not operated upon rails, commonly known as an electric trackless trolley coach, which is operated as a part of the general trackless trolley system of passenger transportation of the City of Greensboro and vicinity, shall not exceed 30,000 pounds.

(12) No vehicle shall be operated on any highway the weight of which, resting on the surface of such highway, exceeds 600 pounds upon any inch of tire roller or other support.

Any vehicle or combination of vehicle and load may exceed the gross weight limitations for the vehicle or vehicle and load hereinbefore set out in this section by not more than five per centum (5%), except that under no circumstances shall the total weight, including tolerance, exceed 73,280 pounds on the National System of Interstate and Defense Highways unless changed by federal law.

For each violation of the gross weight limitation for the vehicle or vehicle and load the owner of the vehicle shall pay to the Division a penalty for each pound of weight of such vehicle or vehicle and load in excess of the weight limitations, including the five percent (5%), hereinbefore set out in this section for each vehicle or vehicle and load in accordance with the following schedule: for the first 2,000 pounds or any part thereof, one cent (1¢) per pound; for the next 3,000 pounds or any part thereof, two cents (2¢) per pound; for each pound in excess of 5,000 pounds, five cents (5¢) per pound.

Any vehicle or combination of vehicles operated on any highway on the State highway system shall also be subject to the safe load-carrying capacity for bridges as established and posted by the Department of Transportation pursuant to G.S. 136-72. (1937, c. 407, s. 82; 1943, c. 213, s. 2; cc. 726, 784; 1945, c. 242, s. 2; c. 569, s. 2; c. 576, s. 7; 1947, c. 1079; 1949, c. 1207, s. 2; 1951, c. 495, s. 2; c. 942, s. 1; c. 1013, ss. 5, 6, 8; 1953, cc. 214, 1092; 1959, c. 872; c. 1264, s. 6; 1963, c. 159; c. 610, ss. 3-5; c. 702, s. 5; 1965, cc. 483, 1044; 1969, c. 537; 1973, c. 507, s. 5; c. 1449, ss. 1, 2; 1975, c. 325; c. 373, s. 2; c. 716, s. 5; c. 735; c. 736, ss. 1-3; 1977, c. 461; c. 464, s. 34.)

Editor's Note. — The first 1975 amendment deleted, immediately following the table of distances and weights in subdivision (10), a proviso which read: "Provided the tandem-axle weight shall not exceed 35,700 pounds where the gross weight of any vehicle or combination of vehicles having five or more axles exceeds 73,000 pounds."

The second 1975 amendment added the last paragraph of the section.

The third 1975 amendment substituted "Division" for "Department" in subdivision (5) and in the next-to-last paragraph of the section.

The fourth 1975 amendment substituted present subdivision (4) for a provision which read: "When the wheels attached to said axle are equipped with low-pressure pneumatic tires, 18,000 pounds."

The fifth 1975 amendment added the present sixth, eighth and ninth sentences in subdivision (5).

The first 1977 amendment added the seventh sentence of subdivision (5).

The second 1977 amendment substituted "Department of Transportation" for "Board of Transportation" throughout the section.

Penalty Qualifies As "Tax." — The penalties prescribed in this section are deemed a "tax" under § 20-96 and qualify as "any tax" as used in § 20-91.1. Cedar Creek Enterprises, Inc. v. State Dep't of Motor Vehicles, 290 N.C. 450, 226 S.E.2d 336 (1976).

The penalties provided in subdivisions (5) and (12) are mandatory. Opinion of Attorney General to Mr. J.F. Alexander, 44 N.C.A.G. 307 (1975).

§ 20-118.1. Peace officer may weigh vehicle and require removal of excess load; refusal to permit weighing. — Any peace officer having reason to believe that the weight of a vehicle and load is unlawful is authorized to weigh the same either by means of portable or stationary scales, and may require that such vehicle be driven to the nearest scales in the event such scales are within two miles. The officer may then require the driver to unload immediately such portion of the load as may be necessary to decrease the gross weight of such vehicle to the maximum therefor specified in this Article. All material so unloaded shall be cared for by the owner or operator of such vehicle at the risk of such owner or operator. Any person who refuses to permit a vehicle being operated by him to be weighed as in this section provided or who refuses to drive said vehicle upon the scales provided for weighing for the purpose of being weighed, shall be guilty of a misdemeanor. (1927, c. 148, s. 37; 1949, c. 1207, s. 3; 1951, c. 1013, s. 4.)

§ 20-118.2. Authority to fix higher weight limitations at reduced speeds for certain vehicles. — The Department of Transportation is hereby authorized and empowered to fix higher weight limitations at reduced speeds for vehicles used in transporting property when the point of origin or destination of the motor vehicles is located upon any light traffic highway, county road, farm-to-market road, or any other roads of the secondary system only and/or to the extent only that the motor vehicle is necessarily using said highway in transporting the property from the bona fide point of origin of the property being transported or to the bona fide point of destination of said property and such weights may be different from the weight of those vehicles otherwise using such roads. (1951, c. 1013, s. 7A; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 34.)

Editor's Note. — The 1977 amendment substituted "Department of Transportation" for "Board of Transportation" near the beginning of the section.

§ 20-119. Special permits for vehicles of excessive size or weight. — The Department of Transportation may, in their discretion, upon application in writing and good cause being shown therefor, issue a special permit in writing authorizing the applicant to operate or move a vehicle of a size or weight exceeding a maximum specified in this Article upon any highway under the jurisdiction and for the maintenance of which the body granting the permit is responsible. Every such permit shall be carried in the vehicle to which it refers and shall be open to inspection by any peace officer; and it shall be a misdemeanor for any person to violate any of the terms or conditions of such

special permit: Provided, the authorities in any incorporated city or town may grant permits in writing and for good cause shown, authorizing the applicant to move a vehicle over the streets of such city or town, the size or width exceeding the maximum expressed in this Article. (1937, c. 407, s. 83; 1957, c. 65, s. 11; 1959, c. 1129; 1973, c. 507, s. 5; 1977, c. 464, s. 34.)

Editor's Note. — The 1977 amendment substituted "Department of Transportation" for "Board of Transportation" in the first sentence.

This section was enacted for the protection of the traveling public. Lyday v. Southern Ry., 253 N.C. 687, 117 S.E.2d 778 (1961).

Violation as Negligence Per Se. — The failure to obtain a permit to operate oversize or overweight vehicles in violation of this section is negligence per se. Byers v. Standard Concrete Prods. Co., 268 N.C. 518, 151 S.E.2d 38 (1966).

Violation as Contributory Negligence. — Whether violation of this section by the plaintiff constitutes contributory negligence depends on whether or not such violation is a proximate cause, or one of the proximate causes, of the damages suffered by the plaintiff. Lyday v. Southern Ry., 253 N.C. 687, 117 S.E.2d 778 (1961).

Transporting Pole in Daytime without Special Permit Is Not Negligence Per Se. — Vehicles transporting poles in the daytime are exempt from the requirements of § 20-116(e), and therefore during the daytime it is not negligence per se to transport without a special permit a 40-foot pole on a trailer. Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966).

§ 20-120. Operation of flat trucks on State highways regulated; trucks hauling leaf tobacco in barrels or hogsheads. — It shall be unlawful for any person, firm or corporation to operate, or have operated on any public highway in the State any open, flat truck loaded with logs, cotton bales, boxes or other load piled on said truck, without having the said load securely fastened on said truck.

It shall be unlawful for any firm, person or corporation to operate or permit to be operated on any highway of this State a truck or trucks on which leaf tobacco in barrels or hogsheads is carried unless each section or tier of such barrels or hogsheads are reasonably securely fastened to such truck or trucks by metal chains or wire cables, or manila or hemp ropes of not less than five-eighths inch in diameter, to hold said barrels or hogsheads in place under any ordinary traffic or road condition: Provided that the provisions of this paragraph shall not apply to any truck or trucks on which the hogsheads or barrels of tobacco are arranged in a single layer, tier, or plane, it being the intent of this paragraph to require the use of metal chains or wire cables only when barrels or hogsheads of tobacco are stacked or piled one upon the other on a truck or trucks. Nothing in this paragraph shall apply to trucks engaged in transporting hogsheads or barrels of tobacco between factories and storage houses of the same company unless such hogsheads or barrels are placed upon the truck in tiers. In the event the hogsheads or barrels of tobacco are placed upon the truck in tiers same shall be securely fastened to the said truck as hereinbefore provided in this paragraph.

Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. (1939, c. 114; 1947, c. 1094; 1953, c. 240.)

§ 20-121. When authorities may restrict right to use highways. — The Department of Transportation or local authorities may prohibit the operation of vehicles upon or impose restrictions as to the weight thereof, for a total period not to exceed 90 days in any one calendar year, when operated upon any highway under the jurisdiction of and for the maintenance of which the body adopting the ordinance is responsible, whenever any said highway by reason of deterioration, rain, snow or other climatic conditions will be damaged unless the use of vehicles thereon is prohibited or the permissible weights thereof reduced. The local authority enacting any such ordinance shall erect, or cause to be erected and maintained, signs designating the provisions of the ordinance at

each end of that portion of any highway to which the ordinance is applicable, and the ordinance shall not be effective until or unless such signs are erected and maintained. (1937, c. 407, s. 84; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 34.)

Cross Reference. — As to powers of municipal corporations as to streets, see § 160A-296 et seq.

Editor's Note. — The 1977 amendment substituted "Department of Transportation" for "Board of Transportation" in the first sentence.

§ 20-122. Restrictions as to tire equipment. — (a) Every solid rubber tire on a vehicle moved on any highway shall have rubber on its entire traction surface at least one and a half inches thick above the edge of the flange of the entire periphery.

(b) No tire on a vehicle moved on a highway shall have on its periphery any block, stud, flange, cleat or spike or any other protuberance of any material other than rubber which projects beyond the tread of the traction surface of the tire, except that it shall be permissible to use farm machinery with tires having protuberances which will not injure the highway and except, also, that it shall be permissible to use tire chains of reasonable proportions upon any vehicle when required for safety because of snow, ice or other conditions tending to cause a vehicle to slide or skid. It shall be permissible to use upon any vehicle for increased safety, regular and snow tires with studs which project beyond the tread of the traction surface of the tire not more than one sixteenth of an inch when compressed.

(c) The Department of Transportation or local authorities in their respective jurisdictions may, in their discretion, issue special permits authorizing the operation upon a highway of traction engines or tractors having movable tracks with transverse corrugation upon the periphery of such movable tracks or farm tractors of other farm machinery.

(d) It shall not be unlawful to drive farm tractors on dirt roads from farm to farm: Provided, in doing so they do not damage said dirt roads or interfere with traffic. (1937, c. 407, s. 85; 1939, c. 266; 1957, c. 65, s. 11; 1965, c. 435; 1973, c. 507, s. 5; 1977, c. 464, s. 34.)

Editor's Note. — The 1977 amendment substituted "Department of Transportation" for "Board of Transportation" in subsection (c).

Cited in State Hwy. Comm'n v. Raleigh Farmers Mkt., Inc., 263 N.C. 622, 139 S.E.2d 904 (1965).

§ 20-122.1. Motor vehicles to be equipped with safe tires. — (a) Every motor vehicle subject to safety equipment inspection in this State and operated on the streets and highways of this State shall be equipped with tires which are safe for the operation of the motor vehicle and which do not expose the public to needless hazard. Tires shall be considered unsafe if cut so as to expose tire cord, cracked so as to expose tire cord, or worn so as to expose tire cord or there is a visible tread separation or chunking or the tire has less than two thirty-seconds inch tread depth: Provided, the two thirty-seconds tread depth requirements of this section shall not apply to dual wheel trailers. Provided further that as to trucks owned by farmers and operated exclusively in the carrying and transportation of the owner's farm products which are approved for daylight use only and which are equipped with dual wheels, the tread depth requirements of this section shall not apply to more than one wheel in each set of dual wheels. For the purpose of this section, the following definitions shall apply:

(1) "Chunking" — separation of the tread from the carcass in particles which may range from very small size to several square inches in area.
(2) "Cord" — strands forming a ply in a tire.
(3) "Tread" — portion of tire which comes in contact with road.

(4) "Tread depth" — the distance, measured near the center line of the tire, from the base of the tread design to the top of the tread.

(b) The driver of any vehicle who is charged with a violation of this section shall be allowed 15 calendar days within which to bring the tires of such vehicle in conformance with the requirements of this section. It shall be a defense to any such charge that the person arrested produce in court, or submit to the prosecuting attorney prior to trial, a certificate from an official safety inspection equipment station showing that within 15 calendar days after such arrest, the tires on such vehicle had been made to conform with the requirements of this section or that such vehicle had been sold, destroyed, or permanently removed from the highways. Violation of this section shall not constitute negligence per se. (1969, c. 378, s. 1; c. 1256.)

§ 20-123. Trailers and towed vehicles. — (a) No motor vehicle shall be driven upon any highway drawing or having attached thereto more than one trailer or semitrailer: Provided that this provision shall not apply to trailers not exceeding three in number drawn by a motor vehicle used by municipalities for the removal of domestic and commercial refuse and street rubbish, but such combination of vehicles shall not exceed a total length of 50 feet inclusive of front and rear bumpers: Provided that this provision shall not apply to a combination of vehicles coupled together by a saddle mount device used to transport motor vehicles in a driveaway service when no more than two saddle mounts are used and provided further that equipment used in said combination is approved by the safety regulations of the Interstate Commerce Commission and the safety regulations of the North Carolina Division of Motor Vehicles and the Department of Transportation. Nothing herein shall prohibit the towing of farm trailers and equipment in single tandem during the period from one-half hour before sunrise and one-half hour after sunset, but such combination of vehicles shall not exceed a total length of 40 feet and provided there is displayed on the rear of the last vehicle being towed, in such position as to be clearly visible at all times, a red flag not less than 12 inches both in length and width. The towing of farm trailers and equipment as herein permitted shall not be applicable to interstate or federal numbered highways.

(b) No trailer or semitrailer or other towed vehicle shall be operated over the highways of the State unless such trailer or semitrailer or other towed vehicle be firmly attached to the rear of the motor vehicle drawing same, and unless so equipped that it will not snake, but will travel in the path of the vehicle drawing such trailer or semitrailer or other towed vehicle, which equipment shall at all times be kept in good condition. (1937, c. 407, s. 86; 1955, c. 296, s. 3; 1963, c. 356, s. 2; c. 1027, s. 2; 1965, c. 966; 1971, c. 639; 1973, c. 507, s. 5; 1975, c. 716, s. 5; 1977, c. 464, s. 34.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsection (a).

The 1977 amendment substituted "Department of Transportation" for "Board of Transportation" in subsection (a).

One using a vehicle trailer on the public highways is required to exercise reasonable care, both as to the equipment of the trailer and as to the operation of the vehicle to which it is attached. Miller v. Lucas, 267 N.C. 1, 147 S.E.2d 537 (1966).

In the case of a trailer not controlled in its movements by any person thereon, the operator of the vehicle to which the trailer is attached must exercise reasonable care to see that it is properly attached and that the progress of the two vehicles does not cause danger or injury. Miller v. Lucas, 267 N.C. 1, 147 S.E.2d 537 (1966).

And Violation of Section Is Negligence Per Se. — A violation of this section intended and designed to prevent injury to persons or property on the highways is negligence per se. Miller v. Lucas, 267 N.C. 1, 147 S.E.2d 537 (1966).

Liability for Defect in Trailer Hitch. — The owner of a motor vehicle to which a trailer is attached is generally held liable for loss or injury proximately by reason of a defect in the trailer fastening or hitch, resulting in the trailer breaking loose and becoming detached from the motor vehicle. Miller v. Lucas, 267 N.C. 1, 147 S.E.2d 537 (1966).

The owner of a motor vehicle with a trailer attached is generally held not liable for loss or injury inflicted by reason of a defect in the trailer fastening or hitch resulting in the trailer breaking loose, where he did not have knowledge of such defect, and would not have discovered it by reasonable inspection. Miller v. Lucas, 267 N.C. 1, 147 S.E.2d 537 (1966).

§ 20-123.1. Steering mechanism. — The steering mechanism of every self-propelled motor vehicle operated on the highway shall be maintained in good working order, sufficient to enable the operator to control the vehicle's movements and to maneuver it safely. (1957, c. 1038, s. 3.)

§ 20-124. Brakes. — (a) Every motor vehicle when operated upon a highway shall be equipped with brakes adequate to control the movement of and to stop such vehicle or vehicles, and such brakes shall be maintained in good working order and shall conform to regulations provided in this section.

(b) Repealed by Session Laws 1973, c. 1330, s. 39.

(c) Every motor vehicle when operated on a highway shall be equipped with brakes adequate to control the movement of and to stop and hold such vehicle, and shall have all originally equipped brakes in good working order, including two separate means of applying the brakes. If these two separate means of applying the brakes are connected in any way, they shall be so constructed that failure of any one part of the operating mechanism shall not leave the motor vehicle without brakes.

(d) Every motorcycle and every motor-driven cycle when operated upon a highway shall be equipped with at least one brake which may be operated by hand or foot.

(e) Motor trucks and tractor-trucks with semitrailers attached shall be capable of stopping on a dry, hard, approximately level highway free from loose material at a speed of 20 miles per hour within the following distances: Thirty feet with both hand and service brake applied simultaneously and 50 feet when either is applied separately, except that vehicles maintained and operated permanently for the transportation of property and which were registered in this or any other state or district prior to August, 1929, shall be capable of stopping on a dry, hard, approximately level highway free from loose material at a speed of 20 miles per hour within a distance of 50 feet with both hand and service brake applied simultaneously, and within a distance of 75 feet when either applied separately.

(ee) Every motor truck and tractor-truck with semitrailer attached, shall be equipped with brakes acting on all wheels, except trucks and truck-tractors having three or more axles need not have brakes on the front wheels, except that when such vehicles are equipped with at least two steerable axles, the wheels of one steerable axle need not have brakes. However, such trucks and truck-tractors must be capable of complying with the performance requirements of G.S. 20-124(e).

(f) Every semitrailer, or trailer, or separate vehicle, attached by a drawbar or coupling to a towing vehicle, and having a gross weight of two tons, and all house trailers of 1,000 pounds gross weight or more, shall be equipped with brakes controlled or operated by the driver of the towing vehicle, which shall conform to the specifications set forth in subsection (e) of this section and shall be of a type approved by the Commissioner.

It shall be unlawful for any person or corporation engaged in the business of selling house trailers at wholesale or retail to sell or offer for sale any house trailer which is not equipped with the brakes required by this subsection.

This subsection shall not apply to house trailers being used as dwellings, or to house trailers not intended to be used or towed on public highways and roads. This subsection shall not apply to house trailers with a manufacturer's certificate of origin dated prior to December 31, 1974.

(g) The provisions of this section shall not apply to any trailer or semitrailer when used by a farmer, his tenant, agent, or employee under such circumstances

that such trailer or semitrailer is exempt from registration by the provisions of G.S. 20-51.

(h) From and after July 1, 1955, no person shall sell or offer for sale for use in motor vehicle brake systems in this State any hydraulic brake fluid of a type and brand other than those approved by the Commissioner of Motor Vehicles. From and after January 1, 1970, no person shall sell or offer for sale in motor vehicle brake systems any brake lining of a type or brand other than those approved by the Commissioner of Motor Vehicles. Violation of the provisions of this subsection shall constitute a misdemeanor. (1937, c. 407, s. 87; 1953, c. 1316, s. 2; 1955, c. 1275; 1959, c. 990; 1965, c. 1031; 1967, c. 1188; 1969, cc. 787, 866; 1973, c. 1203; c. 1330, s. 39.)

Legislative Purpose. — This section was enacted to promote safe operation of motor vehicles on the highways. Stephens v. Southern Oil Co., 259 N.C. 456, 131 S.E.2d 39 (1963).

The purpose of this section is to protect from injury all persons using the highway, both occupants of the vehicle in question and others. Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967).

Section Is Mandatory. — The language of this section is mandatory. Stephens v. Southern Oil Co., 259 N.C. 456, 131 S.E.2d 39 (1963).

But Section Must Be Given Reasonable Interpretation. — Although the language of this section is mandatory, the statute must be given a reasonable interpretation to promote its intended purpose. Stephens v. Southern Oil Co., 259 N.C. 456, 131 S.E.2d 39 (1963); Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967); Stone v. Mitchell, 5 N.C. App. 373, 168 S.E.2d 668 (1969).

The duty imposed by this section rests both upon the owner and upon the driver of the vehicle, though knowledge of a defect, or negligence in failing to discover it, on the part of the one would not necessarily be imputed to the other. Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967).

The legislature did not intend to make operators of motor vehicles insurers of the adequacy of their brakes. The operator must act with care and diligence to see that his brakes meet the standard prescribed by this section; but if because of some latent defect, unknown to the operator and not reasonably discoverable upon proper inspection, he is not able to control the movement of his car, he is not negligent, and for that reason not liable for injuries directly resulting from such loss of control; such injuries result from an unavoidable accident. Stephens v. Southern Oil Co., 259 N.C. 456, 131 S.E.2d 39 (1963); Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967); Stone v. Mitchell, 5 N.C. App. 373, 168 S.E.2d 668 (1969).

Violation Negligence Per Se. — Violation of this section is negligence per se, but such violation must be proximate cause of injury to become actionable. Tysinger v. Coble Dairy Prods., 225 N.C. 717, 36 S.E.2d 246 (1945); Arnett v. Yeago, 247 N.C. 356, 100 S.E.2d 855 (1957); Watts v. Watts, 252 N.C. 352, 113 S.E.2d 720 (1960); Bundy v. Belue, 253 N.C. 31, 116 S.E.2d 200 (1960); Tate v. Bryant, 16 N.C. App. 132, 191 S.E.2d 433 (1972).

One who fails to comply with the provisions of this section is negligent. Stephens v. Southern Oil Co., 259 N.C. 456, 131 S.E.2d 39 (1963).

If the negligence resulting from failure to comply with the provisions of this section proximately causes injury, liability results. Stephens v. Southern Oil Co., 259 N.C. 456, 131 S.E.2d 39 (1963).

The violation of this section and other safety statutes is negligence per se, unless the statute expressly provides otherwise. McCall v. Dixie Cartage & Warehousing, Inc., 272 N.C. 190, 158 S.E.2d 72 (1967).

Where the plaintiff has shown the defendant's brakes to be defective, this is negligence per se. Anderson v. Robinson, 8 N.C. App. 224, 174 S.E.2d 45 (1970).

Liability of Bailor. — When a prospective purchaser of an automobile is permitted by the dealer to take the car and drive it for the purpose of trying it out to determine whether he wishes to buy it, no representative of the dealer accompanying him, the relationship between the dealer and the prospective purchaser is that of bailor and bailee. The bailment is one for the mutual benefit of the parties. Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967).

The bailor, even though a dealer in secondhand automobiles and engaged in the repair of automobiles, is not an insurer of the brakes upon a vehicle held by him for sale and delivered by him to a prospective customer for a trial drive upon the highway. Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967).

A bailor who knows, or by a reasonable inspection of his vehicle should know, that its brakes are defective and unsafe, is negligent in permitting that vehicle to be taken from his premises and driven upon the highway by a bailee and may be held liable in damages to a third person injured by the operation of such vehicle, if such defect in its brakes is the proximate cause of such injury. Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967).

The burden is upon the plaintiff to prove that the bailor, at the time he allowed the vehicle to leave his possession for such purpose, knew, or in the exercise of reasonable care in the inspection of the vehicle should have known, that the brakes were defective. Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967).

Runaway Automobile; Inference. — The fact that an automobile ran down the street for a considerable distance immediately after it was parked, permits the inference that plaintiff's intestate did not turn its front wheels to the curb of the street, as required by this section and § 20-163. Watts v. Watts, 252 N.C. 352, 113 S.E.2d 720 (1960).

Delivery of Automobile with Defective Brakes. — Whether defendant breached his duty to the intestates of plaintiff by delivering to them an automobile when he knew, or by the exercise of ordinary care should have known, the brakes were defective and operation was dangerous held a question for the jury. Austin v. Austin, 252 N.C. 283, 113 S.E.2d 553 (1960).

Fold-Out Camper Trailers Are Not House Trailers. — See opinion of Attorney General to The Honorable Donald R. Kincaid, Member of Senate, N.C. General Assembly, 45 N.C.A.G. 210 (1976).

The doctrine of res ipsa loquitur does not apply to a brake failure several hours and many miles after delivery of the car to the bailee. Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967).

Reasonable Excuse for Failure to Comply with Section. — In recognition of the principle that this statute must be reasonably construed and applied, defendant could offer proof of legal excuse in avoidance of his failure to have observed the duty created by this section, i.e., proof that an occurrence wholly without his fault made compliance with the section impossible at the moment complained of and which proper care on his part would not have avoided. Upon adducing the substantial evidence tending to so prove, it is then a jury question as to whether the defendant was negligent for failure to have provided a foot brake in good working order. Anderson v. Robinson, 8 N.C. App. 224, 174 S.E.2d 45 (1970).

The defendant may excuse violation of this section by showing a sudden and unexpected brake failure not the result of his failure to reasonably inspect the vehicle. Tate v. Bryant, 16 N.C. App. 132, 191 S.E.2d 433 (1972).

Question of Proximate Cause Is for Jury. — Whether a violation of the provisions of this section is one proximate cause of an injury is for the jury to determine. Stephens v. Southern Oil Co., 259 N.C. 456, 131 S.E.2d 39 (1963).

Harmless Instruction. — A charge as to proper brakes on motor vehicles, in compliance with this section, where the evidence shows no mention of brakes, is a harmless inadvertence. Hopkins v. Colonial Stores, Inc., 224 N.C. 137, 29 S.E.2d 455 (1944).

Evidence Sufficient to Negative Prima Facie Case of Negligence. — Defendants' evidence to the effect that brakes on the corporate defendant's vehicle had been overhauled and relined and had worked perfectly until some two days thereafter when the brakes suddenly failed, causing the accident in suit, and that after the collision it was ascertained that the flange on one of the wheels was broken, permitting the brake fluid to escape, was held to require the court to instruct the jury that if they accepted defendants' evidence it was sufficient to negative the prima facie case of negligence made out by plaintiff's evidence of the failure of the brakes on defendant's vehicle. Stephens v. Southern Oil Co., 259 N.C. 456, 131 S.E.2d 39 (1963).

Applied in Burlington Indus., Inc. v. State Hwy. Comm'n, 262 N.C. 620, 138 S.E.2d 281 (1964).

Quoted in Newbern v. Leary, 215 N.C. 134, 1 S.E.2d 384 (1939).

Cited in Crotts v. Overnite Transp. Co., 246 N.C. 420, 98 S.E.2d 502 (1957); Jones v. C.B. Atkins Co., 259 N.C. 655, 131 S.E.2d 371 (1963); Warren v. Jeffries, 263 N.C. 531, 139 S.E.2d 718 (1965); State Hwy. Comm'n v. Raleigh Farmers Mkt., Inc., 263 N.C. 622, 139 S.E.2d 904 (1965); Vann v. Hayes, 266 N.C. 713, 147 S.E.2d 186 (1966).

§ 20-125. Horns and warning devices. — (a) Every motor vehicle when operated upon a highway shall be equipped with a horn in good working order capable of emitting sound audible under normal conditions from a distance of not less than 200 feet, and it shall be unlawful, except as otherwise provided in this section, for any vehicle to be equipped with or for any person to use upon a vehicle any siren, compression or spark plug whistle or for any person at any time to use a horn otherwise than as a reasonable warning or to make any unnecessary or unreasonable loud or harsh sound by means of a horn or other warning device. All such horns and warning devices shall be maintained in good working order and shall conform to regulation not inconsistent with this section to be promulgated by the Commissioner.

(b) Every vehicle owned and operated by a police department or by the State Highway Patrol or by the Wildlife Resources Commission and used exclusively for law-enforcement purposes, or by a fire department, either municipal or rural, or by a fire patrol, whether such fire department or patrol be a paid organization or a voluntary association, vehicles designed, equipped and used exclusively for the transportation of human tissues and organs for transplantation, and every ambulance used for answering emergency calls, shall be equipped with special lights, bells, sirens, horns or exhaust whistles of a type approved by the Commissioner of Motor Vehicles.

The operators of all such vehicles so equipped are hereby authorized to use such equipment at all times while engaged in the performance of their duties and services, both within their respective corporate limits and beyond.

In addition to the use of special equipment authorized and required by this subsection, the chief and assistant chiefs of any police department or of any fire department, whether the same be municipal or rural, paid or voluntary, county fire marshals and civil preparedness coordinators, are hereby authorized to use such special equipment on privately owned vehicles operated by them while actually engaged in the performance of their official or semiofficial duties or services either within or beyond their respective corporate limits.

And vehicles driven by inspectors in the employ of the North Carolina Utilities Commission shall be equipped with a bell, siren, or exhaust whistle of a type approved by the Commissioner, and all vehicles owned and operated by the State Bureau of Investigation for the use of its agents and officers in the performance of their official duties may be equipped with special lights, bells, sirens, horns or exhaust whistles of a type approved by the Commissioner of Motor Vehicles.

Every vehicle used or operated for law-enforcement purposes by the sheriff or any salaried deputy sheriff or salaried rural policeman of any county, whether owned by the county or not, may be, but is not required to be, equipped with special lights, bells, sirens, horns or exhaust whistles of a type approved by the Commissioner of Motor Vehicles. Such special equipment shall not be operated or activated by any person except by a law-enforcement officer while actively engaged in performing law-enforcement duties.

In addition to the use of special equipment authorized and required by this subsection, the chief and assistant chiefs of each emergency rescue squad which is recognized or sponsored by any municipality or civil preparedness agency, are hereby authorized to use such special equipment on privately owned vehicles operated by them while actually engaged in their official or semiofficial duties or services either within or beyond the corporate limits of the municipality which recognizes or sponsors such organization.

(c) Notwithstanding any other provisions of law, the following vehicles may be equipped with a special blue warning light of a type approved by the Commissioner of Motor Vehicles:

(1) All publicly owned vehicles used primarily for law-enforcement purposes;

(2) All other vehicles used primarily by law-enforcement officers in the performance of their official duties.

It shall be unlawful for such blue lights to be installed on a vehicle other than those enumerated in (c) above, or for such blue lights to be activated or operated by any person except a law-enforcement officer who is actively engaged in performing lawful duties. (1937, c. 407, s. 88; 1951, cc. 392, 1161; 1955, c. 1224; 1959, c. 166, s. 1; c. 494; c. 1170, s. 1; c. 1209; 1965, c. 257; 1975, c. 588; c. 734, s. 15; 1977, c. 52, s. 1; c. 438, s. 1.)

Local Modification. — Brunswick: 1959, c. 211; Edgecombe: 1955, c. 1024.

Editor's Note. — Session Laws 1975, c. 588, substituted "assistant chiefs" for "one assistant chief" near the beginning of the third paragraph of subsection (b).

Session Laws 1975, c. 734, s. 15, directed that subsection (b) of this section be amended by

substituting "civil preparedness" for "civil defense" in the third sentence of the sixth paragraph. The intention was evidently to amend the third line of the sixth paragraph, which consists of a single sentence, and the editors have so treated the amendment.

The first 1977 amendment inserted "county fire marshals and civil preparedness coordinators" near the middle of the third paragraph of subsection (b).

The second 1977 amendment inserted, in the first paragraph of subsection (b), "vehicles designed, equipped and used exclusively for the transportation of human tissues and organs for transplantation."

Distinction between Vehicles Making Normal Use of Highway and Those Engaged in Emergency Uses. — The legislature, in prescribing practical warning devices for use on motor vehicles, drew a distinction between vehicles making normal use of the highway and those engaged in emergency uses. For normal use, a horn audible for 200 feet under normal conditions was deemed adequate, under subsection (a) of this section; but something different and manifestly with a more authoritative voice and greater volume was expected of vehicles on emergency errands under subsection (b). McEwen Funeral Serv., Inc. v. Charlotte City Coach Lines, 248 N.C. 146, 102 S.E.2d 816 (1958).

Blue Light for Law-Enforcement Vehicles May Be Used. — See opinion of Attorney General to Chief W.W. Pleasants, Durham Chief of Police, 40 N.C.A.G. 391 (1970).

Applied in State v. Speights, 12 N.C. App. 32, 182 S.E.2d 204 (1971).

Cited in State v. Speights, 280 N.C. 137, 185 S.E.2d 152 (1971).

§ 20-125.1. Directional signals. — (a) It shall be unlawful for the owner of any motor vehicle of a changed model or series designation indicating that it was manufactured or assembled after July 1, 1953, to register such vehicle or cause it to be registered in this State, or to obtain, or cause to be obtained in this State registration plates therefor, unless such vehicle is equipped with a mechanical or electrical signal device by which the operator of the vehicle may indicate to the operator of another vehicle, approaching from either the front or rear and within a distance of 200 feet, his intention to turn from a direct line. Such signal device must be of a type approved by the Commissioner of Motor Vehicles.

(b) It shall be unlawful for any dealer to sell or deliver in this State any motor vehicle of a changed model or series designation indicating that it was manufactured or assembled after July 1, 1953, if he knows or has reasonable cause to believe that the purchaser of such vehicle intends to register it or cause it to be registered in this State or to resell it to any other person for registration in and use upon the highways of this State, unless such motor vehicle is equipped with a mechanical or electrical signal device by which the operator of the vehicle may indicate to the operator of another vehicle, approaching from either of the front or rear or within a distance of 200 feet, his intention to turn from a direct line. Such signal device must be of a type approved by the Commissioner of Motor Vehicles: Provided that in the case of any motor vehicle manufactured or assembled after July 1, 1953, the signal device with which such motor vehicle is equipped shall be presumed prima facie to have been approved by the Commissioner of Motor Vehicles. Irrespective of the date of manufacture of any motor vehicle a certificate from the Commissioner of Motor Vehicles to the effect that a particular type of signal device has been approved by his Division shall be admissible in evidence in all the courts of this State.

(c) Trailers satisfying the following conditions are not required to be equipped with a directional signal device:

(1) The trailer and load does not obscure the directional signals of the towing vehicle from the view of a driver approaching from the rear and within a distance of 200 feet;

(2) The gross weight of the trailer and load does not exceed 4,000 pounds.

(d) Nothing in this section shall apply to motorcycles. (1953, c. 481; 1957, c. 488, s. 1; 1963, c. 524; 1969, c. 622; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" near the end of subsection (b).

§ 20-126. Mirrors. — (a) No person shall drive a motor vehicle on the streets or highways of this State unless equipped with an inside rearview mirror of a type approved by the Commissioner, which provides the driver with a clear, undistorted, and reasonably unobstructed view of the highway to the rear of such vehicle; provided, a vehicle so constructed or loaded as to make such inside rearview mirror ineffective may be operated if equipped with a mirror of a type to be approved by the Commissioner located so as to reflect to the driver a view of the highway to the rear of such vehicle. A violation of this subsection shall not constitute negligence per se in civil actions. Farm tractors, self-propelled implements of husbandry and construction equipment and all self-propelled vehicles not subject to registration under this Chapter are exempt from the provisions of this section. Provided that pickup trucks equipped with an outside rearview mirror approved by the Commissioner shall be exempt from the inside rearview mirror provision of this section.

(b) It shall be unlawful for any person to operate upon the highways of this State any vehicle manufactured, assembled or first sold on or after January 1, 1966 and registered in this State unless such vehicle is equipped with at least one outside mirror mounted on the driver's side of the vehicle. Mirrors herein required shall be of a type approved by the Commissioner.

(c) No person shall operate a motorcycle upon the streets or highways of this State unless such motorcycle is equipped with a rearview mirror so mounted as to provide the operator with a clear, undistorted and unobstructed view of at least 200 feet to the rear of the motorcycle. No motorcycle shall be registered in this State after January 1, 1968, unless such motorcycle is equipped with a rearview mirror as described in this section. Violation of the provisions of this subsection shall not be considered negligence per se or contributory negligence per se in any civil action. (1937, c. 407, s. 89; 1965, c. 368; 1967, c. 282, s. 1; c. 674, s. 2; c. 1139.)

Editor's Note. — Session Laws 1967, c. 282, s. 12, provides that any inside mirror installed in any motor vehicle by its manufacturer shall be deemed to comply with subsection (a) of this section.

The violation of this section and other safety statutes is negligence per se, unless the statute expressly provides otherwise. McCall v. Dixie Cartage & Warehousing, Inc., 272 N.C. 190, 158 S.E.2d 72 (1967).

Cited in Bechtler v. Bracken, 218 N.C. 515, 11 S.E.2d 721 (1940).

§ 20-127. Windshields must be unobstructed. — (a) It shall be unlawful for any person to drive any vehicle upon a highway with any sign, poster or other nontransparent material upon the front windshield, side wings, side or rear window of such motor vehicle other than a certificate or other paper required to be so displayed by law, or approved by the Commissioner of Motor Vehicles.

(b) No motor vehicle which is equipped with a permanent windshield shall be operated upon the highways unless said windshield is equipped with a device for cleaning snow, rain, moisture, or other matters from the windshield directly in front of the operator, which device shall be in good working order and so constructed as to be controlled or operated by the operator of the vehicle. Provided, on any vehicle equipped by its manufacturer with such devices on both the right and left sides of windshield, both such devices shall be in working order. The device required by this subsection shall be of a type approved by the Commissioner.

(c) The windshield, rear and side glasses of a motor vehicle must be free from discoloration which impair the driver's vision or create a hazard. (1937, c. 407, s. 90; 1953, c. 1254; 1955, c. 1157, s. 2; 1959, c. 1264, s. 7; 1967, c. 1077.)

§ 20-128. Prevention of noise, smoke, etc.; muffler cut-outs regulated. — (a) No person shall drive a motor vehicle on a highway unless such motor vehicle is equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise, annoying smoke and smoke screens.

(b) It shall be unlawful to use a "muffler cut-out" on any motor vehicle upon a highway.

(c) No motor vehicle registered in this State which was manufactured after model year 1967 shall be operated in this State unless it is equipped with such emission-control devices to reduce air pollution as were installed at the time of manufacture, provided the foregoing requirement shall not apply where such devices have been removed for the purpose of converting the motor vehicle to operate on natural or liquified petroleum gas or other modifications have been made in order to reduce air pollution, further provided that such modifications shall have first been approved by the Department of Water and Air Resources [Department of Natural Resources and Community Development]. (1937, c. 407, s. 91; 1971, c. 455, s. 1.)

Editor's Note. — Session Laws 1973, c. 1262, which reorganized the Department of Natural and Economic Resources, did not provide for substituting "Department of Natural and Economic Resources" for "Department of Water and Air Resources" throughout the General Statutes, but, because the functions of the former Department of Water and Air Resources have devolved upon the Department of Natural and Economic Resources, the editors inserted "Department of Natural and Economic Resources" in brackets in this section.

The title of the Department of Natural and Economic Resources was changed to Department of Natural Resources and Community Development by Session Laws 1977, c. 771, s. 4.

Warrant held sufficient to charge violation of this section. State v. Daughtry, 236 N.C. 316, 72 S.E.2d 658 (1952).

Cited in State v. Woolard, 260 N.C. 133, 132 S.E.2d 364 (1963); Stanley v. Department of Conservation & Dev., 284 N.C. 15, 199 S.E.2d 641 (1973).

§ 20-128.1. Control of visible emissions. — (a) It shall be a violation of this Article:

(1) For any gasoline-powered motor vehicle registered and operated in this State to emit visible air contaminants under any mode of operation for longer than five consecutive seconds.

(2) For any diesel-powered motor vehicle registered and operated in this State to emit for longer than five consecutive seconds under any mode of operation visible air contaminants which are equal to or darker than the shade or density designated as No. 1 on the Ringelmann Chart or are equal to or darker than a shade or density of twenty percent (20%) opacity.

(b) Any person charged with a violation of this section shall be allowed 30 days within which to make the necessary repairs or modification to bring the motor vehicle into conformity with the standards of this section and to have the motor vehicle inspected and approved by the agency issuing the notice of violation. Any person who, within 30 days of receipt of a notice of violation, and prior to inspection and approval by the agency issuing the notice, receives additional notice or notices of violation, may exhibit a certificate of inspection and approval from the agency issuing the first notice in lieu of inspection and approval by the agencies issuing the subsequent notices.

(c) The provisions of this section shall be enforceable by all persons designated in G.S. 20-49; by all law-enforcement officers of this State within their respective jurisdictions; by the personnel of local air pollution control

agencies within their respective jurisdictions; and by personnel of State air pollution control agencies throughout the State.

(d) Any person who fails to comply with the provisions of this section shall be subject to the penalties provided in G.S. 20-176. (1971, c. 1167, s. 10.)

Cited in Stanley v. Department of Conservation & Dev., 284 N.C. 15, 199 S.E.2d 641 (1973).

§ 20-129. Required lighting equipment of vehicles. — (a) When Vehicles Must Be Equipped. — Every vehicle upon a highway within this State during the period from a half hour after sunset to a half hour before sunrise, and at any other time when there is not sufficient light to render clearly discernible any person on the highway at a distance of 200 feet ahead, shall be equipped with lighted headlamps and rear lamps as in this section respectively required for different classes of vehicles, and subject to exemption with reference to lights on parked vehicles as declared in G.S. 20-134.

(b) Headlamps on Motor Vehicles. — Every self-propelled motor vehicle other than motorcycles, road machinery, and farm tractors shall be equipped with at least two headlamps, all in good operating condition with at least one on each side of the front of the motor vehicle. Headlamps shall comply with the requirements and limitations set forth in G.S. 20-131 or G.S. 20-132.

(c) Headlamps on Motorcycles. — Every motorcycle shall be equipped with at least one and not more than two headlamps which shall comply with the requirements and limitations set forth in G.S. 20-131 or 20-132. The headlamps on a motorcycle shall be lighted at all times while the motorcycle is in operation on highways or public vehicular areas.

(d) Rear Lamps. — Every motor vehicle, and every trailer or semitrailer attached to a motor vehicle and every vehicle which is being drawn at the end of a combination of vehicles, shall have all originally equipped rear lamps or the equivalent in good working order, which lamps shall exhibit a red light plainly visible under normal atmospheric conditions from a distance of 500 feet to the rear of such vehicle. One rear lamp or a separate lamp shall be so constructed and placed that the number plate carried on the rear of such vehicle shall under like conditions be illuminated by a white light as to be read from a distance of 50 feet to the rear of such vehicle. Every trailer or semitrailer shall carry at the rear, in addition to the originally equipped lamps, a red reflector of the type which has been approved by the Commissioner and which is so located as to height and is so maintained as to be visible for at least 500 feet when opposed by a motor vehicle displaying lawful undimmed lights at night on an unlighted highway.

Notwithstanding the provisions of the first paragraph of this subsection, it shall not be necessary for a trailer weighing less than 4,000 pounds to carry or be equipped with a rear lamp, provided such vehicle is equipped with and carries at the rear two red reflectors of a diameter of not less than four inches, such reflectors to be approved by the Commissioner, and which are so designed and located as to height and are maintained so that each reflector is visible for at least 500 feet when approached by a motor vehicle displaying lawful undimmed headlights at night on an unlighted highway.

The rear lamps of a motorcycle shall be lighted at all times while the motorcycle is in operation on highways or public vehicular areas.

(e) Lamps on Bicycles. — Every bicycle shall be equipped with a lighted lamp on the front thereof, visible under normal atmospheric conditions from a distance of at least 300 feet in front of such bicycle, and shall also be equipped with a reflex mirror or lamp on the rear, exhibiting a red light visible under like

conditions from a distance of at least 200 feet to the rear of such bicycle, when used at night.

(f) Lights on Other Vehicles. — All vehicles not heretofore in this section required to be equipped with specified lighted lamps shall carry on the left side one or more lighted lamps or lanterns projecting a white light, visible under normal atmospheric conditions from a distance of not less than 500 feet to the front of such vehicle and visible under like conditions from a distance of not less than 500 feet to the rear of such vehicle, or in lieu of said lights shall be equipped with reflectors of a type which is approved by the Commissioner. Farm tractors operated on a highway at night must be equipped with at least one white lamp visible at a distance of 500 feet from the front of the tractor and with at least one red lamp visible at a distance of 500 feet to the rear of the tractor. Two red reflectors each having a diameter of at least four inches may be used on the rear of the tractor in lieu of the red lamp.

(g) No person shall sell or operate on the highways of the State any motor vehicle, motorcycle or motor-driven cycle, manufactured after December 31, 1955, unless it shall be equipped with a stop lamp on the rear of the vehicle. The stop lamp shall display a red or amber light visible from a distance of not less than 100 feet to the rear in normal sunlight, and shall be actuated upon application of the service (foot) brake. The stop lamp may be incorporated into a unit with one or more other rear lamps. (1937, c. 407, s. 92; 1939, c. 275; 1947, c. 526; 1955, c. 1157, ss. 3-5, 8; 1957, c. 1038, s. 1; 1967, cc. 1076, 1213; 1969, c. 389; 1973, c. 531, ss. 1, 2.)

Cross Reference. — See note to § 20-131.

Purpose of Section. — This section was enacted to minimize the hazards incident to the movement of motor vehicles upon the public roads during the nighttime. Thomas v. Thurston Motor Lines, 230 N.C. 122, 52 S.E.2d 377 (1949).

This section was enacted for the protection of persons and property and in the interest of public safety, and the preservation of human life. State v. Norris, 242 N.C. 47, 86 S.E.2d 916 (1955).

This section was enacted in the interest of public safety. Scarborough v. Ingram, 256 N.C. 87, 122 S.E.2d 798 (1961); Oxendine v. Lowry, 260 N.C. 709, 133 S.E.2d 687 (1963); White v. Mote, 270 N.C. 544, 155 S.E.2d 75 (1967).

This is a safety statute enacted for the protection of persons and property. Brown v. Boren Clay Prods. Co., 5 N.C. App. 418, 168 S.E.2d 452 (1969).

Section Applies to State Highway System Only. — The provisions of this section are not applicable to defendants' truck parked or stopped on a street in the city when plaintiff has neither allegation nor proof to show that the street forms a part of the State highway system. Coleman v. Burris, 265 N.C. 404, 144 S.E.2d 241 (1965).

Section 20-161 does not conflict with nor reduce the obligation imposed on the operator of a motor vehicle stopped or parked on the highway at night to light his vehicle as required by this section and § 20-134. Melton v. Crotts, 257 N.C. 121, 125 S.E.2d 396 (1962).

What Constitutes Violation. — Driving a motor vehicle without lights during the period from a half hour after sunset to a half hour before sunrise violates this section and is punishable as prescribed by § 20-176(b). State v. Eason, 242 N.C. 59, 86 S.E.2d 774 (1955).

Operating a motor vehicle on a public highway at night without lights is a violation of this section. Williamson v. Varner, 252 N.C. 446, 114 S.E.2d 92 (1960).

Violation as Negligence Per Se. — The operation of a tractor-trailer on the highways at night without the rear and clearance lights burning as required by this section is negligence per se. Thomas v. Thurston Motor Lines, 230 N.C. 122, 52 S.E.2d 377 (1949).

The violation of this section is negligence per se. Williamson v. Varner, 252 N.C. 446, 114 S.E.2d 92 (1960); Correll v. Gaskins, 263 N.C. 212, 139 S.E.2d 202 (1964); Faison v. T & S Trucking Co., 266 N.C. 383, 146 S.E.2d 450 (1966); McNulty v. Chaney, 1 N.C. App. 610, 162 S.E.2d 90 (1968); Brown v. Boren Clay Prods. Co., 5 N.C. App. 418, 168 S.E.2d 452 (1969); Hardison v. Williams, 21 N.C. App. 670, 205 S.E.2d 551 (1974).

The violation of this section constitutes negligence as a matter of law. Scarborough v. Ingram, 256 N.C. 87, 122 S.E.2d 798 (1961); Oxendine v. Lowry, 260 N.C. 709, 133 S.E.2d 687 (1963); White v. Mote, 270 N.C. 544, 155 S.E.2d 75 (1967).

One who operates a vehicle at night without lights, or with improper lights, is negligent. Reeves v. Campbell, 264 N.C. 224, 141 S.E.2d 296 (1965).

Riding a bicycle on the highway at night without a lamp of any kind on the front thereof

is a violation of this section and is negligence per se. Oxendine v. Lowry, 260 N.C. 709, 133 S.E.2d 687 (1963).

And as Misdemeanor under § 20-176. — The violation of this section is a misdemeanor under § 20-176. Williamson v. Varner, 252 N.C. 446, 114 S.E.2d 92 (1960).

Lights on Motor Vehicles Serve Two Purposes. — The lights required by this section serve two purposes: (1) to enable the operator of the automobile to see what is ahead of him; (2) to inform others of the approach of the automobile. Reeves v. Campbell, 264 N.C. 224, 141 S.E.2d 296 (1965).

The function of a front light or headlight, defined by this section and § 20-131, is to produce a driving light sufficient, under normal atmospheric conditions, to enable the operator to see a person 200 feet ahead. O'Berry v. Perry, 266 N.C. 77, 145 S.E.2d 321 (1965); Miller v. Wright, 272 N.C. 666, 158 S.E.2d 824 (1968).

The adequacy of headlights upon a motor vehicle, in normal atmospheric conditions, is determined by this section and § 20-131. Miller v. Wright, 272 N.C. 666, 158 S.E.2d 824 (1968).

Purpose of Front Lamp on Bicycle. — Subsection (e) of this section, respecting a front lamp on a bicycle, is designed for the benefit of those approaching a bicycle from the front and for the protection of the bicyclist from such. Oxendine v. Lowry, 260 N.C. 709, 133 S.E.2d 687 (1963).

And of Red Reflector. — The red reflector required under subsection (e) is designed to protect the bicyclist from vehicles approaching from the rear and to give notice to such vehicles of the presence of the bicycle ahead. Oxendine v. Lowry, 260 N.C. 709, 133 S.E.2d 687 (1963).

Bicycle-Riding on Highway without Lights Was Negligence. — In a wrongful death case, if deceased was riding his bicycle, without lights, at night upon a public highway, he was guilty of negligence. Miller v. Enzor, 17 N.C. App. 510, 195 S.E.2d 86 (1973).

Intensity of Light. — Subsection (e) in no way requires a light of such intensity as to render objects visible along the highway in front of the bicycle. Oxendine v. Lowry, 260 N.C. 709, 133 S.E.2d 687 (1963).

Negligence in not having a light on the rear of a truck will not preclude recovery against one who drove his car into the truck, unless it contributed to the injury. Hughes v. Luther, 189 N.C. 841, 128 S.E. 145 (1925).

Absence of Rear Lights on Smoke-Covered Road. — Where plaintiff's evidence tended to show that he was driving at night along a highway covered with smoke from fires along its side and that he collided with the rear of an oil truck which was headed in the same direction and which had been stopped on the highway without rear lights in violation of this section, it was held that, conceding negligence on the part of defendant, plaintiff's evidence discloses contributory negligence barring recovery as a matter of law, either in driving at a speed in excess of that at which he could stop within the distance to which his lights would disclose the existence of obstructions, or, if he could have seen the oil truck in time to have avoided a collision, in failing to do so. Sibbitt v. R. & W. Transit Co., 220 N.C. 702, 18 S.E.2d 203 (1942).

Parking on highway without lights 40 minutes before sunrise is unlawful. Smith v. Nunn, 257 N.C. 108, 125 S.E.2d 351 (1962).

Bicycle Being Carried by Pedestrian. — Plaintiff's evidence was to the effect that at nighttime he was carrying a child's bicycle, too small for him to ride, across a street intersection to a repair shop, and that he was hit by a vehicle entering the intersection against the stoplight at a high rate of speed. The court held that the refusal to give defendant's requested instruction that the failure to have a light on the bicycle was a violation of subsection (f) [now subsection (e)] of this section was not error, since under the circumstances plaintiff was a pedestrian rather than a cyclist. Holmes v. Blue Bird Cab, Inc., 227 N.C. 581, 43 S.E.2d 71 (1947), decided prior to the 1955 amendment.

Disabled Vehicle. — A tractor-trailer standing on the paved portion of a highway at nighttime is required to have the rear and clearance lights burning as provided by this section, regardless of whether or not the vehicle is disabled within the meaning of § 20-161(c). Thomas v. Thurston Motor Lines, 230 N.C. 122, 52 S.E.2d 377 (1949).

It is negligence to permit a disabled bus to stand on a highway at night without lights, blocking a lane of traffic, without giving warning to approaching vehicles. Dezern v. Asheboro City Bd. of Educ., 260 N.C. 535, 133 S.E.2d 204 (1963).

Right of Motorist to Assume That Other Vehicle Will Display Lights. — A motorist has the right to act upon the assumption, until he has notice to the contrary, that no other motorist will permit a motor vehicle either to move or to stand on the highway without displaying thereon the lights required by this section and § 20-134. Chaffin v. Brame, 233 N.C. 377, 64 S.E.2d 276 (1951). See Towe v. Stokes, 117 F. Supp. 880 (M.D.N.C. 1954); United States v. First-Citizens Bank & Trust Co., 208 F.2d 280 (4th Cir.), aff'g Rosenblatt v. United States, 112 F. Supp. 114 (E.D.N.C. 1953).

A plaintiff until he saw, or by the exercise of due care should have seen, the approach of defendant's car, was entitled to assume and to act upon the assumption that no motorist would be traveling without lights in violation of this section. White v. Lacey, 245 N.C. 364, 96 S.E.2d 1 (1957).

Whether Obstruction Should Have Been Seen Is Jury Question. — Generally speaking,

where the statutes, as this section, or the decisions of the courts, require red lights as a warning of danger on any object in the highway and such lights are not present, it is a question for the jury to determine whether the driver at night should have seen the obstruction, notwithstanding the absence of red lights. Morris v. Sells-Floto Circus, Inc., 65 F.2d 782 (4th Cir. 1933).

Instructions. — The court correctly instructed the jury in specific detail that the defendant would be chargeable with negligence if he drove a school bus having a width in excess of 80 inches on the highway during the nighttime without displaying burning clearance lights thereon as required by this section. This instruction was correct, even though the duty to keep the lighting system on the vehicle in good working order may have rested on the defendant's employer and not on the defendant. The latter was not empowered to set a positive statute at naught merely because his employer may have furnished him a vehicle with a defective lighting system. Hansley v. Tilton, 234 N.C. 3, 65 S.E.2d 300 (1951).

Defendant was held entitled to an instruction, even in the absence of request therefor, in substance, as follows: If the jury find by the greater weight of the evidence that plaintiff stopped his car and permitted it to stand, without lights, on the paved portion of the road in defendant's right lane of travel, such conduct on the part of the plaintiff would constitute negligence as a matter of law; and if the jury find by the greater weight of the evidence that such negligence was a proximate cause of the collision and plaintiff's injuries, the jury is instructed to answer the contributory negligence issue, "Yes." Correll v. Gaskins, 263 N.C. 212, 139 S.E.2d 202 (1964).

Where plaintiff's evidence fails to show that his bicycle was equipped with a lighted lamp on the front thereof, but does show that he had a reflecting mirror on its rear, and that plaintiff's bicycle was hit from the rear by a car operated by defendant, and there is no evidence in the record that if the bicycle had been equipped with a front lamp, the lamp would have been visible to a person approaching in an automobile from the rear of the bicycle, the Supreme Court held the only legitimate inference is that the absence of a lighted lamp on the front of the bicycle was not a proximate cause or a contributing proximate cause of the collision, and the court may properly charge the jury to this effect. Oxendine v. Lowry, 260 N.C. 709, 133 S.E.2d 687 (1963).

Evidence Sufficient for Jury. — Evidence tending to show that the headlights on defendant's car were defective and that he was driving at a speed of 60 to 65 miles an hour and that, in a sudden effort to avoid colliding with another automobile which had been backed into the highway and which was apparently not in motion at the time, defendant drove off the road, causing the car to overturn, inflicting serious injury to plaintiff, a guest in the car, requires the submission of the case to the jury. Stewart v. Stewart, 221 N.C. 147, 19 S.E.2d 242 (1942).

Evidence that the car in which plaintiff was riding as a guest struck defendant's trailer which was standing across the highway in the car's lane of traffic, and that the trailer did not have burning the lights required by this section, is sufficient to overrule defendant's motion to nonsuit and motion for a directed verdict in its favor on the issue of negligence, since the question of proximate cause under the evidence is for the jury. Thomas v. Thurston Motor Lines, 230 N.C. 122, 52 S.E.2d 377 (1949).

Evidence Showing Violation of Section. — See Powell v. Lloyd, 234 N.C. 481, 67 S.E.2d 664 (1951); White v. Mote, 270 N.C. 544, 155 S.E.2d 75 (1967).

Applied in McKinnon v. Howard Motor Lines, 228 N.C. 132, 44 S.E.2d 735 (1947); Pascal v. Burke Transit Co., 229 N.C. 435, 50 S.E.2d 534 (1948); Gantt v. Hobson, 240 N.C. 426, 82 S.E.2d 384 (1954) (as to subsection (d)); Punch v. Landis, 258 N.C. 114, 128 S.E.2d 224 (1962); Griffin v. Watkins, 269 N.C. 650, 153 S.E.2d 356 (1967); Williamson v. McNeill, 8 N.C. App. 625, 175 S.E.2d 294 (1970).

Quoted in part in Morris v. Jenrette Transp. Co., 235 N.C. 568, 70 S.E.2d 845 (1952).

Cited in Newbern v. Leary, 215 N.C. 134, 1 S.E.2d 384 (1939); Pike v. Seymour, 222 N.C. 42, 21 S.E.2d 884 (1942); Morgan v. Cook, 236 N.C. 477, 73 S.E.2d 296 (1952); Hollifield v. Everhart, 237 N.C. 313, 74 S.E.2d 706 (1953); Smith v. City of Kinston, 249 N.C. 160, 105 S.E.2d 648 (1958); Meece v. Dickson, 252 N.C. 300, 113 S.E.2d 578 (1960); Smith v. Goldsboro Iron & Metal Co., 257 N.C. 143, 125 S.E.2d 377 (1962); State Hwy. Comm'n v. Raleigh Farmers Mkt., Inc., 263 N.C. 622, 139 S.E.2d 904 (1965).

§ 20-129.1. Additional lighting equipment required on certain vehicles. — In addition to other equipment required in this Chapter, the following vehicles shall be equipped as follows:

(1) On every bus or truck, whatever its size, there shall be the following:

On the rear, two reflectors, one at each side, and one stoplight.

(2) On every bus or truck 80 inches or more in overall width, in addition to the requirements in subdivision (1):

On the front, two clearance lamps, one at each side.

On the rear, two clearance lamps, one at each side.

On each side, two side marker lamps, one at or near the front and one at or near the rear.

On each side, two reflectors, one at or near the front and one at or near the rear.

(3) On every truck tractor:

On the front, two clearance lamps, one at each side.

On the rear, one stoplight.

(4) On every trailer or semitrailer having a gross weight of 4,000 pounds or more:

On the front, two clearance lamps, one at each side.

On each side, two side marker lamps, one at or near the front and one at or near the rear.

On each side, two reflectors, one at or near the front and one at or near the rear.

On the rear, two clearance lamps, one at each side, also two reflectors, one at each side, and one stoplight.

(5) On every pole trailer having a gross weight of 4,000 pounds or more:

On each side, one side marker lamp and one clearance lamp which may be in combination, to show to the front, side and rear.

On the rear of the pole trailer or load, two reflectors, one at each side.

(6) On every trailer, semitrailer or pole trailer having a gross weight of less than 4,000 pounds:

On the rear, two reflectors, one on each side. If any trailer or semitrailer is so loaded or is of such dimensions as to obscure the stoplight on the towing vehicle, then such vehicle shall also be equipped with one stoplight.

(7) Front clearance lamps and those marker lamps and reflectors mounted on the front or on the side near the front of a vehicle shall display or reflect an amber color.

(8) Rear clearance lamps and those marker lamps and reflectors mounted on the rear or on the sides near the rear of a vehicle shall display or reflect a red color.

(9) All lighting devices and reflectors mounted on the rear of any vehicle shall display or reflect a red color, except the stoplight or other signal device, which may be red, amber or yellow, and except that the light illuminating the license plate shall be white and the light emitted by a backup lamp shall be white or amber. (1955, c. 1157, s. 4; 1969, c. 387.)

This section was enacted in the interest of public safety. Scarborough v. Ingram, 256 N.C. 87, 122 S.E.2d 798 (1961); Oxendine v. Lowry, 260 N.C. 709, 133 S.E.2d 687 (1963); White v. Mote, 270 N.C. 544, 155 S.E.2d 75 (1967).

Its violation constitutes negligence as a matter of law. Scarborough v. Ingram, 256 N.C. 87, 122 S.E.2d 798 (1961); Oxendine v. Lowry, 260 N.C. 709, 133 S.E.2d 687 (1963); White v. Mote, 270 N.C. 544, 155 S.E.2d 75 (1967).

Applied in Smith v. Goldsboro Iron & Metal Co., 257 N.C. 143, 125 S.E.2d 377 (1962).

Cited in Atkins v. Moye, 277 N.C. 174, 176 S.E.2d 729 (1970).

§ 20-129.2. Lighting equipment for mobile homes. — Notwithstanding the provisions of G.S. 20-129 and 20-129.1, the lighting equipment required to be provided and equipped on a house trailer, mobile home, modular home, or structural component thereof shall be as designated by the Commissioner of Motor Vehicles and from time to time promulgated by regulation of the Division. (1975, c. 716, s. 5; c. 833, s. 1.)

Editor's Note. — Pursuant to Session Laws 1975, c. 716, s. 5, "Division" has been substituted for "Department" at the end of the section as enacted by Session Laws 1975, c. 833, s. 1.

§ 20-130. Additional permissible light on vehicle. — (a) Spot Lamps. — Any motor vehicle may be equipped with not to exceed two spot lamps, except that a motorcycle shall not be equipped with more than one spot lamp, and every lighted spot lamp shall be so aimed and used upon approaching another vehicle that no part of the beam will be directed to the left of the center of the highway nor more than 100 feet ahead of the vehicle. No spot lamps shall be used on the rear of any vehicle.

(b) Auxiliary Driving Lamps. — Any motor vehicle may be equipped with not to exceed two auxiliary driving lamps mounted on the front, and every such auxiliary driving lamp or lamps shall meet the requirements and limitations set forth in G.S. 20-131, subsection (c).

(c) Restrictions on Lamps. — Any device, other than headlamps, spot lamps, or auxiliary driving lamps, which projects a beam of light of an intensity greater than 25 candlepower, shall be so directed that no part of the beam will strike the level of the surface on which the vehicle stands at a distance of more than 50 feet from the vehicle.

(d) Electronically Modulated Headlamps. — Nothing contained in this Chapter shall prohibit the use of electronically modulated headlamps on motorcycles, law-enforcement and fire department vehicles, county fire marshals and civil preparedness coordinators, public and private ambulances, and rescue squad emergency service vehicles, provided such headlamps and light modulator are of a type or kind which have been approved by the Commissioner of Motor Vehicles. (1937, c. 407, s. 93; 1977, c. 104.)

Editor's Note. — The 1977 amendment added subsection (d).

§ 20-130.1. Use of red lights on front of vehicles prohibited; exceptions. — It shall be unlawful for any person to drive upon the highways of this State any vehicle displaying red lights visible from the front of said vehicle. The provisions of this section shall not apply to police cars, highway patrol cars, vehicles owned by the Wildlife Resources Commission and operated exclusively for law-enforcement purposes, ambulances, vehicles designed, equipped and used exclusively for the transportation of human tissues and organs for transplantation, fire-fighting vehicles, school buses, a vehicle operated in the performance of his duties or services by any member of a municipal or rural fire department, paid or voluntary, or vehicles of a voluntary life-saving organization that have been officially approved by the local police authorities and manned or operated by members of such organization while on official call or vehicles operated by medical doctors and anesthetists in emergencies or to such lights as may be prescribed by the Interstate Commerce Commission. The provisions of this section shall not apply to motor vehicles used in law enforcement by the sheriff or any salaried deputy sheriff or salaried rural policeman of any county, county fire marshal, or civil preparedness coordinator regardless of whether or not the vehicle is owned by the county. (1943, c. 726; 1947, c. 1032; 1953, c. 354; 1955, c. 528; 1957, c. 65, s. 11; 1959, c. 166, s. 2; c. 1170, s. 2; 1967, c. 651, s. 1; 1971, c. 1214; 1977, c. 52, s. 2; c. 438, s. 2.)

Editor's Note. — The first 1977 amendment inserted "county fire marshal, or civil preparedness coordinator" near the end of the last sentence.

The second 1977 amendment inserted in the second sentence "vehicles designed, equipped and used exclusively for the transportation of human tissues and organs for transplantation."

Section Applies to Vehicles Operated at Time Lights Are Required. — While it is true that this section declares that it shall be unlawful to display red lights visible in front of a vehicle, it may be fairly assumed that the General Assembly intended the section to apply to vehicles operated at the time when lights are required, as provided in § 20-129. Hollifield v. Everhart, 237 N.C. 313, 74 S.E.2d 706 (1953).

§ 20-130.2. Use of amber lights on certain vehicles. — All wreckers operated on the highways of the State shall be equipped with an amber-colored flashing light which shall be so mounted and located as to be clearly visible in all directions from a distance of 500 feet. It shall be lawful to equip any other vehicle with a similar warning light including, but not by way of limitation, maintenance or construction vehicles or equipment of the Department of Transportation engaged in performing maintenance or construction work on the roads, maintenance or construction vehicles of any person, firm or corporation, and any other vehicles required to contain a warning light. (1967, c. 651, s. 2; 1973, c. 507, s. 5; 1977, c. 464, s. 34.)

Editor's Note. — The 1977 amendment substituted "Department of Transportation" for "Board of Transportation."

§ 20-130.3. Use of white or clear lights on rear of vehicles prohibited; exceptions. — It shall be unlawful for any person to willfully drive a motor vehicle in forward motion upon the highways of this State displaying white or clear lights on the rear of said vehicle. The provisions of this section shall not apply to the white light required by G.S. 20-129(d) or so-called backup lights lighted only when said vehicle is in reverse gear or backing. Violation of this section does not constitute negligence per se in any civil action. (1973, c. 1071.)

§ 20-131. Requirements as to headlamps and auxiliary driving lamps. — (a) The headlamps of motor vehicles shall be so constructed, arranged, and adjusted that, except as provided in subsection (c) of this section, they will at all times mentioned in G.S. 20-129, and under normal atmospheric conditions and on a level road, produce a driving light sufficient to render clearly discernible a person 200 feet ahead, but any person operating a motor vehicle upon the highways, when meeting another vehicle, shall so control the lights of the vehicle operated by him by shifting, depressing, deflecting, tilting, or dimming the headlight beams in such manner as shall not project a glaring or dazzling light to persons within a distance of 500 feet in front of such headlamp. Every new motor vehicle, other than a motorcycle or motor-driven cycle, registered in this State after January 1, 1956, which has multiple-beam road-lighting equipment shall be equipped with a beam indicator, which shall be lighted whenever the uppermost distribution of light from the headlamps is in use, and shall not otherwise be lighted. Said indicator shall be so designed and located that when lighted it will be readily visible without glare to the driver of the vehicle so equipped.

(b) Headlamps shall be deemed to comply with the foregoing provisions prohibiting glaring and dazzling lights if none of the main bright portion of the headlamp beams rises above a horizontal plane passing through the lamp centers parallel to the level road upon which the loaded vehicle stands, and in no case higher than 42 inches, 75 feet ahead of the vehicle.

(c) Whenever a motor vehicle is being operated upon a highway, or portion thereof, which is sufficiently lighted to reveal a person on the highway at a distance of 200 feet ahead of the vehicle, it shall be permissible to dim the headlamps or to tilt the beams downward or to substitute therefor the light from an auxiliary driving lamp or pair of such lamps, subject to the restrictions as to tilted beams and auxiliary driving lamps set forth in this section.

(d) Whenever a motor vehicle meets another vehicle on any highway it shall be permissible to tilt the beams of the headlamps downward or to substitute therefor the light from an auxiliary driving lamp or pair of such lamps subject to the requirement that the tilted headlamps or auxiliary lamp or lamps shall give sufficient illumination under normal atmospheric conditions and on a level road to render clearly discernible a person 75 feet ahead, but shall not project a glaring or dazzling light to persons in front of the vehicle: Provided, that at all times required in G.S. 20-129 at least two lights shall be displayed on the front of and on opposite sides of every motor vehicle other than a motorcycle, road roller, road machinery, or farm tractor.

(e) No city or town shall enact an ordinance in conflict with this section. (1937, c. 407, s. 94; 1939, c. 351, s. 1; 1955, c. 1157, ss. 6, 7.)

Cross References. — As to failure to dim headlights not cause for suspension or revocation of driver's license, see § 20-18. As to penalties imposed for failure to dim headlights, see § 20-181.

The function of a front light or headlight, defined by § 20-129 and this section, is to produce a driving light sufficient, under normal atmospheric conditions, to enable the operator to see a person 200 feet ahead. O'Berry v. Perry, 266 N.C. 77, 145 S.E.2d 321 (1965); Miller v. Wright, 272 N.C. 666, 158 S.E.2d 824 (1968).

The adequacy of headlights upon a motor vehicle, in normal atmospheric conditions, is determined by this section and § 20-129. Miller v. Wright, 272 N.C. 666, 158 S.E.2d 824 (1968).

The function of a parking light is to enable a vehicle parked or stopped upon the highway to be seen under similar conditions from a distance of 500 feet to the front of such vehicle. O'Berry v. Perry, 266 N.C. 77, 145 S.E.2d 321 (1965).

Lights May Be Dimmed for Better Visibility. — The duty of a motorist to dim or deflect his headlights is not restricted by this section solely to instances in which he is meeting oncoming traffic, since this section refers to "normal atmospheric conditions"; therefore, it may be permissible for a motorist to deflect his headlights when driving in fog or other atmospheric conditions in which deflected headlights afford better visibility. Short v. Chapman, 261 N.C. 674, 136 S.E.2d 40 (1964).

Requirements Differ from § 20-129(e). — The requirement of subsection (e) of § 20-129 is entirely different from the requirement for motor vehicles, when used at night, as set forth in subsection (a) of this section. Oxendine v. Lowry, 260 N.C. 709, 133 S.E.2d 687 (1963).

Contributory Negligence. — In an action for damages due to negligence of defendants, where the evidence showed that plaintiffs, on a joint enterprise, driving their car about 2:00 A. M., at 40 or 45 miles per hour, with lights dimmed so that they could not see ahead over 75 to 100 feet, never applied the brakes and failed to see defendants' truck until after the collision, crashing into the back of the truck with terrific force, plaintiffs were guilty of contributory negligence which was a proximate cause of the accident, thereby barring their recovery. Pike v. Seymour, 222 N.C. 42, 21 S.E.2d 884 (1942).

Applied in Cronenberg v. United States, 123 F. Supp. 693 (E.D.N.C. 1954); Williamson v. McNeill, 8 N.C. App. 625, 175 S.E.2d 294 (1970).

Quoted in Newbern v. Leary, 215 N.C. 134, 1 S.E.2d 384 (1939); as to subsections (a) and (d), in Keener v. Beal, 246 N.C. 247, 98 S.E.2d 19 (1957); Meeks v. Atkeson, 7 N.C. App. 631, 173 S.E.2d 509 (1970).

Cited in Singletary v. Nixon, 239 N.C. 634, 80 S.E.2d 676 (1954); Smith v. City of Kinston, 249 N.C. 160, 105 S.E.2d 648 (1958).

§ 20-132. Acetylene lights. — Motor vehicles may be equipped with two acetylene headlamps of approximately equal candlepower when equipped with clear plane-glass fronts, bright six-inch spherical mirrors, and standard acetylene five-eighths foot burners not more and not less and which do not project a glaring or dazzling light into the eyes of approaching drivers. (1937, c. 407, s. 95.)

§ 20-133. Enforcement of provisions. — (a) The Commissioner is authorized to designate, furnish instructions to and to supervise official stations for adjusting headlamps and auxiliary driving lamps to conform with the provisions of G.S. 20-129. When headlamps and auxiliary driving lamps have been adjusted in conformity with the instructions issued by the Commissioner, a certificate of adjustment shall be issued to the driver of the motor vehicle on forms issued

in duplicate by the Commissioner and showing date of issue, registration number of the motor vehicle, owner's name, make of vehicle and official designation of the adjusting station.

(b) The driver of any motor vehicle equipped with approved headlamps, auxiliary driving lamps, rear lamps or signal lamps, who is arrested upon a charge that such lamps are improperly adjusted or are equipped with bulbs of a candlepower not approved for use therewith, shall be allowed 48 hours within which to bring such lamps into conformance with the requirements of this Article. It shall be a defense to any such charge that the person arrested produce in court or submit to the prosecuting attorney a certificate from an official adjusting station showing that within 48 hours after such arrest such lamps have been made to conform with the requirements of this Article. (1937, c. 407, s. 96.)

§ 20-134. Lights on parked vehicles. — Whenever a vehicle is parked or stopped upon a highway, whether attended or unattended during the times mentioned in § 20-129, there shall be displayed upon such vehicle one or more lamps projecting a white or amber light visible under normal atmospheric conditions from a distance of five hundred feet to the front of such vehicle, and projecting a red light visible under like conditions from a distance of five hundred feet to the rear, except that local authorities may provide by ordinance that no lights need be displayed upon any such vehicle when parked in accordance with local ordinances upon a highway where there is sufficient light to reveal any person within a distance of two hundred feet upon such highway. (1937, c. 407, s. 97; 1959, c. 1264, s. 9.)

Cross Reference. — As to right of motorist to assume that others will comply with this section, see note to § 20-129.

Design of Section. — This section is designed to promote safe use of the public highways. Beasley v. Williams, 260 N.C. 561, 133 S.E.2d 227 (1963).

The function of a parking light is to enable a vehicle parked or stopped upon the highway to be seen under similar conditions from a distance of 500 feet to the front of such vehicle. O'Berry v. Perry, 266 N.C. 77, 145 S.E.2d 321 (1965).

Section 20-161 does not conflict with nor reduce the obligation imposed on the operator of a motor vehicle stopped or parked on the highway at night to light his vehicle as required by this section and § 20-129. Melton v. Crotts, 257 N.C. 121, 125 S.E.2d 396 (1962).

This section is inapplicable to a motor vehicle parked in a residential district in a city or town on a street which constitutes no part of the highway system. Smith v. Goldsboro Iron & Metal Co., 257 N.C. 143, 125 S.E.2d 377 (1962).

The provisions of this section are not applicable to defendants' truck parked or stopped on a street in the city when plaintiff has neither allegation nor proof to show that the street forms a part of the State highway system. Coleman v. Burris, 265 N.C. 404, 144 S.E.2d 241 (1965).

It is not necessarily unlawful in all cases to park a vehicle at night on the paved portion of a highway without lights thereon, as an emergency may arise thereby making it impossible to move such vehicle immediately. Pike v. Seymour, 222 N.C. 42, 21 S.E.2d 884 (1942).

Violation Is Negligence Per Se. — The parking of a truck on a public highway at night without lights in violation of this section is negligence per se, and the question of proximate cause is for the determination of the jury. [This case was decided under the corresponding section of the former law.] Barrier v. Thomas & Howard Co., 205 N.C. 425, 171 S.E. 626 (1933).

Parking on a paved highway at night, without flares or other warning, is negligence. Allen v. Dr. Pepper Bottling Co., 223 N.C. 118, 25 S.E.2d 388 (1943).

Leaving a disabled marine corps wrecker standing on the highway in the nighttime without the lights and warning signals required by this section and § 20-161 constituted negligence. United States v. First-Citizens Bank & Trust Co., 208 F.2d 280 (4th Cir.), aff'g Rosenblatt v. United States, 112 F. Supp. 114 (E.D.N.C. 1953).

A violation of this section is negligence per se. Correll v. Gaskins, 263 N.C. 212, 139 S.E.2d 202 (1964); Faison v. T & S Trucking Co., 266 N.C. 383, 146 S.E.2d 450 (1966); Edwards v. Mayes, 385 F.2d 369 (4th Cir. 1967).

Disabled Bus. — It is negligence to permit a disabled bus to stand on a highway at night without lights, blocking a lane of traffic, without giving warning to approaching vehicles. Dezern v. Asheboro City Bd. of Educ., 260 N.C. 535, 133 S.E.2d 204 (1963).

Instruction. — Defendant was entitled to an instruction, even in the absence of request

therefor, in substance, as follows: If the jury find by the greater weight of the evidence that plaintiff stopped his car and permitted it to stand, without lights, on the paved portion of the road in defendant's right lane of travel, such conduct on the part of the plaintiff would constitute negligence as a matter of law; and if the jury find by the greater weight of the evidence that such negligence was a proximate cause of the collision and plaintiff's injuries, the jury is instructed to answer the contributory negligence issue, "Yes." Correll v. Gaskins, 263 N.C. 212, 139 S.E.2d 202 (1964).

Jury Question. — Evidence that the driver of a car left the vehicle standing unattended without lights at nighttime, partially on the hard surface, and that plaintiff was unable to stop before striking the rear of the vehicle when he first saw it upon resuming his bright lights after dimming his lights in response to oncoming traffic, was sufficient to be submitted to the jury on the issue of negligence. Beasley v. Williams, 260 N.C. 561, 133 S.E.2d 227 (1963).

It is for the jury to decide whether, upon the evidence, a violation of this statute was a proximate cause of decedent's injuries. Edwards v. Mayes, 385 F.2d 369 (4th Cir. 1967).

Applied in Bumgardner v. Allison, 238 N.C. 621, 78 S.E.2d 752 (1953); Kinsey v. Town of Kenly, 263 N.C. 376, 139 S.E.2d 686 (1965).

Stated in Puryear v. Cooper, 2 N.C. App. 517, 163 S.E.2d 299 (1968).

Cited in McKinnon v. Howard Motor Lines, 228 N.C. 132, 44 S.E.2d 735 (1947); Keener v. Beal, 246 N.C. 247, 98 S.E.2d 19 (1957); Vann v. Hayes, 266 N.C. 713, 147 S.E.2d 186 (1966); Brown v. Boren Clay Prods. Co., 5 N.C. App. 418, 168 S.E.2d 452 (1969); Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970); McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972); Williamson v. Basinger, 30 N.C. App. 50, 226 S.E.2d 213 (1976).

§ 20-135. Safety glass. — (a) It shall be unlawful to operate knowingly, on any public highway or street in this State, any motor vehicle which is registered in the State of North Carolina and which shall have been manufactured or assembled on or after January 1, 1936, unless such motor vehicle be equipped with safety glass wherever glass is used in doors, windows, windshields, wings or partitions; or for a dealer to sell a motor vehicle manufactured or assembled on or after January 1, 1936, for operation upon the said highways or streets unless it be so equipped. The provisions of this Article shall not apply to any motor vehicle if such motor vehicle shall have been registered previously in another state by the owner while the owner was a bona fide resident of said other state.

(b) The term "safety glass" as used in this Article shall be construed as meaning glass so treated or combined with other materials as to reduce, in comparison with ordinary sheet glass or plate glass, the likelihood of injury to persons by glass when the glass is cracked or broken.

(c) The Division of Motor Vehicles shall approve and maintain a list of the approved types of glass, conforming to the specifications and requirements for safety glass as set forth in this Article, and in accordance with standards recognized by the United States Bureau of Standards, and shall not issue a license for or relicense any motor vehicle subject to the provisions of this Article unless such motor vehicle be equipped as herein provided with such approved type of glass.

(d) The owner of any motor vehicle which is operated knowingly or any dealer who sells a motor vehicle in violation of the provisions of this Article shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not more than twenty-five dollars ($25.00) or be imprisoned not more than 30 days, or both, in the discretion of the court. (1937, c. 407, s. 98; 1941, c. 36; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsection (c).

§ 20-135.1. Safety belts. — (a) The Commissioner shall establish specifications or requirements for approved-type safety belts and safety harness and attachments.

(b) No person shall sell, offer or keep for sale any safety belt, safety harness, or attachment thereto as referred to in subsection (a) for use in a vehicle, unless of a type and brand which has been approved by the Commissioner. (1957, c. 1038, s. 2.)

§ 20-135.2. Safety belts and anchorages. — (a) Every new motor vehicle registered in this State and manufactured, assembled, or sold after January 1, 1964, shall, at the time of registration, be equipped with at least two sets of seat safety belts for the front seat of the motor vehicle. Such seat safety belts shall be of such construction, design, and strength to support a loop load strength of not less than 5,000 pounds for each belt, and must be of a type approved by the Commissioner.

This subsection shall not apply to passenger motor vehicles having a seating capacity in the front seat of less than two passengers.

(b) After July 1, 1962, no seat safety belt shall be sold for use in connection with the operation of a motor vehicle on any highway of this State unless it shall be constructed and installed as to have a loop strength through the complete attachment of not less than 5,000 pounds and the buckle or closing device shall be of such construction and design that after it has received the aforesaid loop belt load it can be released with one hand with a pull of less than 45 pounds.

(c) The provisions of this section shall apply only to passenger vehicles of nine-passenger capacity or less, except motorcycles. (1961, c. 1076; 1963, c. 288.)

Seat belt enactments are not absolute safety measures, and no statutory duty to use the belts can be implied from them. Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968).

The failure of a guest passenger to use an available seat belt does not constitute contributory negligence barring recovery by the passenger for personal injuries received in an automobile accident caused by defendant driver's negligence. Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968).

Nor Does It Invoke Doctrine of Avoidable Consequences. — The doctrine of avoidable consequences is not invoked by the failure of plaintiff guest passenger to use an available seat belt, since the failure to fasten the seat belt occurs before defendant's negligence. Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968).

Applied in Calloway v. Ford Motor Co., 281 N.C. 496, 189 S.E.2d 484 (1972).

§ 20-135.3. Seat belt anchorages for rear seats of motor vehicles. — Every new motor vehicle registered in this State and manufactured, assembled or sold after July 1, 1966, shall be equipped with sufficient anchorage units at the attachment points for attaching at least two sets of seat safety belts for the rear seat of the motor vehicle. Such anchorage units at the attachment points shall be of such construction, design and strength to support a loop load strength of not less than 5,000 pounds for each belt.

The provisions of this section shall apply to passenger vehicles of nine-passenger capacity or less, except motorcycles. (1965, c. 372.)

Cross Reference. — See note to § 20-135.2.

§ 20-135.4. Certain automobile safety standards. — (a) Definitions. — For the purposes of this section, the term "private passenger automobile" shall mean a four-wheeled motor vehicle designed principally for carrying passengers, for use on public roads and highways, except a multipurpose passenger vehicle which is constructed either on a truck chassis or with special features for occasional off-road operation.

(b), (c) Repealed by Session Laws 1975, c. 856.

(d) The manufacturer's specified height of any passenger motor vehicle shall not be elevated or lowered, either in front or back, more than six inches by

modification, alteration, or change of the physical structure of said vehicle without prior written approval of the Commissioner of Motor Vehicles.

On or after January 1, 1975, no self-propelled passenger vehicle that has been so altered, modified or changed shall be operated upon any highway or public vehicular area without the prior written approval of the Commissioner. (1971, c. 485; 1973, cc. 58, 1082; 1975, c. 856.)

Editor's Note. — The 1975 amendment repealed subsections (b) and (c), which related to manufacturers' warrants on energy-absorption systems.

Section Is Applicable to Specific Vehicle; Statute Not Preempted by Federal Legislation. — See opinion of Attorney General to Mr. Joe W. Garrett, Commissioner of Motor Vehicles, 41 N.C.A.G. 677 (1971).

§ 20-136. Smoke screens. — (a) It shall be unlawful for any person or persons to drive, operate, equip or be in the possession of any automobile or other motor vehicle containing, or in any manner provided with, a mechanical machine or device designed, used or capable of being used for the purpose of discharging, creating or causing, in any manner, to be discharged or emitted, either from itself or from the automobile or other motor vehicle to which attached, any unusual amount of smoke, gas or other substance not necessary to the actual propulsion, care and keep of said vehicle, and the possession by any person or persons of any such device, whether the same is attached to any such motor vehicle, or detached therefrom, shall be prima facie evidence of the guilt of such person or persons of a violation of this section.

(b) Any person or persons violating the provisions of this section shall be guilty of a felony, and upon conviction shall be imprisoned in the State's prison for a period of not less than one year or not more than 10 years, in the discretion of the court. (1937, c. 407, s. 99.)

§ 20-136.1. Location of television viewers. — No person shall drive any motor vehicle equipped with any television viewer, screen, or other means of visually receiving a television broadcast which is located in the motor vehicle at any point forward of the back of the driver's seat, or which is visible to the driver while operating the motor vehicle. (1949, c. 583, s. 4.)

§ 20-137. Unlawful display of emblem or insignia. — It shall be unlawful for any person to display on his motor vehicle, or to allow to be displayed on his motor vehicle, any emblem or insignia of any organization, association, club, lodge, order, or fraternity, unless such person be a member of the organization, association, club, lodge, order, or fraternity, the emblem or insignia of which is so displayed.

Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be subject to a fine not exceeding fifty dollars ($50.00) or imprisonment for a period not exceeding 30 days. (Ex. Sess. 1924, c. 63.)

Editor's Note. — The effect of this section was summarized in 3 N.C.L. Rev. 25.

§§ 20-137.1 to 20-137.5: Reserved for future codification purposes.

Part 9A. Abandoned and Derelict Motor Vehicles.

§ 20-137.6. Declaration of purpose. — Abandoned and derelict motor vehicles constitute a hazard to the health and welfare of the people of the State in that such vehicles can harbor noxious diseases, furnish shelter and breeding

places for vermin, and present physical dangers to the safety and well-being of children and other citizens. It is therefore in the public interest that the present accumulation of abandoned and derelict motor vehicles be eliminated and that the future abandonment of such vehicles be prevented. (1973, c. 720, s. 1.)

Editor's Note. — Session Laws 1973, c. 720, s. 2, provides: "This act shall not repeal or modify G.S. 20-162.3 and shall become effective on Sept. 3, 1973."

§ 20-137.7. Definitions of words and phrases. — The following words and phrases when used in this Part shall for the purpose of this Part have the meaning respectively prescribed to them in this Part, except in those instances where the context clearly indicates a different meaning:

(1) "Abandoned vehicle" means a motor vehicle that has remained illegally on private or public property for a period of more than 10 days without the consent of the owner or person in control of the property.

(2) "Demolisher" means any person, firm or corporation whose business is to convert a motor vehicle into processed scrap or scrap metal or otherwise to wreck, or dismantle, such a vehicle.

(3) "Department" means the North Carolina Department of Transportation.

(4) "Derelict vehicle" means a motor vehicle:

a. Whose certificate of registration has expired and the registered and legal owner no longer resides at the address listed on the last certificate of registration on record with the North Carolina Department of Transportation; or

b. Whose major parts have been removed so as to render the vehicle inoperable and incapable of passing inspection as required under existing standards; or

c. Whose manufacturer's serial plates, vehicle identification numbers, license number plates and any other means of identification have been removed so as to nullify efforts to locate or identify the registered and legal owner; or

d. Whose registered and legal owner of record disclaims ownership or releases his rights thereto; or

e. Which is more than 12 years old and does not bear a current license as required by the Department.

(5) "Officer" means any law-enforcement officer of the State, of any county or of any municipality including county sanitation officers.

(6) "Salvage yard" means a business or a person who possesses five or more derelict vehicles, regularly engages in buying and selling used vehicle parts.

(7) "Secretary" means the Secretary of the North Carolina Department of Transportation.

(8) "Tag" means any type of notice affixed to an abandoned or derelict motor vehicle advising the owner or the person in possession that the same has been declared an abandoned or derelict vehicle and will be treated as such, which tag shall be of sufficient size as to be easily discernible and contain such information as the Secretary deems necessary to enforce this Part.

(9) "Vehicle" means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway by mechanical means.

(10) "Vehicle recycling" means the process whereby discarded vehicles (abandoned, derelict or wrecked) are collected and then processed by shredding, bailing or shearing to produce processed scrap iron and steel which is then remelted by steel mills and foundries to make raw

materials which are subsequently used to manufacture new metal-based products for the consumer. (1973, c. 720, s. 1.)

Editor's Note. — The 1975 amendment corrected an error in the 1973 act by adding "Whose" at the beginning of paragraph c of subdivision (4).

§ 20-137.8. Secretary may adopt rules and regulations. — The Secretary is hereby vested with the power and is charged with the duties of administering the provisions of this Part and is authorized to adopt such rules and regulations as may be necessary to carry out the provisions thereof. (1973, c. 720, s. 1.)

§ 20-137.9. Removal from private property. — Any abandoned or any derelict vehicle in this State shall be subject to be removed from public or private property provided not objected to by the owner of the private property after notice as hereinafter provided and disposed of in accordance with the provisions of this Part, provided, that all abandoned motor vehicles left on any right-of-way of any road or highway in this State may be removed in accordance with G.S. 20-161. (1973, c. 720, s. 1.)

§ 20-137.10. Abandoned and derelict vehicles to be tagged; determination of value. — (a) When any vehicle is derelict or abandoned in this State, the Secretary shall cause a tag to be placed on the vehicle which shall be notice to the owner, the person in possession of the vehicle, or any lienholder that the same is considered to have been derelict or abandoned and is subject to forfeiture to the State.

(b) Repealed by Session Laws 1975, c. 438, s. 3.

(c) The tag shall serve as the only notice that if the vehicle is not removed within five days from the date reflected on the tag, it will be removed to a designated place to be sold. After the vehicle is removed, the Secretary shall give notice in writing to the person in whose name the vehicle was last registered at the last address reflected in the Department's records and to any lienholder of record that the vehicle is being held, designating the place where the vehicle is being held and that if it is not redeemed within 10 days from the date of the notice by paying all costs of removal and storage the same shall be sold for recycling purposes. The proceeds of the sale shall be deposited in the highway fund established for the purpose of administering the provisions of this Part.

(d) If the value of the vehicle is determined to be more than one hundred dollars ($100.00), and if the identity of the last registered owner cannot be determined or if the registration contains no address for the owner, or if it is impossible to determine with reasonable certainty the identification and addresses of any lienholders, notice by one publication in a newspaper of general circulation in the area where the vehicle was located shall be sufficient to meet all requirements of notice pursuant to this Part. The notice of publication may contain multiple listings of vehicles. Five days after date of publication the advertised vehicles may be sold. The proceeds of such sale shall be deposited in the highway fund established for the purpose of administering the provisions of this Part.

(d1) If the value of the vehicle is determined to be less than one hundred dollars ($100.00), and if the identity of the last registered owner cannot be determined or if the registration contains no address for the owner, or if it is impossible to determine with reasonable certainty the identification and addresses of any lienholders, no notice in addition to that required by subsection (a) hereof shall be required prior to sale.

(e) All officers, as defined in this Part, are given the authority to appraise or determine the value of derelict or abandoned vehicles as defined in this Part. (1973, c. 720, s. 1; 1975, c. 438, s. 3.)

Editor's Note. — The 1975 amendment deleted subsection (b), relating to vehicles valued at less than $100.00, substituted "The tag" for "If the value of the vehicle is determined to be more than one hundred dollars ($100.00) the tag shall so state and" at the beginning of subsection (c), deleted "legal" preceding "notice" in the first sentence of subsection (c), and added subsection (d1).

§ 20-137.11. Title to vest in State. — Title to all vehicles sold or disposed of in accordance with this Part shall vest in the State. All manufacturers' serial number plates and any other identification numbers for all vehicles sold to any person other than a demolisher shall at the time of the sale be turned in to the Department for destruction. Any demolisher purchasing or acquiring any vehicle hereunder shall, under oath, state to the Department that the vehicles purchased or acquired by it have been shredded or recycled.

The Secretary shall remove and destroy all departmental records relating to such vehicles in such method and manner as he may prescribe. (1973, c. 720, s. 1.)

§ 20-137.12. Secretary may contract for disposal. — The Secretary is hereby authorized to contract with any federal, other state, county or municipal authority or private enterprise for tagging, collection, storage, transportation or any other services necessary to prepare derelict or abandoned vehicles for recycling or other methods of disposal. Publicly owned properties, when available, shall be provided as temporary collecting areas for the vehicles defined herein. The Secretary shall have full authority to sell such derelict or abandoned vehicles. If the Secretary deems it more advisable and practical, in addition, he is authorized to contract with private enterprise for the purchase of such vehicles for recycling. (1973, c. 720, s. 1.)

§ 20-137.13. No liability for removal. — No agent or employee of any federal, State, county or municipal government, no person or occupant of the premises from which any derelict or abandoned vehicle shall be removed, nor any person or firm contracting for the removal of or disposition of any such vehicle shall be held criminally or civilly liable in any way arising out of or caused by carrying out or enforcing any provisions of this Part. (1973, c. 720, s. 1.)

§ 20-137.14. Enclosed, antique, registered and certain other vehicles exempt. — The provisions of this Part shall not apply to vehicles located on used car lots, in private garages, enclosed parking lots, or on any other parking area on private property which is not visible from any public street or highway, nor to motor vehicles classified as antiques and registered under the laws of the State of North Carolina, those not required by law to be registered, or those in possession of a salvage yard as defined in G.S. 20-137.7, unless that vehicle presents some safety or health hazard or constitutes a nuisance. (1973, c. 720, s. 1.)

Part 10. Operation of Vehicles and Rules of the Road.

§ 20-138. Persons under the influence of intoxicating liquor. — (a) It is unlawful and punishable as provided in G.S. 20-179 for any person who is under the influence of intoxicating liquor to drive or operate any vehicle upon any highway or any public vehicular area within this State.

(b) It is unlawful for any person to operate any vehicle upon any highway or any public vehicular area within this State when the amount of alcohol in such person's blood is 0.10 percent or more by weight and upon conviction if such conviction is a first conviction under this section, he shall be eligible for consideration for limited driving privileges pursuant to the provisions of G.S. 20-179(b); provided that second and subsequent convictions under this section

shall be punishable as provided in G.S. 20-179(a)(2) and (3). An offense under this subsection shall be treated as a lesser included offense of the offense of driving under the influence. (1937, c. 407, s. 101; 1971, c. 619, s. 1; 1973, c. 1081, s. 1.)

I. General Consideration.
II. Effect of Violation.
III. Arrest and Due Process.
IV. Evidence.
V. Instructions.
VI. Convictions.

I. GENERAL CONSIDERATION.

Cross References. — As to revocation of license for driving while intoxicated, see § 20-17. For definitions of "public vehicular area," see §§ 20-16.2(h), 136-91(b)(2). For provision that reckless driving shall be a lesser offense included in a charge under this section, see § 20-140. As to prosecution and punishment for driving while intoxicated, see § 20-179 and the note thereto.

Editor's Note. — Some of the cases treated below were decided under the corresponding provisions of earlier laws.

For note on offense of driving under the influence of intoxicating liquor when vehicle is motionless, see 36 N.C.L. Rev. 322 (1958).

Constitutionality. — The prohibition against driving upon the public highways when the amount of alcohol in one's blood is 0.10 percent or more by weight contributes in a real and substantial way to the safety of other travelers and is a constitutional exercise of police power by the General Assembly. State v. Basinger, 30 N.C. App. 45, 226 S.E.2d 216 (1976).

The arrangement of this section is a logical and permissible effort by the legislature to provide for safety on the highways of this State. State v. Basinger, 30 N.C. App. 45, 226 S.E.2d 216 (1976).

Purpose of Section. — This section is designed for the protection of human life or limb. State v. Stewardson, 32 N.C. App. 344, 232 S.E.2d 308 (1977).

The intent of the legislature as revealed by the last sentence of this section is threefold: (1) In order that a defendant shall not be twice convicted by prosecution under each subsection separately, an offense under subsection (b) is to be treated as a lesser included offense of an offense under subsection (a) for protection against such double jeopardy; (2) to place a defendant on notice by statute that in a prosecution under subsection (a), if there is evidence of a chemical analysis of his breath or blood indicating that the amount of alcohol in his blood is 0.10 percent or more by weight, he may be convicted under subsection (b); and (3) to provide that where there is evidence of a chemical analysis of a defendant's breath or blood offered in a prosecution under subsection (a), the offense under subsection (b) shall be submitted as a lesser included offense. State v. Basinger, 30 N.C. App. 45, 226 S.E.2d 216 (1976).

Elements of Offenses. — Subsection (a) of this section defines three distinct elements of the offense: (1) driving a vehicle; (2) upon a highway [or public vehicular area] within the State; (3) while under the influence of intoxicating liquor. State v. Haddock, 254 N.C. 162, 118 S.E.2d 411 (1961).

The three elements of the offense under subsection (a) are (1) driving a vehicle, (2) upon a highway [or public vehicular area] within the State, (3) while under the influence of intoxicating liquor. State v. Kellum, 273 N.C. 348, 160 S.E.2d 76 (1968); State v. Griggs, 27 N.C. App. 159, 218 S.E.2d 200 (1975); State v. Basinger, 30 N.C. App. 45, 226 S.E.2d 216 (1976).

This section as written before the 1971 amendment required the State to prove that defendant (1) drove a vehicle, (2) upon a highway of this State, (3) while under the influence of intoxicating liquor. State v. Carter, 15 N.C. App. 391, 190 S.E.2d 241 (1972).

The elements of the offense defined in subsection (b) are (1) driving a vehicle, (2) upon a highway (or public vehicular area) within the State, (3) when the amount of alcohol in the driver's blood is 0.10 percent or more by weight. State v. Basinger, 30 N.C. App. 45, 226 S.E.2d 216 (1976).

Section Applicable to Operation of Farm Tractor on Highway. — The General Assembly intended that while farm tractors are motor implements of husbandry, they are vehicles within the meaning of this section when operated upon a highway by one under the influence of intoxicating liquor. State v. Green, 251 N.C. 141, 110 S.E.2d 805 (1959).

Section Applicable to Persons Operating Bicycles with Helper Motors. — See opinion of Attorney General to Mr. Michael F. Royster, Assistant District Attorney, Twenty-Sixth Judicial District, 45 N.C.A.G. 286 (1976).

"Driving" Construed. — The word "driving," when used in statutes prohibiting the operation of a motor vehicle while under the influence of intoxicating liquor, is almost universally construed as requiring that the vehicle be in motion. State v. Carter, 15 N.C. App. 391, 190 S.E.2d 241 (1972).

"Operate" Construed. — The Supreme Court has held that the term "operate," when used in connection with an automobile, clearly imports motion and that holding an automobile motionless by putting one's foot on a brake pedal is not operating the automobile. State v. Carter, 15 N.C. App. 391, 190 S.E.2d 241 (1972).

In a prosecution under repealed § 14-387, similar to subsection (a) of this section, defendant testified that he was not driving the truck, but that the driver got out to examine the motor when the truck stalled, and that defendant placed his foot on the brake to keep the truck from rolling backward. The court charged the jury to the effect that holding his foot on the brake to keep the truck from rolling backward was an operation of the truck within the meaning of the statute. It was held that the operation of a motor vehicle within the meaning of the statute imports motion of the vehicle, and does not include the acts of defendant as testified to by him. State v. Hatcher, 210 N.C. 55, 185 S.E. 435 (1936).

"Operator" under § 20-4.01(25). — In a prosecution for driving under the influence and driving while license was revoked, evidence that defendant was seated behind the wheel of a car which had the motor running was sufficient to prove that defendant was the operator of the car under § 20-4.01(25). State v. Turner, 29 N.C. App. 163, 223 S.E.2d 530 (1976).

Portion of Sidewalk as Highway. — The portion of a sidewalk between a street and a filling station, open to the use of the public as a matter of right for the purposes of vehicular traffic, is a "highway" within the meaning of this section. State v. Perry, 230 N.C. 361, 53 S.E.2d 288 (1949).

"Under the Influence" Defined. — A person is under the influence of intoxicating liquor, within the meaning and intent of this section, when he has drunk a sufficient quantity of intoxicating beverages to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties. State v. Carroll, 226 N.C. 237, 37 S.E.2d 688 (1946); State v. Lee, 237 N.C. 263, 74 S.E.2d 654 (1953); State v. Turberville, 239 N.C. 25, 79 S.E.2d 359 (1953); State v. Nall, 239 N.C. 60, 79 S.E.2d 354 (1953); State v. Hairr, 244 N.C. 506, 94 S.E.2d 472 (1956); State v. Green, 251 N.C. 141, 110 S.E.2d 805 (1959); Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970); State v. Combs, 13 N.C. App. 195, 185 S.E.2d 8 (1971); State v. Jenkins, 21 N.C. App. 541, 204 S.E.2d 919 (1974).

A person is under the influence of intoxicating liquor, within the meaning and intent of the statute, when he has drunk a sufficient quantity of intoxicating beverage to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties. This definition is preferred, and any substantial deviation therefrom is not approved, but certain minor variations from the approved language have been held not sufficiently prejudicial to require a new trial. State v. Bledsoe, 6 N.C. App. 195, 169 S.E.2d 520 (1969).

A person is under the influence of an intoxicant within the meaning of this section whenever he has consumed sufficient alcohol to appreciably impair his mental or bodily faculties or both. State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973).

A person would not be guilty of a violation of subsection (a) of this section if he had partaken of an intoxicant to an appreciable extent, but would be if he had partaken to such an extent that there was an appreciable impairment of either bodily or mental faculties. State v. Felts, 5 N.C. App. 499, 168 S.E.2d 483 (1969).

The correct test is not whether the party had drunk or consumed a spoonful or a quart of intoxicating beverage, but whether a person is under the influence of an intoxicating liquor by reason of his having drunk a sufficient quantity of an intoxicating beverage to cause him to lose normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties. State v. Ellis, 261 N.C. 606, 135 S.E.2d 584 (1964).

One is under the influence of an intoxicant when he has consumed some quantity of an intoxicating beverage, whether it be a small amount or a large amount, one drink or several drinks, one bottle or can of beer or more than one, so as to cause him to lose the normal control of his bodily faculties or his mental faculties, or both of those faculties, to such an extent that there is an appreciable impairment of either one of those faculties, that is, bodily or mental faculties. State v. Felts, 5 N.C. App. 499, 168 S.E.2d 483 (1969).

Subsection (a) of this section requires an appreciable impairment of one's normal control of his bodily or mental faculties, or both. State v. Combs, 13 N.C. App. 195, 185 S.E.2d 8 (1971).

"Under the Influence" and "Drunk" Are Not Synonymous. — "Under the influence of an intoxicant" and "drunk" are not necessarily synonymous. Davis v. Rigsby, 261 N.C. 684, 136 S.E.2d 33 (1964). But see the earlier decision of State v. Carroll, 226 N.C. 237, 37 S.E.2d 688 (1946).

"Drunk" within the meaning of § 14-335 is not synonymous with "under the influence of intoxicating liquor" within the intent of this section. State v. Painter, 261 N.C. 332, 134 S.E.2d 638 (1964).

Hence, in a prosecution for public drunkenness under § 14-335 an instruction applying the definition of "under the influence of intoxicating liquor" must be held for

prejudicial error. State v. Painter, 261 N.C. 332, 134 S.E.2d 638 (1964).

But a person drunk by the use of intoxicating liquor is necessarily under the influence of intoxicating liquor within the intent and meaning of this section. State v. Stephens, 262 N.C. 45, 136 S.E.2d 209 (1964); Southern Nat'l Bank v. Lindsey, 264 N.C. 585, 142 S.E.2d 357 (1965).

Words "Section" and "Subsection" Intended to Have Different Applications. — It is apparent from the distinctive use in this section of the words "section" and "subsection" that the General Assembly intended them to have different applications in the enforcement of this section. The General Assembly intended the term "section" to refer to § 20-138 in its entirety while the term "subsection" refers to either § 20-138(a) or (b) individually. Helms v. Powell, 32 N.C. App. 266, 231 S.E.2d 912 (1977).

The use of the word "subsection" in the last sentence of subsection (b) is a strong indication that the General Assembly intended (a) and (b) as separate subsections. Helms v. Powell, 32 N.C. App. 266, 231 S.E.2d 912 (1977).

Thus, a "first conviction under this section" within the meaning of subsection (b) is a conviction of either offense provided by this section. Helms v. Powell, 32 N.C. App. 266, 231 S.E.2d 912 (1977).

Source of Alcohol under Subsection (b) Need Not Be Intoxicating Beverage. — The primary purpose for which the General Assembly enacted subsection (b) is to regulate conduct for the safety of the public using the State's highways, and it would be contrary to the legislative intent of subsection (b) to read into it a requirement that the source of alcohol be intoxicating beverage as required in subsection (a). A person whose blood contains .10 percent or more by weight of alcohol, regardless of the source of the alcohol, and who drives upon the highways within the State, violates subsection (b). State v. Hill, 31 N.C. App. 733, 230 S.E.2d 579 (1976).

And State Need Not Prove Defendant Knew He Was Drinking Alcohol. — In order to convict, under subsection (b), the State need not prove that defendant must have known or had reasonable grounds to believe that he was drinking alcohol. State v. Hill, 31 N.C. App. 733, 230 S.E.2d 579 (1976).

Jurisdiction of Municipal Court. — Where a statute creating a municipal court did not give it criminal jurisdiction over the offense described by repealed § 14-387, similar to subsection (a) of this section, this jurisdiction was acquired by such section only to the extent of binding the defendant over to the superior court upon conviction. State v. Jones, 181 N.C. 543, 106 S.E. 827 (1921).

Prospective Effect of 1973 Act. — See State v. Bunton, 27 N.C. App. 704, 220 S.E.2d 354 (1975).

II. EFFECT OF VIOLATION.

Aiders and Abettors Guilty as Principals. — The unlawful operation of a vehicle upon a highway within this State while under the influence of intoxicating liquor within the meaning of this section is a misdemeanor, and all who participate therein, as aiders and abettors or otherwise, are guilty as principals. State v. Nall, 239 N.C. 60, 79 S.E.2d 354 (1953).

Permitting Intoxicated Person to Drive. — When an owner places his motor vehicle in the hands of an intoxicated driver, sits by his side, and permits him, without protest, to operate the vehicle on a public highway while in a state of intoxication, the owner is as guilty as the man at the wheel. State v. Gibbs, 227 N.C. 677, 44 S.E.2d 201 (1947).

One Need Not Be Drunk to Violate Subsection (a). — Subsection (a) provides that one may not operate a motor vehicle while under the influence of some intoxicant. It is not necessary for one to be drunk and operate a motor vehicle on a public highway to violate this subsection, although one would be guilty if he were drunk and operated a motor vehicle on a public highway, but a person need only be under the influence. State v. Felts, 5 N.C. App. 499, 168 S.E.2d 483 (1969).

But under Subsection (a) Facts Should Show Intoxication Rather Than Mere Consumption. — Intoxicating beverages affect different persons in different ways and some persons would be intoxicated by the consumption of the same quantity of intoxicating beverages that the plaintiff consumed, but the consumption of a similar amount by other persons would have no effect. Thus, no court has ever turned to an arithmetic solution to this problem. Rather, the courts have uniformly required the proof of facts which would tend to show intoxication, rather than the mere consumption of alcoholic beverages. Atkins v. Moye, 8 N.C. App. 126, 174 S.E.2d 34, aff'd, 277 N.C. 179, 176 S.E.2d 789 (1970), decided under this section as it stood before the 1973 amendment, which added subsection (b).

The phrase "however slightly" does not properly express the intent of subsection (a) of this section, which makes it an offense to operate a motor vehicle on the public highway while under the influence of intoxicating liquor. State v. Combs, 13 N.C. App. 195, 185 S.E.2d 8 (1971).

It is not sufficient for a conviction under subsection (a) of this section for the State to show that defendant drove an automobile upon a highway within the State when he had drunk a sufficient quantity of intoxicating liquor to affect however slightly his mental and physical

faculties. The State must show that he has drunk a sufficient quantity of intoxicating liquor to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties. State v. Hairr, 244 N.C. 506, 94 S.E.2d 472 (1956).

Violation of Subsection (a) Is Negligence Per Se. — Defendant is guilty of negligence per se in operating his pickup truck while under the influence of intoxicating liquor in violation of subsection (a) of this section. Watters v. Parrish, 252 N.C. 787, 115 S.E.2d 1 (1960).

It is negligence per se for one to operate an automobile while under the influence of an intoxicant within the meaning of subsection (a) of this section. Davis v. Rigsby, 261 N.C. 684, 136 S.E.2d 33 (1964); Southern Nat'l Bank v. Lindsey, 264 N.C. 585, 142 S.E.2d 357 (1965); Wardrick v. Davis, 15 N.C. App. 261, 189 S.E.2d 746 (1972).

Violation of subsection (a) is negligence per se. Edwards v. Mayes, 385 F.2d 369 (4th Cir. 1967); Arant v. Ransom, 4 N.C. App. 89, 165 S.E.2d 671 (1969).

It is unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle upon the highways within this State, and a violation of subsection (a) of this section is negligence. Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970).

An intentional, willful, or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence. State v. Griffith, 24 N.C. App. 250, 210 S.E.2d 431 (1974), cert. denied, 286 N.C. 546, 212 S.E.2d 168 (1975).

But Causal Relation Must Be Shown to Sustain Action for Negligence. — Unquestionably a motorist is guilty of negligence if he operates a motor vehicle on the highway while under the influence of intoxicating liquor. Such conduct, however, will not constitute either actionable negligence or contributory negligence unless, like any other negligence, it is causally related to the accident. Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970).

Mere proof that a motorist involved in a collision was under the influence of an intoxicant at the time does not establish a causal relation between his condition and the collision. His condition must have caused him to violate a rule of the road and to operate his vehicle in a manner which was a proximate cause of the collision. Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970).

Death caused by a violation of subsection (a) of this section may be manslaughter, but a condition precedent to conviction is that the violation of the law in this respect must have caused the wreck and the death of deceased. State v. Dills, 204 N.C. 33, 167 S.E. 459 (1933).

One who drives his automobile, in violation of this section, runs into another car and thereby proximately causes the death of one of the occupants is guilty of manslaughter at least. State v. Stansell, 203 N.C. 69, 164 S.E. 580 (1932).

Evidence that defendant was driving on the public highways of the State while under the influence of intoxicating liquor in violation of this section, and was driving recklessly in violation of § 20-140, which proximately caused the death of a passenger in his car, is sufficient to be submitted to the jury in a prosecution for manslaughter. State v. Blankenship, 229 N.C. 589, 50 S.E.2d 724 (1948).

Death caused by a violation of either this section or § 20-140(b) may constitute manslaughter. State v. Griffith, 24 N.C. App. 250, 210 S.E.2d 431 (1974), cert. denied, 286 N.C. 546, 212 S.E.2d 168 (1975).

Death caused by a violation of this section may constitute manslaughter. State v. Stewardson, 32 N.C. App. 344, 232 S.E.2d 308 (1977).

A precedent to a conviction of manslaughter for the violation of either this section or § 20-140(b) or both is that the violation of either one or both must have caused the accident and the death of decedent. State v. Griffith, 24 N.C. App. 250, 210 S.E.2d 431 (1974), cert. denied, 286 N.C. 546, 212 S.E.2d 168 (1975).

Necessity That Causal Connection Be Shown. — The violation of § 20-154 and this section, if conceded, is not sufficient to sustain a prosecution for involuntary manslaughter, unless a causal relation is shown between the breach of the statute and the death. State v. Lowery, 223 N.C. 598, 27 S.E.2d 638 (1943).

Violation of Statute Not Proximate Cause of Fatal Accident. — In a prosecution for manslaughter under repealed § 14-387, relating to drunken driving, it was held that the violation of that section was not the proximate cause of the fatal accident. State v. Miller, 220 N.C. 660, 18 S.E.2d 143 (1942).

III. ARREST AND DUE PROCESS.

Policeman May Arrest without Warrant. — A policeman could arrest without a warrant a person in his presence violating repealed § 14-387, similar to subsection (a) of this section. State v. Loftin, 186 N.C. 205, 119 S.E. 209 (1923).

A highway patrolman apprehending a person driving a motor vehicle on the public highway while under the influence of intoxicating liquor is authorized, by virtue of the provisions of § 20-188 and subdivision (1) of § 15-41 [now subdivision (b)(1) of § 15A-401], to arrest such person without a warrant, and such arrest is legal. State v. Broome, 269 N.C. 661, 153 S.E.2d 384 (1967).

But Offense Must Have Occurred in Presence of Arresting Officer. — An arrest of

a defendant without a warrant for the offense of operating a motor vehicle on a public highway while under the influence of an intoxicant is illegal where the defendant has not operated the vehicle in the arresting officer's presence. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

The rule that when a misdemeanor or other criminal offense is committed in the presence of an officer, he may forthwith arrest the offender without a warrant, applies when the offense committed is the violation of subsection (a) of this section. State v. Pillow, 234 N.C. 146, 66 S.E.2d 657 (1951).

Sufficiency of Warrant. — A warrant charging that the defendant "did unlawfully and willfully operate a motor vehicle on the public roads while under the influence of intoxicating liquors, opiates or narcotic drugs," was held a sufficient charge of a violation of this section as it stood before the 1971 and 1973 amendments. State v. Smith, 240 N.C. 99, 81 S.E.2d 263 (1954).

A warrant, containing no reference to any specific statute or ordinance, disclosing on its face that it was drafted in the language of former § 14-387, was sufficient to charge the defendant with operating a motor vehicle upon the public streets of a town while "under the influence of intoxicating liquor or narcotic drugs," the language of this section as it stood before the 1971 and 1973 amendments, and by going to trial without making a motion to quash, defendant waived the right to attack the warrant on the ground of duplicity. State v. Thompson, 257 N.C. 452, 126 S.E.2d 58 (1962).

As to the duplicity of charging two of the criminal offenses created and defined in this section as it stood before the 1971 and 1973 amendments, see also State v. Strouth, 266 N.C. 340, 145 S.E.2d 852 (1966).

A warrant charging defendant with driving under the influence and reckless driving, which were treated as separate counts, was sufficient since each count charged all the essential elements constituting the violation of law charged. State v. Fuller, 24 N.C. App. 38, 209 S.E.2d 805 (1974).

Waiver of Duplicity. — In a prosecution under this section, by going to trial without making a motion to quash, defendant waives any duplicity which might exist in the bill or warrant. State v. Strouth, 266 N.C. 340, 145 S.E.2d 852 (1966).

Constitutional and Statutory Rights of Accused Detained under This Section. — One who is detained by police officers under a charge of driving while under the influence of an intoxicant has the same constitutional and statutory rights as any other accused. State v. Lawson, 285 N.C. 320, 204 S.E.2d 843 (1974).

One who is detained by police officers under a charge of driving while under the influence of an intoxicant has the same constitutional and statutory rights, including the rights given under N.C. Const., Art. I, § 23, and § 15-47 [now § 15A-501], as any other accused. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Miranda Rules Applicable. — After the defendant was arrested and placed in the patrol car, the rules of Miranda were applicable to him just as to any other person in custody on a criminal charge. State v. Lawson, 285 N.C. 320, 204 S.E.2d 843 (1974).

Right of Accused to Communicate with Counsel and Others. — The denial of a request for permission to contact counsel as soon as a person is charged with a crime involving the element of intoxication is a denial of a constitutional right, resulting in irreparable prejudice to his defense. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

When one is taken into police custody for an offense of which intoxication is an essential element, time is of the essence. Intoxication does not last. Ordinarily a drunken man will "sleep it off" in a few hours. Thus, if one accused of driving while intoxicated is to have witnesses for his defense, he must have access to his counsel, friends, relatives, or some disinterested person within a relatively short time after his arrest. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

A defendant's guilt or innocence under subsection (a) of this section depends upon whether he is intoxicated at the time of his arrest. His condition then is the crucial and decisive fact to be proven. Permission to communicate with counsel and friends is of no avail if those who come to the jail in response to a prisoner's call are not permitted to see for themselves whether he is intoxicated. In this situation, the right of a defendant to communicate with counsel and friends implies, at the very least, the right to have them see, observe and examine him, with reference to his alleged intoxication. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

IV. EVIDENCE.

In a prosecution for drunken driving, the arresting officer may be asked his opinion as to whether at the time the arrest was made the defendant was under the influence of liquor. State v. Warren, 236 N.C. 358, 72 S.E.2d 763 (1952).

In a prosecution under this section, two highway patrolmen who investigated the accident in which defendant was involved just before his arrest were properly allowed to testify that in their opinion defendant was under the influence of intoxicating liquor. State v. Mills, 268 N.C. 142, 150 S.E.2d 13 (1966).

Effect of Family Connection between Accused and Arresting Officer. — Where defendant introduces evidence of ill will between himself and his brother-in-law (the deputy sheriff who arrest him for drunken driving), it is error for the court to charge that the jurors

should disabuse their minds of any family connection. State v. Kirk, 260 N.C. 447, 133 S.E.2d 65 (1963).

Admissibility of Opinion of Lay Witness. — A lay witness is competent to testify whether or not in his opinion a person was under the influence of an intoxicant on a given occasion on which he observed him. State v. Willard, 241 N.C. 259, 84 S.E.2d 899 (1954).

Testimony as to Results of Blood Test Admissible. — In a prosecution for drunken driving it is competent for an expert witness to testify as to the results of a test of the defendant's blood, based on a sample taken less than an hour after the alleged offense with defendant's consent, as to the alcoholic content of the blood. State v. Willard, 241 N.C. 259, 84 S.E.2d 899 (1954); State v. Moore, 245 N.C. 158, 95 S.E.2d 548 (1956).

Assuming the blood specimen is obtained at or near the pertinent time and identified and traced until chemical analysis thereof is made, in a prosecution under this section testimony of a qualified expert (1) as to the making and results of a chemical analysis of such blood specimen to determine the alcoholic content thereof, and (2) as to the effects of certain percentages of alcohol in the blood stream, is competent. State v. Paschal, 253 N.C. 795, 117 S.E.2d 749 (1961).

A qualified expert may testify as to the effect of certain percentages of alcohol in the bloodstream of human beings, provided the blood sample analyzed was timely taken, properly traced, and identified. State v. Webb, 265 N.C. 546, 144 S.E.2d 619 (1965).

Significance of Answering "No" When Asked If Blood Test Wanted. — Where defendant did not refuse to submit to a blood test, but simply answered "No" when asked by a police officer if he wanted one, and presumably such blood test, if requested by defendant, would have been made at his expense, the only significance of his statement was that he did not choose to go to the expense of having such blood test made. His unwillingness to incur this expense was without probative significance in relation to his guilt or innocence. The testimony as to the officer's inquiry and defendant's response was susceptible of use and probably was used to the defendant's prejudice and the admission of the challenged testimony was prejudicial error. State v. Paschal, 253 N.C. 795, 117 S.E.2d 749 (1961).

Result of Breathalyzer Test Is Competent Evidence. — The result of a breathalyzer test, when the qualifications of the person making the test and the manner of making it meet the requirements of § 20-139.1, is competent evidence in a criminal prosecution under this section. State v. Cooke, 270 N.C. 644, 155 S.E.2d 165 (1967).

Evidence of results of breathalyzer test gives rise to inference that defendant was under the influence. State v. Jenkins, 21 N.C. App. 541, 204 S.E.2d 919 (1974).

Violation Must Be Shown beyond a Reasonable Doubt. — Before the State is entitled to a conviction under subsection (a) of this section, it must show beyond a reasonable doubt that the defendant was driving a motor vehicle on a public highway of the State while under the influence of intoxicating liquor. State v. Carroll, 226 N.C. 237, 37 S.E.2d 688 (1946); State v. Lee, 237 N.C. 263, 74 S.E.2d 654 (1953); State v. Nall, 239 N.C. 60, 79 S.E.2d 354 (1953); State v. Hairr, 244 N.C. 506, 94 S.E.2d 472 (1956).

But Circumstantial Evidence May Suffice. — Though the evidence on the part of the State as to violation of this section is circumstantial, it may be sufficient to be submitted to a jury. State v. Newton, 207 N.C. 323, 177 S.E. 184 (1934).

Where the State relied upon circumstantial evidence, from which there could be little doubt that the defendant's car collided with another; although the defendant said he had been hit from the rear, he admitted a collision; his radiator was leaking; the officer had followed a trail of water from the scene of collision to the point where he found the defendant and his car, and the car was hot, stopped, and wouldn't run, and with a bluish paint on it that resembled the bluish paint of the other car; the jury was fully justified in finding that the defendant, when seen by the officer, and later tested by the breathalyzer, was, if anything, less intoxicated than at the time of the collision. State v. Cummings, 267 N.C. 300, 148 S.E.2d 97 (1966).

The fact that a motorist has been drinking, when considered in connection with faulty driving such as following an irregular course on the highway or other conduct indicating an impairment of physical or mental faculties, is sufficient, prima facie, to show a violation of subsection (a) of this section. State v. Hewitt, 263 N.C. 759, 140 S.E.2d 241 (1965); Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970); State v. Cartwright, 12 N.C. App. 4, 182 S.E.2d 203 (1971); State v. Flannery, 31 N.C. App. 617, 230 S.E.2d 603 (1976).

Evidence of Amount of Alcohol in Blood Required for Submission of Lesser Included Offense. — In a prosecution under subsection (a), where there is no evidence offered of a chemical analysis of the defendant's breath or blood indicating that the amount of alcohol in defendant's blood was 0.10 percent or more by weight, the offense under subsection (b) may not be submitted as a lesser included offense. State v. Basinger, 30 N.C. App. 45, 226 S.E.2d 216 (1976).

Evidence Raising No More than Suspicion or Conjecture Is Insufficient. — Officers who reached the scene of an accident some 30 minutes after it occurred testified that in their opinion defendant driver was intoxicated or

under the influence of something, and one of them testified that he smelled something on defendant's breath, but both testified that they did not know whether defendant's condition was due to drink or to injuries sustained by him in the accident. It was held that the evidence raises no more than a suspicion or conjecture as to whether defendant was driving under the influence of liquor or narcotic drugs, and defendant's motion as of nonsuit should have been allowed. State v. Hough, 229 N.C. 532, 50 S.E.2d 496 (1948).

Odor of Alcohol Insufficient to Show That Driver Is under Influence. — An odor of alcohol on the breath of the driver of an automobile is evidence that he has been drinking. However, an odor, standing alone, is no evidence that he is under the influence of an intoxicant, and the mere fact that one has had a drink will not support such a finding. Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970); State v. Cartwright, 12 N.C. App. 4, 182 S.E.2d 203 (1971).

The testimony of two witnesses to the effect that from the detection of some "foreign" odor of an intoxicant from the mouth of a man whom they had not seen before, and who had been knocked unconscious by a blow on the head, they were of opinion he was under the influence of intoxicating liquor, standing alone, was insufficient to constitute substantial evidence that the man, previously, while driving an automobile on the highway, had been under the influence of intoxicants to the extent held necessary in State v. Carroll, 226 N.C. 237, 37 S.E.2d 688 (1946), to constitute violation of this section. State v. Flinchem, 228 N.C. 149, 44 S.E.2d 724 (1947).

Evidence Sufficient for Jury. — See State v. Simpson, 233 N.C. 438, 64 S.E.2d 568 (1951); State v. Cole, 241 N.C. 576, 86 S.E.2d 203 (1955); State v. St. Clair, 246 N.C. 183, 97 S.E.2d 840 (1957); State v. Green, 251 N.C. 40, 110 S.E.2d 609 (1959); State v. Flannery, 31 N.C. App. 617, 230 S.E.2d 603 (1976).

Evidence that defendant was highly intoxicated when sheriff caught up with him after a chase was sufficient to take charge of driving under the influence of intoxicants to the jury. State v. Garner, 244 N.C. 79, 92 S.E.2d 445 (1956).

Evidence that defendant was intoxicated within the purview of this section was held amply sufficient to be submitted to the jury even in the absence of expert testimony as to the alcoholic content of defendant's blood. State v. Willard, 241 N.C. 259, 84 S.E.2d 899 (1954).

The State's evidence was amply sufficient to carry the case to the jury on the charge of driving while intoxicated. State v. Mills, 268 N.C. 142, 150 S.E.2d 13 (1966).

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of drunken driving where it tended to show that defendant was driving on the wrong side of the road, and that he had a strong odor of alcohol about him; was unsteady on his feet and had half a fifth of whiskey in his truck. State v. Cartwright, 12 N.C. App. 4, 182 S.E.2d 203 (1971).

Evidence was held sufficient to be submitted to the jury on a charge of driving a motor vehicle on the highways while under the influence of intoxicants in violation of this section. State v. Blankenship, 229 N.C. 589, 50 S.E.2d 724 (1948). See State v. Sawyer, 230 N.C. 713, 55 S.E.2d 464 (1949).

V. INSTRUCTIONS.

Evidence Sufficient to Support Instruction as to Driving under Influence. — Evidence tending to show that defendant was seen driving his truck some 30 minutes before a highway patrolman reached the scene of the accident, that defendant had then been arrested and was in the custody of a deputy sheriff, that defendant was in a highly intoxicated condition, and that no intoxicating liquor was found in or about the vehicle, was held sufficient to support an instruction in regard to the law if defendant at the time of the accident was driving while under the influence of intoxicating liquor. State v. Lindsey, 264 N.C. 588, 142 S.E.2d 355 (1965).

Instructions on Intoxication Held Proper. — In a prosecution for drunken driving under repealed § 14-387, an instruction that defendant was under the influence of intoxicating liquor if he had drunk enough to make him act or think differently than he would have acted or thought if he had not drunk any, regardless of the amount he drank, was held without error. State v. Harris, 213 N.C. 648, 197 S.E. 142 (1938).

In prosecution under subsection (a) of this section, an instruction that defendant was under the influence of intoxicants if he had drunk a sufficient amount to make him think or act differently than he would otherwise have done, regardless of the amount, and that he was "under the influence" if his mind and muscles did not normally coordinate or if he was abnormal in any degree from intoxicants was held without error. State v. Biggerstaff, 226 N.C. 603, 39 S.E.2d 619 (1946). But see State v. Edwards, 9 N.C. App. 602, 176 S.E.2d 874 (1970), and State v. Harris, 10 N.C. App. 553, 180 S.E.2d 29 (1971), wherein a similar instruction was held error.

An instruction that "under the influence of intoxicating liquor" means that the defendant at the time and place in question had by reason of having drunk some intoxicating beverage lost the normal control of the powers or functions of his body or mind, or both, so that such loss could be estimated or recognized, properly expresses the intent of subsection (a) of this section. State v. Combs, 13 N.C. App. 195, 185 S.E.2d 8 (1971).

An instruction that a person is under the influence of some intoxicating beverage within the meaning of this statute when he has drunk a sufficient quantity of some intoxicating beverage to cause him to lose the normal control of his mental or bodily faculties, his mental or bodily capabilities, to such an extent that there is appreciable or noticeable impairment of either one or both of those faculties was held without error. State v. Robinette, 13 N.C. App. 224, 185 S.E.2d 9 (1971).

In an instruction stating the degree of impairment of the faculties necessary to render one "under the influence" of intoxicating liquor within the meaning of this section, the use of the word "perceptibly" instead of the word "appreciably," without explanation of what it means, is not error. While the language of the rule in State v. Carroll, 226 N.C. 237, 37 S.E.2d 688 (1946), is preferred, there is not in the word "perceptible" sufficient difference in meaning and common understanding for the rule to have been misunderstood by the jury. State v. Lee, 237 N.C. 263, 74 S.E.2d 654 (1953).

The inadvertent use by the trial judge of the word "qualities" in place of the word "faculties" at one point in the charge could not have in any way misled the jury to defendant's prejudice. State v. Bledsoe, 6 N.C. App. 195, 169 S.E.2d 520 (1969).

The use of the term "any beverage containing alcohol," rather than the term "intoxicating beverage," in the court's charge defining the expression "under the influence of intoxicating liquor" in a prosecution for drunken driving, was not prejudicial. State v. Nall, 239 N.C. 60, 79 S.E.2d 354 (1953).

Instructions on Intoxication Held Erroneous. — An instruction that a person is under the influence of intoxicating liquor when "he has drunk a sufficient quantity of alcoholic liquor or beverage to affect, however slightly, his mind and his muscles, his mental and his physical faculties" is erroneous. State v. Carroll, 226 N.C. 237, 37 S.E.2d 688 (1946).

The trial judge's instruction that "a person would be under the influence of intoxicants if he had drunk a sufficient amount to make him think or act differently than he would otherwise have done, regardless of the amount, and he would be under the influence if his mind and muscles did not normally coordinate, or if he was abnormal in any degree from intoxicants," was held erroneous. State v. Harris, 10 N.C. App. 553, 180 S.E.2d 29 (1971). But see State v. Biggerstaff, 226 N.C. 603, 39 S.E.2d 619 (1946), wherein a similar instruction was approved.

In a drunken driving prosecution, a trial court's instruction that a person is under the influence of intoxicants if he has consumed a sufficient amount to make him think or act differently than he otherwise would have done, regardless of the amount that he consumed, and that one is under the influence if his mind and muscles do not normally coordinate or if he is abnormal in any degree, is reversible error. State v. Edwards, 9 N.C. App. 602, 176 S.E.2d 874 (1970). But see State v. Biggerstaff, 226 N.C. 603, 39 S.E.2d 619 (1946), wherein a similar instruction was approved.

Instructions Held Prejudicial Wherein Defendant Stated to Be Driver. — See State v. Swaringen, 249 N.C. 38, 105 S.E.2d 99 (1958).

Instruction on Breathalyzer Test. — In a prosecution for driving while under the influence of intoxicating liquor, there is no requirement that the jury be instructed that they must find that the breathalyzer test was administered in accordance with Board of Health (now Commission for Health Services) regulations. State v. Jenkins, 21 N.C. App. 541, 204 S.E.2d 919 (1974).

Duty of Judge to Charge as to Good Character of Defendant. — Where defendant was charged with operating a motor vehicle on the public highway while under the influence of intoxicating liquor, in the absence of request it was not incumbent upon the trial judge to charge specifically as to the effect of evidence of the good character of the defendant. This was not an essential feature of the case. State v. Glatly, 230 N.C. 177, 52 S.E.2d 277 (1949).

Instruction on Lesser Included Offense of Reckless Driving. — The fact that the evidence indicated that defendant operated a motor vehicle upon a highway after consuming such quantity of intoxicating liquor as directly and visibly affected the operation of said vehicle, thereby satisfying the requisite elements of § 20-140(c), combined with the legislative mandate that such offense is a lesser included offense of driving under the influence of intoxicating liquor as defined in this section, required a finding that the trial court should have instructed the jury that they could find defendant guilty of the lesser included offense of reckless driving as defined in § 20-140(c). State v. Burrus, 30 N.C. App. 250, 226 S.E.2d 677 (1976).

In a prosecution for driving under the influence of intoxicating liquor, where the record was devoid of any evidence tending to show that defendant's consumption of intoxicating liquor directly and visibly affected his operation of his motor vehicle immediately prior to his arrest for driving under the influence, the trial judge was not required to charge the jury on the lesser included offense of reckless driving. State v. Pate, 29 N.C. App. 35, 222 S.E.2d 741 (1976).

Issue of Intoxication Improperly Submitted to Jury. — See Atkins v. Moye, 8 N.C. App. 126, 174 S.E.2d 34, aff'd, 277 N.C. 179, 176 S.E.2d 789 (1970).

VI. CONVICTIONS.

Jury Questions. — Whether decedent in an action for wrongful death was intoxicated was a question for the jury. Edwards v. Mayes, 385 F.2d 369 (4th Cir. 1967).

The jury would have to find that decedent's drunkenness, and not defendants' negligence, was a proximate cause of the accident, before finding that decedent was contributorily negligent. Edwards v. Mayes, 385 F.2d 369 (4th Cir. 1967).

Verdict Insufficient to Support Judgment. — The jury's verdict of "guilty of driving automobile under the influence" was insufficient to support the judgment against defendant in a prosecution for driving under the influence of intoxicating liquor, second offense, because the verdict neither alluded to the warrant nor used language to show a conviction of the offense charged therein. State v. Medlin, 15 N.C. App. 434, 190 S.E.2d 425 (1972).

Conviction under Subsection (a) Constituted Acquittal under Subsection (b). — The conviction of the lesser offense under subsection (b) constituted an acquittal in the district court of the greater offense under subsection (a). State v. McKenzie, 292 N.C. 170, 232 S.E.2d 424 (1977).

Punishment for Violation. — This section does not provide that the court as a part of the punishment can revoke an operator's license to operate a motor vehicle. Harrell v. Scheidt, 243 N.C. 735, 92 S.E.2d 182 (1956). As to revocation of license by Department of Motor Vehicles, see §§ 20-17, 20-19.

Defendant's motion for judgment of nonsuit held properly denied under authority of State v. Carroll, 226 N.C. 237, 37 S.E.2d 688 (1946). State v. Warren, 236 N.C. 358, 72 S.E.2d 763 (1952).

Applied in State v. Davis, 238 N.C. 252, 77 S.E.2d 630 (1953); State v. Baker, 240 N.C. 140, 81 S.E.2d 199 (1954); State v. Bolling, 240 N.C. 141, 81 S.E.2d 266 (1954); Fox v. Scheidt, 241 N.C. 31, 84 S.E.2d 259 (1954); State v. White, 246 N.C. 587, 99 S.E.2d 772 (1957); State v. Collins, 247 N.C. 244, 100 S.E.2d 489 (1957); State v. Collins, 247 N.C. 248, 100 S.E.2d 492 (1957); Parks v. Washington, 255 N.C. 478, 122 S.E.2d 70 (1961); State v. Stroud, 256 N.C. 458, 124 S.E.2d 136 (1962); State v. Broadway, 256 N.C. 608, 124 S.E.2d 568 (1962); State v. Medlin, 257 N.C. 773, 127 S.E.2d 552 (1962); Porter v. Pitt, 261 N.C. 482, 135 S.E.2d 42 (1964); State v. Smith, 261 N.C. 613, 135 S.E.2d 571 (1964); Rice v. Rigsby, 261 N.C. 687, 136 S.E.2d 35 (1964); State v. Brown, 262 N.C. 495, 137 S.E.2d 825 (1964); State v. Forrest, 262 N.C. 625, 138 S.E.2d 284 (1964); State v. Virgil, 263 N.C. 73, 138 S.E.2d 777 (1964); State v. Anderson, 263 N.C. 124, 139 S.E.2d 6 (1961); State v. Farrington, 263 N.C. 128, 139 S.E.2d 3 (1964); State v. Hollingsworth, 263 N.C. 158, 139 S.E.2d 235 (1964); State v. Morgan, 263 N.C. 400, 139 S.E.2d 708 (1965); Brewer v. Garner, 264 N.C. 384, 141 S.E.2d 806 (1965); State v. Mohrmann, 265 N.C. 594, 144 S.E.2d 645 (1965); State v. Stauffer, 266 N.C. 358, 145 S.E.2d 917 (1966); State v. Ferebee, 266 N.C. 606, 146 S.E.2d 666 (1966); State v. Green, 266 N.C. 785, 147 S.E.2d 377 (1966); State v. Hall, 267 N.C. 90, 147 S.E.2d 548 (1966); State v. Choplin, 268 N.C. 461, 150 S.E.2d 851 (1966); State v. Owens, 272 N.C. 100, 157 S.E.2d 658 (1967); State v. Randolph, 273 N.C. 120, 159 S.E.2d 324 (1968); State v. Cline, 4 N.C. App. 112, 165 S.E.2d 691 (1969); State v. Sims, 5 N.C. App. 288, 168 S.E.2d 238 (1969); State v. Newsome, 7 N.C. App. 525, 172 S.E.2d 909 (1970); State v. Caviness, 7 N.C. App. 541, 173 S.E.2d 12 (1970); State v. Michaels, 11 N.C. App. 110, 180 S.E.2d 442 (1971); State v. Wright, 13 N.C. App. 489, 186 S.E.2d 196 (1972); State v. Coffey, 14 N.C. App. 642, 188 S.E.2d 550 (1972); State v. Rigsbee, 15 N.C. App. 218, 189 S.E.2d 583 (1972); State v. Warf, 16 N.C. App. 431, 192 S.E.2d 37 (1972); State v. Guffey, 283 N.C. 94, 194 S.E.2d 827 (1973); Vuncannon v. Garrett, 17 N.C. App. 440, 194 S.E.2d 364 (1973); State v. Coley, 17 N.C. App. 443, 194 S.E.2d 372 (1973); State v. Hawkins, 19 N.C. App. 674, 199 S.E.2d 746 (1973); State v. Sawyer, 26 N.C. App. 728, 217 S.E.2d 116 (1975); State v. Smith, 291 N.C. 438, 230 S.E.2d 644 (1976); State v. Hurley, 28 N.C. App. 478, 221 S.E.2d 743 (1976); State v. Lesley, 29 N.C. App. 169, 223 S.E.2d 532 (1976); Smith v. Powell, 32 N.C. App. 563, 232 S.E.2d 863 (1977).

Quoted in State v. Parker, 220 N.C. 416, 17 S.E.2d 475 (1941); State v. Robbins, 243 N.C. 161, 90 S.E.2d 322 (1955); State v. Stone, 245 N.C. 42, 95 S.E.2d 77 (1956); State v. Bradley, 32 N.C. App. 666, 233 S.E.2d 603 (1977).

Stated in Morrisey v. Crabtree, 143 F. Supp. 105 (M.D.N.C. 1956).

Cited in State v. Creech, 210 N.C. 700, 188 S.E. 316 (1936); State v. Carter, 233 N.C. 581, 65 S.E.2d 9 (1951); State v. Baucom, 244 N.C. 61, 92 S.E.2d 426 (1956); State v. St. Clair, 248 N.C. 333, 103 S.E.2d 408 (1958); State v. Medlin, 250 N.C. 601, 108 S.E.2d 855 (1959); Rick v. Murphy, 251 N.C. 162, 110 S.E.2d 815 (1959); State v. Ball, 255 N.C. 351, 121 S.E.2d 604 (1961); State v. Gurley, 257 N.C. 270, 125 S.E.2d 445 (1962); In re Donnelly, 260 N.C. 375, 132 S.E.2d 904 (1963); Cline v. Atwood, 267 N.C. 182, 147 S.E.2d 885 (1966); State v. Gallamore, 6 N.C. App. 608, 170 S.E.2d 573 (1969); Wood v. Ross, 434 F.2d 297 (4th Cir. 1970); Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971); State v. Marshall, 11 N.C. App. 200, 180 S.E.2d 464 (1971); McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972); State v. Chappell, 18 N.C. App. 288, 196 S.E.2d 558 (1973); In re Sparks, 25 N.C. App. 65, 212 S.E.2d 220 (1975); In re Stuhl, 292 N.C. 379, 233 S.E.2d 562 (1977); Creech v. Alexander, 32 N.C. App. 139, 231 S.E.2d 36 (1977); Powell v. Bost, 32 N.C. App. 292, 232 S.E.2d 3 (1977).

§ 20-139. Persons under the influence of drugs. — (a) It is unlawful and punishable as provided in G.S. 20-179 for any person who is an habitual user of any narcotic drug to drive or operate any vehicle upon any highway or public vehicular area within this State.

(b) It is unlawful and punishable as provided in G.S. 20-179 for any person, who is under the influence of any narcotic drug or who is under the influence of any other drug to such degree that his physical or mental faculties are appreciably impaired, to drive or operate a motor vehicle upon any highway or public vehicular area within this State.

(c) The term "narcotic drug" as used in this Chapter shall have the meaning assigned to the term in Chapter 90 of the General Statutes. (1939, c. 292; 1951, c. 1042, s. 1; 1959, c. 1264, s. 1; 1971, c. 619, s. 2.)

Cross Reference. — For definitions of "public vehicular area," see §§ 20-16.2(h), 136-91(b)(2).

Driveways of an apartment complex are "public vehicular areas" within the meaning of this section. Opinion of Attorney General to Mr. C.C. Tarleton, 42 N.C.A.G. 107 (1972).

Cited in In re Sparks, 25 N.C. App. 65, 212 S.E.2d 220 (1975).

§ 20-139.1. Result of a chemical analysis admissible in evidence; presumption. — (a) In any criminal action arising out of acts alleged to have been committed by any person while driving or operating a vehicle while under the influence of intoxicating liquor or with a blood alcohol content of 0.10 percent or more by weight, the amount of alcohol in the person's blood at the time alleged as shown by chemical analysis of the person's breath or blood shall be admissible in evidence. The percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per 100 cubic centimeters of blood. The provisions of this section shall not be construed as limiting the introduction of any other competent evidence, including other types of chemical analyses.

(b) Chemical analyses of the person's breath or blood, to be considered valid under the provisions of this section, shall have been performed according to methods approved by the Commission for Health Services and by an individual possessing a valid permit issued by the Department of Human Resources for this purpose. The Department of Human Resources is authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct such analyses, and the Department of Human Resources may issue permits which shall be subject to termination or revocation at the discretion of the Department of Human Resources; provided, that in no case shall the arresting officer or officers administer said test.

(c) When a person shall submit to a blood test at the request of a law-enforcement officer under the provisions of G.S. 20-16.2 only a physician or a registered nurse (or other qualified person) may withdraw blood for the purpose of determining the alcoholic content therein. No such person shall be held to answer in any criminal or civil action for assault or battery by reason of withdrawing blood from another under this section; provided, however, that no person shall be relieved of liability for negligent acts or omissions in withdrawing blood from another under the provisions of this section.

(d) The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law-enforcement officer. The failure or inability of the person tested to obtain an additional test shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law-enforcement officer. Any law-enforcement officer having in his charge any person who has submitted to

the chemical test under the provisions of G.S. 20-16.2 shall assist such person in contacting a qualified person as set forth above for the purpose of administering such additional test.

(e) The individual making such chemical analysis of a person's breath shall record in writing the time of arrest and the time and results of such analysis, a copy of which record shall be furnished to the person submitting to said test or to his attorney prior to any trial or proceeding where the results of the test may be used.

(f) If a person under arrest refuses to submit to a chemical test or tests under the provisions of G.S. 20-16.2, evidence of refusal shall be admissible in any criminal action arising out of acts alleged to have been committed while the person was driving or operating a vehicle while under the influence of intoxicating liquor.

(g) The Department of Human Resources is empowered to make regulations concerning the ingestion of controlled amounts of beverages containing ethyl alcohol by individuals submitting to chemical analyses as a part of scientific, experimental, educational, or demonstration programs. Such regulations shall prescribe procedures consistent with controlling federal law governing the acquisition, transportation, possession, storage, administration, and disposition of ethyl alcohol or of beverages containing ethyl alcohol intended for use in such programs. Any person acquiring ethyl alcohol or beverages containing ethyl alcohol under such regulations shall keep records accounting for the disposition of all ethyl alcohol and beverages containing ethyl alcohol so acquired, and such records shall at all reasonable times be available for inspection upon the request of any federal or State law-enforcement officer with jurisdiction over the laws relating to alcohol or intoxicating liquor. All acts done pursuant to such regulations reasonably in furtherance of bona fide objectives of the chemical testing program within this State shall be lawful notwithstanding the provisions of any other general, special, or local statute or any ordinance or regulation of the State or of any agency or subdivision of the State. Regulations of the Department of Human Resources adopted pursuant to this section shall be filed and published in accordance with the provisions of Chapter 150A of the General Statutes. (1963, c. 966, s. 2; 1967, c. 123; 1969, c. 1074, s. 2; 1971, c. 619, ss. 12, 13; 1973, c. 476, s. 128; c. 1081, s. 2; c. 1331, s. 3; 1975, c. 405.)

I. General Consideration.
II. Administration of Test.
III. Use of Evidence.

I. GENERAL CONSIDERATION.

Cross Reference. — For provision making it unlawful for any person to operate a vehicle when the amount of alcohol in his blood is 0.10 percent or more by weight, see § 20-138.

Editor's Note. — The 1975 amendment substituted "Department of Human Resources" for "Commission for Health Services" near the end of the first sentence and immediately preceding the proviso to the second sentence in subsection (b).

Many of the cases cited in the note below were decided prior to the 1969 and subsequent amendments.

For article on tests for intoxication, see 45 N.C.L. Rev. 34 (1966).

Opinions of Attorney General. — Mr. Howard D. Cole, Assistant Prosecutor, Eighteenth Judicial District, 40 N.C.A.G. 401 (1969).

This section relates only to criminal actions arising out of the operation of a motor vehicle and has no application to the effect of voluntary intoxication upon criminal responsibility for assault and homicide. State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973).

The breathalyzer test is a chemical test for the testing of a person's breath for the purpose of determining the alcoholic content of his blood. State v. Hill, 9 N.C. App. 279, 176 S.E.2d 41 (1970), rev'd on other grounds, 277 N.C. 547, 178 S.E.2d 462 (1971).

This section requires two things before a chemical analysis of a person's breath can be considered valid. First, it requires that such analysis shall have been performed according to methods approved by the State Board of Health (now Commission for Health Services). Second,

it requires that such analysis shall have been made by an individual possessing a valid permit issued by the State Board of Health (now Commission for Health Services) for this purpose. It is left open for the State to prove compliance with these two requirements in any proper and acceptable manner. State v. Powell, 10 N.C. App. 726, 179 S.E.2d 785, aff'd, 279 N.C. 608, 184 S.E.2d 243 (1971); State v. Eubanks, 283 N.C. 556, 196 S.E.2d 706 (1973).

This section requires two things before a chemical analysis of a person's breath or blood can be considered valid under the section. First, that such analysis shall be performed according to methods approved by the State Board of Health (now Commission for Health Services), and second, that such analysis be made by a person possessing a valid permit issued by the State Board of Health (now Commission for Health Services) for this purpose. State v. Powell, 279 N.C. 608, 184 S.E.2d 243 (1971); State v. Chavis, 15 N.C. App. 566, 190 S.E.2d 374 (1972).

The two requirements must be met, but it is left open for the State to prove compliance in any proper and acceptable manner. State v. Chavis, 15 N.C. App. 566, 190 S.E.2d 374 (1972); State v. Warf, 16 N.C. App. 431, 192 S.E.2d 37 (1972).

"Arresting Officer". — An officer who is present at the scene of the arrest for the purpose of assisting in it, if necessary, is an "arresting officer" within the meaning of this section, even though a different officer actually places his hand upon the defendant and informs him that he is under arrest. State v. Stauffer, 266 N.C. 358, 145 S.E.2d 917 (1966).

Where defendant was already under arrest and was seated in the patrol car of the arresting officer when the officer who eventually administered the test first arrived on the scene, and where the latter officer had not been called to the scene for any purpose of assisting in the arrest and he in no way did assist in the arrest, but arrived at the scene merely because it happened to be on his direct route to the police station, and he stopped there solely to assist in moving the defendant's car out of the way of traffic, and despite the fact that the latter officer testified on cross-examination by defendant's counsel that if trouble had developed with the defendant he would have assisted the arresting officer with that too, these facts did not make him an arresting officer. State v. Dail, 25 N.C. App. 552, 214 S.E.2d 219, cert. denied, 288 N.C. 245, 217 S.E.2d 669 (1975).

Miranda Requirements Inapplicable to Breathalyzer Test. — Since the taking of a breath sample from an accused for the purpose of the test is not evidence of a testimonial or cummunicative nature within the privilege against self-incrimination, the requirements of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966) are inapplicable to a breathalyzer test administered pursuant to this section. State v. Flannery, 31 N.C. App. 617, 230 S.E.2d 603 (1976).

Procedure for Requesting Chemical Tests Not Different from § 20-16.2. — The General Assembly did not intend to establish a different procedure for requesting chemical tests under this section than it provided in § 20-16.2. State v. Flannery, 31 N.C. App. 617, 230 S.E.2d 603 (1976).

Thus, this section is not violated when the request comes from the arresting officer. State v. Flannery, 31 N.C. App. 617, 230 S.E.2d 603 (1976).

And the arresting officer is qualified to testify as to defendant's refusal to submit to such tests. State v. Flannery, 31 N.C. App. 617, 230 S.E.2d 603 (1976).

Blood Alcohol Level of Less Than .10 Percent Not Conclusive on Drunken Driving Charge. — See opinion of Attorney General to Honorable George H. Martin, Magistrate, Clay County, 40 N.C.A.G. 430 (1970).

Drivers' Licenses; Drunken Driving; Highway Patrol and Other Officers; Chemical Tests for Alcohol. — See opinion of Attorney General to Mr. Howard D. Cole, Assistant Prosecutor, Eighteenth Judicial District, 40 N.C.A.G. 401 (1969).

Prospective Effect of Second 1973 Amendment. — See State v. Bunton, 27 N.C. App. 704, 220 S.E.2d 354 (1975).

Refusal of arresting officer to sign forms authorizing that blood sample be sent from hospital that did not perform certain type of analysis to hospital that did was not a violation of defendant's rights under subsection (d) of this section so as to render prior breathalyzer results inadmissible, since the officer complied with the mandate of this section by taking defendant to a physician of his choice for the prior test and it was defendant's responsibility to obtain an analysis of the blood sample. State v. Sawyer, 26 N.C. App. 728, 217 S.E.2d 116, cert. denied, 288 N.C. 395, 218 S.E.2d 469 (1975).

Compliance with Requirements of Section Held Sufficient. — Where an officer had a valid permit issued by the Board (now Commission) to conduct such analysis and testified that he made the analysis in this case according to methods approved by that Board (now Commission), the Supreme Court held this sufficient to meet the requirements of this section. State v. Powell, 279 N.C. 608, 184 S.E.2d 243 (1971).

All that this section requires of the arresting officer is that he assist defendant in contacting the doctor; he is not required in addition to transport defendant to the doctor. State v. Bunton, 27 N.C. App. 704, 220 S.E.2d 354 (1975).

Applied in State v. Powell, 264 N.C. 73, 140 S.E.2d 705 (1965); State v. Randolph, 273 N.C. 120, 159 S.E.2d 324 (1968); State v. Mobley, 273 N.C. 471, 160 S.E.2d 334 (1968); State v. Sherrill,

15 N.C. App. 590, 190 S.E.2d 405 (1972); State v. Fuller, 24 N.C. App. 38, 209 S.E.2d 805 (1974); State v. Hurley, 28 N.C. App. 478, 221 S.E.2d 743, cert. denied, 289 N.C. 617, 223 S.E.2d 394 (1976).

Quoted in State v. Brown, 13 N.C. App. 327, 185 S.E.2d 453 (1971).

Cited in State v. Hill, 31 N.C. App. 733, 230 S.E.2d 579 (1976); In re Arthur, 291 N.C. 640, 231 S.E.2d 614 (1977).

II. ADMINISTRATION OF TEST.

Failure to Comply with Subsection (b). — The failure of the State to produce evidence of the test operator's compliance with subsection (b) must be deemed prejudicial error. State v. Gray, 28 N.C. App. 506, 221 S.E.2d 765 (1976).

The burden of proving compliance with subsection (b) lies with the State and the failure to offer any proof is not sanctioned by the courts. State v. Gray, 28 N.C. App. 506, 221 S.E.2d 765 (1976).

Test Must Have Been Timely Made. — For the test to cast any light on a defendant's condition at the time of the alleged crime, the test must have been timely made. State v. Cooke, 270 N.C. 644, 155 S.E.2d 165 (1967).

Since it is the degree of intoxication at the time of the occurrence in question which is relevant, it is undoubtedly true that the sooner after the event the breathalyzer test is made, the more accurate will be the estimate of blood alcohol concentration at the time of the act in issue. State v. Cooke, 270 N.C. 644, 155 S.E.2d 165 (1967).

The purpose of the limitation in subsection (b) of this section is to assure that the test will be fairly and impartially made. State v. Stauffer, 266 N.C. 358, 145 S.E.2d 917 (1966).

Qualifications to Administer Breathalyzer Test. — A person holding a valid permit issued by the State Board of Health (now Commission for Health Services) is qualified to administer a breathalyzer test. When such permit is introduced in evidence, the permittee is competent to testify as to the results of the test. State v. King, 6 N.C. App. 702, 171 S.E.2d 33 (1969); State v. Powell, 10 N.C. App. 726, 179 S.E.2d 785, aff'd, 279 N.C. 608, 184 S.E.2d 243 (1971).

Although permissible, it is not required that either the "permit" or a certified copy of the "methods approved by the State Board of Health [Commission for Health Services]" be introduced into evidence by the State before testimony of the results of the breathalyzer test can be given. State v. Powell, 10 N.C. App. 726, 179 S.E.2d 785, aff'd, 279 N.C. 608, 184 S.E.2d 243 (1971).

It is not incumbent upon the State to introduce into evidence a certified copy of the methods approved by the State Board of Health (now Commission for Health Services) in administering the breathalyzer test and a witness may testify that he administered the test in accordance with the rules and regulations established by the North Carolina State Board of Health (now Department of Human Resources), without introducing a copy of such rules and regulations in evidence. State v. Powell, 10 N.C. App. 726, 179 S.E.2d 785, aff'd, 279 N.C. 608, 184 S.E.2d 243 (1971).

The testimony of a witness that he had been to school, studied and graduated from the "school for breathalyzer operators put on by the Community College in Raleigh" is not sufficient to satisfy the requirements of the statute that he possess a valid permit issued by the State Board of Health (now Commission for Health Services). State v. Caviness, 7 N.C. App. 541, 173 S.E.2d 12 (1970).

Testimony that a witness has "a license to administer the breathalyzer" is not sufficient to satisfy the requirement of this section, that to be considered valid, the analysis must be performed by an individual possessing a valid permit issued by the State Board of Health (now Commission for Health Services) for this purpose. State v. Caviness, 7 N.C. App. 541, 173 S.E.2d 12 (1970).

Persons Qualified to Give Blood Test. — See opinion of Attorney General to Dr. Jacob Koomen, State Health Director, 40 N.C.A.G. 429 (1970).

Arresting Officer May Not Collect Breath Sample for Subsequent Analysis by a Qualified Operation of a Testing Device. — See opinion of Attorney General to Mr. Jacob Koomen, M.D., M.P.H., State Health Director, 41 N.C.A.G. 792 (1972).

III. USE OF EVIDENCE.

The State's failure to lay the proper foundation for the admission of evidence of the results of the breathalyzer test entitles defendant to a new trial. State v. Gray, 28 N.C. App. 506, 221 S.E.2d 765 (1976).

Failure of State to Offer Proof Has Not Been Sanctioned by Courts. — The manner of proof is left open for the State, but the failure to offer any proof has never been sanctioned by the courts, and such failure resulted in clear and manifest error prejudicial to defendant. State v. Chavis, 15 N.C. App. 566, 190 S.E.2d 374 (1972); State v. Warf, 16 N.C. App. 431, 192 S.E.2d 37 (1972).

Result of Breathalyzer Test Is Competent Evidence. — The result of a breathalyzer test, when the qualifications of the person making the test and the manner of making it meet the requirements of this section, is competent evidence in a criminal prosecution under § 20-138. State v. Cooke, 270 N.C. 644, 155 S.E.2d 165 (1967); State v. Coley, 17 N.C. App. 443, 194 S.E.2d 372 (1973).

Defendant's objections to the results of a breathalyzer test are not sustained where, before being permitted to testify, the officer who had administered the test was questioned preliminarily and his answers tended to show that the tests were made in compliance with this section and the regulations of the State Board of Health (now Department of Human Resources) as set forth in this section. State v. Cummings, 267 N.C. 300, 148 S.E.2d 97 (1966).

In an action to recover damages for injuries received when defendant's car struck the motorcycle upon which plaintiff was a passenger, there was no prejudice to defendant by the admission of the results of the blood alcohol test performed upon the motorcycle's driver since there was no evidence tending to establish any connection between the driver's drinking and the cause of the accident. Gwaltney v. Keaton, 29 N.C. App. 91, 223 S.E.2d 506 (1976).

And May Carry State's Case to Jury. — A breathalyzer test (otherwise relevant and competent) which shows 0.10 percent or more by weight of alcohol in a defendant's blood will carry the State's case to the jury for its determination of whether defendant was under the influence of intoxicating liquor at the time charged. State v. Cooke, 270 N.C. 644, 155 S.E.2d 165 (1967).

But Jury Is Still at Liberty to Acquit. — Despite the results of the breathalyzer test, the jury is still at liberty to acquit defendant if they find that his guilt is not proven beyond a reasonable doubt, and the court should explain this to the jury. State v. Cooke, 270 N.C. 644, 155 S.E.2d 165 (1967).

The jury is at liberty to acquit the defendant if it should find that his guilt was not proven beyond a reasonable doubt. State v. Royall, 14 N.C. App. 214, 188 S.E.2d 50 (1972).

Admitting Results of Breathalyzer Test into Evidence without Showing Test Properly Administered Was Error. — Defendant is entitled to a new trial in a prosecution under § 20-138 where the trial court allowed into evidence the results of a breathalyzer test without a showing by the State that the test was administered according to methods approved by the State Board of Health (now Commission for Health Services) and that the test was administered by a person possessing a valid permit issued by the State Board of Health (now Commission for Health Services). State v. Warf, 16 N.C. App. 431, 192 S.E.2d 37 (1972).

As Was Admission Where Defendant Had Not Been Driving Vehicle. — Where defendant was not driving or operating a vehicle at the time of the alleged assault on a police officer, the court erred in admitting testimony showing the result of a breathalyzer test. State v. Powell, 18 N.C. App. 732, 198 S.E.2d 70 (1973).

Admission of Evidence of Refusal to Submit to Test Does Not Violate Right Against Self-incrimination. — The admission of evidence of defendant's refusal to submit to the tests under this section does not violate his constitutional right against self-incrimination. State v. Flannery, 31 N.C. App. 617, 230 S.E.2d 603 (1976).

Breathalyzer test results are not admissible in a breaking and entering case. State v. Wade, 14 N.C. App. 414, 188 S.E.2d 714 (1972).

Officer's Testimony as to Test Results Held Competent. — Failure to introduce in evidence a certified copy of the rules and regulations of the State Board of Health (now Department of Human Resources) containing the approved methods of administering a breathalyzer test does not make an officer's testimony as to the results of a test incompetent. State v. Powell, 279 N.C. 608, 184 S.E.2d 243 (1971).

§ 20-140. Reckless driving. — (a) Any person who drives any vehicle upon a highway or any public vehicular area carelessly and heedlessly in willful or wanton disregard of the rights or safety of others shall be guilty of reckless driving.

(b) Any person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving.

(c) Any person who operates a motor vehicle upon a highway or public vehicular area after consuming such quantity of intoxicating liquor as directly and visibly affects his operation of said vehicle shall be guilty of reckless driving and such offense shall be a lesser included offense of driving under the influence of intoxicating liquor as defined in G.S. 20-138 as amended.

(d) Any person convicted of reckless driving shall be punished by imprisonment not to exceed six months or by a fine not to exceed five hundred dollars ($500.00) or by both such imprisonment and fine, in the discretion of the

court. (1937, c. 407, s. 102; 1957, c. 1368, s. 1; 1959, c. 1264, s. 8; 1973, c. 1330, s. 3.)

I. General Consideration.
II. Negligence.
III. Reasonable Care.
IV. Examples.
V. Warrants and Allegations.
VI. Evidence.
VII. Instructions.
VIII. Convictions.

I. GENERAL CONSIDERATION.

Editor's Note. — For article on proof of negligence in North Carolina, see 48 N.C.L. Rev. 731 (1970).

Some of the cases cited below were decided under corresponding provisions of the former law.

Legislative Purpose. — This section was enacted for the protection of persons and property and in the interest of public safety and the preservation of human life. State v. Norris, 242 N.C. 47, 86 S.E.2d 916 (1955).

The reckless driving and speed statutes are designed for the protection of life, limb and property. State v. Ward, 258 N.C. 330, 128 S.E.2d 673 (1962).

This section is designed to prevent injury to persons or property and to prohibit the careless and reckless driving of automobiles on the public highways. State v. Colson, 262 N.C. 506, 138 S.E.2d 121 (1964).

This section is a safety statute. State v. Colson, 262 N.C. 506, 138 S.E.2d 121 (1964).

This section is a safety statute, designed for the protection of life, limb and property. State v. Weston, 273 N.C. 275, 159 S.E.2d 883 (1968).

This and § 20-141 constitute the hub of the motor traffic law around which all other provisions regulating the operation of automobiles revolve. Kolman v. Silbert, 219 N.C. 134, 12 S.E.2d 915 (1941).

This section prescribes a standard of care, "and the standard fixed by the legislature is absolute." Aldridge v. Hasty, 240 N.C. 353, 82 S.E.2d 331 (1954); Kellogg v. Thomas, 244 N.C. 722, 94 S.E.2d 903 (1956); Lamm v. Gardner, 250 N.C. 540, 108 S.E.2d 847 (1959); Bondurant v. Mastin, 252 N.C. 190, 113 S.E.2d 292 (1960); Stockwell v. Brown, 254 N.C. 662, 119 S.E.2d 795 (1961); Boykin v. Bissette, 260 N.C. 295, 132 S.E.2d 616 (1963).

Fundamental to the right to operate any motor vehicle is the rule of the prudent man declared in this section, that he shall operate with due care and circumspection so as not to endanger others by his reckless driving. McEwen Funeral Serv. v. Charlotte City Coach Lines, 248 N.C. 146, 102 S.E.2d 816 (1958).

A violation of this section may subject the offender to both civil and criminal liability. There may be a violation of this section as a result of which the offender is subjected, in addition to civil liability, only to the penalty prescribed by statute, but when the negligent acts are reckless to the point of culpability and are sufficient to evince a complete and thoughtless disregard for the rights and safety of other persons using the highways, it then becomes criminal negligence and the driver of a motor vehicle so offending may be called upon to answer for manslaughter. State v. McLean, 234 N.C. 283, 67 S.E.2d 75 (1951).

A violation of this section gives rise to both civil and criminal liability. Ingle v. Roy Stone Transf. Corp., 271 N.C. 276, 156 S.E.2d 265 (1967).

A person may violate this section by either one of the two courses of conduct defined in subsections (a) and (b), or in both respects. State v. Dupree, 264 N.C. 463, 142 S.E.2d 5 (1965); Haynes v. Busby, 15 N.C. App. 106, 189 S.E.2d 653 (1972).

Reckless driving is made up of continuing acts, or a series of acts, which, in themselves, constitute negligence. Ingle v. Roy Stone Transf. Corp., 271 N.C. 276, 156 S.E.2d 265 (1967).

Violations Committed in One Continuous Operation of Vehicle Constitute One Offense. — If a defendant is guilty of the acts condemned either under subsection (a) or (b), or both, in one continuous operation of his vehicle, he is guilty of one offense of reckless driving and not guilty of two separate offenses. State v. Lewis, 256 N.C. 430, 124 S.E.2d 115 (1962).

Surrounding Circumstances Govern Case. — Driving an automobile with tires which are known to be worn out and slick, on a highway which is wet and slippery, at a rate of speed not ordinarily unlawful, under this section may be unlawful under all the circumstances shown by the evidence. Waller v. Hipp, 208 N.C. 117, 179 S.E. 428 (1935).

The principle that the mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed, was following too closely, or failed to keep a proper lookout is not absolute; the negligence, if any, depends upon the

circumstances. Powell v. Cross, 263 N.C. 764, 140 S.E.2d 393 (1965).

Death caused by a violation of either subsection (b) of this section or § 20-138 may constitute manslaughter. State v. Griffith, 24 N.C. App. 250, 210 S.E.2d 431 (1974), cert. denied, 286 N.C. 546, 212 S.E.2d 168 (1975).

A precedent to a conviction of manslaughter for the violation of either subsection (b) of this section or § 20-138 or both is that the violation of either one or both must have caused the accident and the death of decedent. State v. Griffith, 24 N.C. App. 250, 210 S.E.2d 431 (1974), cert. denied, 286 N.C. 546, 212 S.E.2d 168 (1975).

An indictment under this section may be consolidated for trial with an indictment under § 20-217, which prohibits the driver of a motor vehicle from passing a standing school bus on the highway without first bringing said motor vehicle to a complete stop. State v. Webb, 210 N.C. 350, 186 S.E. 241 (1936).

Jurisdiction of Mayor's Court; Excessive Sentence. — Defendant was tried in a mayor's court on charges of operating a motor vehicle while under the influence of intoxicating liquor and reckless driving. On appeal to the superior court, judgment was pronounced exceeding that permitted for the offense of reckless driving alone. It was held that the mayor's court was without jurisdiction of the charge of operating a motor vehicle while under the influence of intoxicating liquor, and even conceding that it had jurisdiction of the charge of reckless driving, the sentence exceeded that permitted for that offense, and the trial of defendant in the superior court upon the warrants, without a bill of indictment first being found and returned, was a nullity. State v. Johnson, 214 N.C. 319, 199 S.E. 96 (1938).

Applied in State v. Flinchem, 228 N.C. 149, 44 S.E.2d 724 (1947); State v. Williams, 237 N.C. 435, 75 S.E.2d 301 (1953); State v. McIntyre, 238 N.C. 305, 77 S.E.2d 698 (1953); State v. Turberville, 239 N.C. 25, 79 S.E.2d 359 (1953); State v. McRae, 240 N.C. 334, 82 S.E.2d 67 (1954); Redden v. Bynum, 256 N.C. 351, 123 S.E.2d 734 (1962); State v. Stroud, 256 N.C. 458, 124 S.E.2d 136 (1962); Benson v. Sawyer, 257 N.C. 765, 127 S.E.2d 549 (1962); Parker v. Bruce, 258 N.C. 341, 128 S.E.2d 561 (1962); Queen v. Jarrett, 258 N.C. 405, 128 S.E.2d 894 (1963); Scott v. Darden, 259 N.C. 167, 130 S.E.2d 42 (1963); State v. Wells, 259 N.C. 173, 130 S.E.2d 299 (1963); Williams v. Tucker, 259 N.C. 214, 130 S.E.2d 306 (1963); Russell v. Hamlett, 259 N.C. 273, 130 S.E.2d 395 (1963); Faulk v. Althouse Chem. Co., 259 N.C. 395, 130 S.E.2d 684 (1963); Jones v. C.B. Atkins Co., 259 N.C. 655, 131 S.E.2d 371 (1963); Rundle v. Grubb Motor Lines, 300 F.2d 333 (4th Cir. 1962); State v. Woolard, 260 N.C. 133, 132 S.E.2d 364 (1963); Scott v. Clark, 261 N.C. 102, 134 S.E.2d 181 (1964); Britt v. Mangum, 261 N.C. 250, 134 S.E.2d 235 (1964); Porter v. Pitt, 261 N.C. 482, 135 S.E.2d 42 (1964); Randall v. Rogers, 262 N.C. 544, 138 S.E.2d 248 (1964); Hall v. Little, 262 N.C. 618, 138 S.E.2d 282 (1964); Knight v. Seymour, 263 N.C. 790, 140 S.E.2d 410 (1965); Farmers Oil Co. v. Miller, 264 N.C. 101, 141 S.E.2d 41 (1965); Bongardt v. Frink, 265 N.C. 130, 143 S.E.2d 286 (1965); State v. Abernathy, 265 N.C. 724, 145 S.E.2d 2 (1965); Drumwright v. Wood, 266 N.C. 198, 146 S.E.2d 1 (1966); Wells v. Bissette, 266 N.C. 774, 147 S.E.2d 210 (1966); Atwood v. Holland, 267 N.C. 722, 148 S.E.2d 851 (1966); State v. Moses, 272 N.C. 509, 158 S.E.2d 617 (1968); Morris v. Brigham, 6 N.C. App. 490, 170 S.E.2d 534 (1969); State v. Grissom, 17 N.C. App. 374, 194 S.E.2d 227 (1973).

Quoted in State v. Crews, 214 N.C. 705, 200 S.E. 378 (1939); Newbern v. Leary, 215 N.C. 134, 1 S.E.2d 384 (1939); State v. Wooten, 228 N.C. 628, 46 S.E.2d 868 (1948);Basden v. Sutton, 7 N.C. App. 6, 171 S.E.2d 77 (1969); State v. McKenzie, 292 N.C. 170, 232 S.E.2d 424 (1977).

Stated in Etheridge v. Etheridge, 222 N.C. 616, 24 S.E.2d 477 (1943).

Cited in Hancock v. Wilson, 211 N.C. 129, 189 S.E. 631 (1937); Bechtler v. Bracken, 218 N.C. 515, 11 S.E.2d 721 (1940); Hoke v. Atlantic Greyhound Corp., 226 N.C. 692, 40 S.E.2d 345 (1946); Singletary v. Nixon, 239 N.C. 634, 80 S.E.2d 676 (1954); State v. Bournais, 240 N.C. 311, 82 S.E.2d 115 (1954); Troxler v. Central Motor Lines, 240 N.C. 420, 82 S.E.2d 342 (1954); Hennis Freight Lines v. Burlington Mills Corp., 246 N.C. 143, 97 S.E.2d 850 (1957); Rick v. Murphy, 251 N.C. 162, 110 S.E.2d 815 (1959); Hunt v. Crawford, 253 N.C. 381, 117 S.E.2d 18 (1960); Fleming v. Drye, 253 N.C. 545, 117 S.E.2d 416 (1960); Pridgen v. Uzzell, 254 N.C. 292, 118 S.E.2d 755 (1961); Gathings v. Sehorn, 255 N.C. 503, 121 S.E.2d 873 (1961); Pittman v. Swanson, 255 N.C. 681, 122 S.E.2d 814 (1961); Powell v. Clark, 255 N.C. 707, 122 S.E.2d 706 (1961); Mason v. Gillikin, 256 N.C. 527, 124 S.E.2d 537 (1962); Hall v. Poteat, 257 N.C. 458, 125 S.E.2d 924 (1962); Greene v. Meredith, 264 N.C. 178, 141 S.E.2d 287 (1965); Webb v. Felton, 266 N.C. 707, 147 S.E.2d 219 (1966); Hout v. Harvell, 270 N.C. 274, 154 S.E.2d 41 (1967); Mabe v. Green, 270 N.C. 276, 154 S.E.2d 91 (1967); Reeves v. Hill, 272 N.C. 352, 158 S.E.2d 529 (1968); Toler v. Brink's, Inc., 1 N.C. App. 315, 161 S.E.2d 208 (1968); Rogers v. Rogers, 2 N.C. App. 668, 163 S.E.2d 645 (1968); State v. White, 3 N.C. App. 31, 164 S.E.2d 36 (1968); Wilder v. Edwards, 7 N.C. App. 513, 173 S.E.2d 72 (1970); Broadnax v. Deloatch, 8 N.C. App. 620, 174 S.E.2d 314 (1970); Huggins v. Kye, 10 N.C. App. 221, 178 S.E.2d 127 (1970); Brewer v. Harris, 279 N.C. 288, 182 S.E.2d 345 (1971); Southwire Co. v. Long Mfg. Co., 12 N.C. App. 335, 183 S.E.2d 253 (1971); McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972); State v. McKenzie, 29 N.C. App. 524, 225 S.E.2d

151 (1976); State v. Hill, 31 N.C. App. 733, 230 S.E.2d 579 (1976).

II. NEGLIGENCE.

A violation of this section is negligence per se. Stegall v. Sledge, 247 N.C. 718, 102 S.E.2d 115 (1958); Carswell v. Lackey, 253 N.C. 387, 117 S.E.2d 51 (1960); Robbins v. Harrington, 255 N.C. 416, 121 S.E.2d 584 (1961); Dunlap v. Lee, 257 N.C. 447, 126 S.E.2d 62 (1962); Boykin v. Bissette, 260 N.C. 295, 132 S.E.2d 616 (1963); Southern Nat'l Bank v. Lindsey, 264 N.C. 585, 142 S.E.2d 357 (1965); Ingle v. Roy Stone Transf. Corp., 271 N.C. 276, 156 S.E.2d 265 (1967).

Evidence of greatly excessive speed in violation of the speed restrictions of § 20-141, and of reckless driving in violation of this section, were sufficient to make out a case of actionable negligence. Bell v. Maxwell, 246 N.C. 257, 98 S.E.2d 33 (1957).

All the evidence tended to show that plaintiff's decedent was killed by the actionable negligence of the driver of the automobile in which he was a passenger in driving it at an excessive speed in violation of former subdivision (4) of § 20-141(b), and in a reckless manner in violation of this section. Bridges v. Graham, 246 N.C. 371, 98 S.E.2d 492 (1957).

The language of this section defines culpable negligence. State v. Roberson, 240 N.C. 745, 83 S.E.2d 798 (1954); State v. Dupree, 264 N.C. 463, 142 S.E.2d 5 (1965); Southern Nat'l Bank v. Lindsey, 264 N.C. 585, 142 S.E.2d 357 (1965).

The language in each subsection of the reckless driving statute defines culpable negligence. Ingle v. Roy Stone Transf. Corp., 271 N.C. 276, 156 S.E.2d 265 (1967); Ford v. Jones, 6 N.C. App. 722, 171 S.E.2d 103 (1969); Haynes v. Busby, 15 N.C. App. 106, 189 S.E.2d 653 (1972).

An intentional, willful, or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence. State v. Griffith, 24 N.C. App. 250, 210 S.E.2d 431 (1974), cert. denied, 286 N.C. 546, 212 S.E.2d 168 (1975).

Culpable Negligence and Actionable Negligence Distinguished. — Culpable negligence in the law of crimes is something more than actionable negligence in the law of torts. State v. Roberson, 240 N.C. 745, 83 S.E.2d 798 (1954).

Where there is an unintentional or inadvertent violation of this section, such violation, standing alone, does not constitute culpable negligence in the law of crimes as distinguished from actionable negligence in the law of torts. The inadvertent or unintentional violation of the statute must be accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or of a heedless indifference to the safety to others. State v. Sealy, 253 N.C. 802, 117 S.E.2d 793 (1961).

Culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. The intentional, willful or wanton violation of a safety statute or ordinance which proximately results in injury is culpable negligence; an unintentional violation, unaccompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, is not. Ingle v. Roy Stone Transf. Corp., 271 N.C. 276, 156 S.E.2d 265 (1967); Ford v. Jones, 6 N.C. App. 722, 171 S.E.2d 103 (1969); Haynes v. Busby, 15 N.C. App. 106, 189 S.E.2d 653 (1972).

The violation of a safety statute which results in injury or death will constitute culpable negligence if the violation is willful, wanton, or intentional. But, where there is an unintentional or inadvertent violation of the statute, such violation standing alone does not constitute culpable negligence. The inadvertent or unintentional violation of the statute must be accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or of a heedless indifference to the safety of others. State v. Weston, 273 N.C. 275, 159 S.E.2d 883 (1968).

If plaintiff's evidence does not establish civil negligence, a fortiori, it will not prove reckless driving, which is criminal negligence. Ford v. Jones, 6 N.C. App. 722, 171 S.E.2d 103 (1969).

III. REASONABLE CARE.

Duty of Motorist Generally. — Every operator of a motor vehicle is required to exercise reasonable care to avoid injury to persons or property of another, and a failure to so operate proximately resulting in injury to another gives rise to a cause of action. Scarlette v. Grindstaff, 258 N.C. 159, 128 S.E.2d 221 (1962).

This section requires every operator of a motor vehicle to exercise reasonable care to avoid injury to persons or property of another and a failure to so operate proximately causing injury to another gives rise to a cause of action. Miller v. Lucas, 267 N.C. 1, 147 S.E.2d 537 (1966).

A motorist must at all times operate his vehicle with due caution and circumspection, with due regard for the rights and safety of others, and at such speed and in such manner as will not endanger or be likely to endanger the lives or property of others. Morris v. Minix, 4 N.C. App. 634, 167 S.E.2d 494 (1969).

A motorist must operate his vehicle at a reasonable rate of speed, keep a lookout for persons on or near the highway, decrease his

speed when any special hazard exists with respect to pedestrians, and, if circumstances warrant, he must give warning of his approach by sounding his horn. Morris v. Minix, 4 N.C. App. 634, 167 S.E.2d 494 (1969).

A motorist is under duty at all times to operate his vehicle at a reasonable rate of speed and maintain constant attention to the highway. Williams v. Henderson, 230 N.C. 707, 55 S.E.2d 462 (1949); Goodson v. Williams, 237 N.C. 291, 74 S.E.2d 762 (1953); Price v. Miller, 271 N.C. 690, 157 S.E.2d 347 (1967).

It is the duty of one proceeding along a public highway to maintain a proper lookout and to exercise due care to avoid colliding with vehicles entering the highway from private premises. Davis v. Imes, 13 N.C. App. 521, 186 S.E.2d 641 (1972).

When Motorist Guilty of Reckless Driving. — Under this section, a person is guilty of reckless driving (1) if he drives an automobile on a public highway in this State, carelessly and heedlessly, in a willful or wanton disregard of the rights or safety of others, or (2) if he drives an automobile on a public highway in this State without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property. State v. Folger, 211 N.C. 695, 191 S.E. 747 (1937).

It is unlawful to drive a motor vehicle upon a public highway carelessly and heedlessly, in willful or wanton disregard of the rights or safety of others, or without due circumspection and at a speed or in any manner so as to endanger or be likely to endanger any person or property. State v. Norris, 242 N.C. 47, 86 S.E.2d 916 (1955).

Under this section a person is guilty of reckless driving if he drives an automobile on a public highway in this State without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property. State v. Floyd, 15 N.C. App. 438, 190 S.E.2d 353 (1972).

IV. EXAMPLES.

Speed Greater than Is Reasonable and Prudent in Existing Conditions Is Unlawful. — In light of the provisions of this section and § 20-141, it is clear that whether or not a speed of 55 miles an hour is lawful depends upon the circumstances at the time. These sections provide that a motorist must at all times drive with due caution and circumspection and at a speed and in a manner so as not to endanger or be likely to endanger any person or property. At no time may a motorist lawfully drive at a speed greater than is reasonable and prudent under the conditions then existing. Primm v. King, 249 N.C. 228, 106 S.E.2d 223 (1958).

Care Required in Emergency. — While the operator of a public automobile is obligated to exercise a high degree of care, he is not charged with the necessity either of possessing superhuman powers of anticipation or of exercising such powers in a threatened emergency. Love v. Queen City Lines, 206 N.C. 575, 174 S.E. 514 (1934).

If the peril suddenly confronting the defendant was due to excessive speed or to his failure to maintain a proper lookout, the fact that care was exercised after the discovery of the peril would not excuse the negligent conduct which was the proximate cause of the injury and damage. The court should have so instructed the jury. Brunson v. Gainey, 245 N.C. 152, 95 S.E.2d 514 (1956).

Duty to Keep Car under Control and Decrease Speed When Special Hazards Exist. — The driver of an automobile is required at all times to operate his vehicle with due regard to traffic and conditions of the highway, and keep his car under control and decrease speed when special hazards exist by reason of weather or highway conditions or when necessary to avoid colliding with any other vehicle. This requirement, as expressed in this section and § 20-141, constitutes the hub of the motor vehicle law around which other provisions regulating the operation of motor vehicles revolve. Cox v. Lee, 230 N.C. 155, 52 S.E.2d 355 (1949); Beasley v. Williams, 260 N.C. 561, 133 S.E.2d 227 (1963).

Effect of Using Prudence after Violation. — A reckless violation which put a driver in such position that he could not avoid an injury, though attempting to do so after the danger became apparent, is not excused by the subsequent attempt. State v. Gray, 180 N.C. 697, 104 S.E. 647 (1920).

The fact that defendant at length made an effort to avoid the accident does not avail him when it appears that his recklessness was responsible for his inability to control the vehicle. State v. Ward, 258 N.C. 330, 128 S.E.2d 673 (1962).

Mere failure to keep a reasonable lookout does not constitute reckless driving. To this must be added dangerous speed or perilous operation. Dunlap v. Lee, 257 N.C. 447, 126 S.E.2d 62 (1962); State v. Dupree, 264 N.C. 463, 142 S.E.2d 5 (1965); Ingle v. Roy Stone Transf. Corp., 271 N.C. 276, 156 S.E.2d 265 (1967); Haynes v. Busby, 15 N.C. App. 106, 189 S.E.2d 653 (1972).

Rear-End Collision. — While the fact of a rear-end collision offers some evidence of negligence, it is not sufficient to present the question of defendant's violation of this section when the fact of accident is combined only with the failure to keep a proper lookout, and not with exessive speed or following too closely. Nance v. Williams, 2 N.C. App. 345, 163 S.E.2d 47 (1968).

Entering Intersection Closely in Front of Plainly Visible Automobile. — The act of a

driver in entering an intersection so closely in front of an automobile plainly visible to him approaching along an intersecting four-lane highway, that the driver of the car does not have sufficient time in the exercise of reasonable care to avoid a collision constitutes a violation of subsections (a) and (b) of this section, and is negligence per se. Snell v. Caudle Sand & Rock Co., 267 N.C. 613, 148 S.E.2d 608 (1966).

Driving on Wrong Side of Road. — The mere fact that defendant's automobile was on the left of the center line in the direction in which it was traveling when the collision occurred, without any evidence that it was being operated at a dangerous speed or in a perilous manner, except being on the wrong side of the road some 40 feet before the collision, does not show on defendant's part an intentional or willful violation of subsection (b) of this section; nor does it show an unintentional violation of subsection (a) accompanied by such recklessness or carelessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting to a thoughtless disregard of consequences, or a heedless indifference to the safety of others, as imports criminal responsibility; and, hence, does not make out a case of reckless driving sufficient to carry the case to the jury. State v. Dupree, 264 N.C. 463, 142 S.E.2d 5 (1965).

Skidding. — The mere skidding of a motor vehicle is not evidence of, and does not imply, negligence. Webb v. Clark, 264 N.C. 474, 141 S.E.2d 880 (1965).

But skidding may form the basis of a recovery where it and the resulting damage is caused from some fault of the operator amounting to negligence on his part. Webb v. Clark, 264 N.C. 474, 141 S.E.2d 880 (1965).

When the condition of a road is such that skidding may be reasonably anticipated, the driver of a vehicle must exercise care commensurate with the danger to keep the vehicle under control so as to avoid injury to occupants of the vehicle and others on or off the highway. Webb v. Clark, 264 N.C. 474, 141 S.E.2d 880 (1965).

Operation of Vehicle While in Drunken Condition. — Defendant's perilous operation of his truck in a drunken condition constituted a driving of it upon the public highway without due caution and circumspection and in a manner so as to endanger persons or property, and was reckless driving within the intent and meaning of this section. Southern Nat'l Bank v. Lindsey, 264 N.C. 585, 142 S.E.2d 357 (1965).

Violation of Traffic Regulation. — The simple violation of a traffic regulation which does not involve actual danger to life, limb or property, while importing civil liability if damage or injury ensue, would not perforce constitute the criminal offense of reckless driving. State v. Cope, 204 N.C. 28, 167 S.E. 456 (1933); State v. Floyd, 15 N.C. App. 438, 190 S.E.2d 353 (1972).

Neither the intentional nor the unintentional violation of a traffic law without more constitutes reckless driving. Ingle v. Roy Stone Transf. Corp., 271 N.C. 276, 156 S.E.2d 265 (1967); Haynes v. Busby, 15 N.C. App. 106, 189 S.E.2d 653 (1972).

V. WARRANTS AND ALLEGATIONS.

Pleading Reckless Driving Effectively. — To plead reckless driving effectively, a party must allege facts which show that the other was violating specific rules of the road in a criminally negligent manner. Roberts v. Pilot Freight Carriers, 273 N.C. 600, 160 S.E.2d 712 (1968); Nance v. Williams, 2 N.C. App. 345, 163 S.E.2d 47 (1968).

To plead reckless driving effectively, the pleader must particularize with reference to the specific rules of the road which the motorist was violating and his manner of doing so. Ingle v. Roy Stone Transf. Corp., 271 N.C. 276, 156 S.E.2d 265 (1967).

Allegations of reckless driving in the words of this section, without more, do not justify a charge of reckless driving. Roberts v. Pilot Freight Carriers, 273 N.C. 600, 160 S.E.2d 712 (1968); Nance v. Williams, 2 N.C. App. 345, 163 S.E.2d 47 (1968).

Allegations as to reckless driving in the words of this section, without specifying wherein the party was reckless, amount to no more than an allegation that the party charged was negligent. They are but conclusions of law which are not admitted by demurrer. They do not justify a charge on reckless driving. Ingle v. Roy Stone Transf. Corp., 271 N.C. 276, 156 S.E.2d 265 (1967).

Alleging Violation of This Section Rather than of Former § 20-140.1. — Where a complaint alleged reckless driving on a university campus as a violation of this section, the fact that the complaint alleged a violation of this section instead of a violation of former § 20-140.1 was not fatal in the light of former § 1-151 [now Rule 8, section (f), of the Rules of Civil Procedure (§ 1A-1)], providing that pleadings shall be liberally construed, and in light of the theory of the trial court that campus roads were highways within the purview of this section. Rhyne v. Bailey, 254 N.C. 467, 119 S.E.2d 385 (1961).

Warrants Held Sufficient. — A warrant charging that defendant "did unlawfully and willfully operate a motor vehicle on a State highway in a careless and reckless manner and without due regard for the rights and safety of others and their property in violation" of municipal ordinances and contrary to the form of the statute is held sufficient to charge defendant with reckless driving under this section, since, although the warrant fails to

follow the language of the statute in accordance with the better practice, it does charge facts sufficient to enable the court to proceed to judgment, and the charge of violating the municipal ordinances may be treated as surplusage. State v. Wilson, 218 N.C. 769, 12 S.E.2d 654 (1941).

Warrants under this section which charge the offense almost literally in the words of the statute are sufficient. State v. Wallace, 251 N.C. 378, 111 S.E.2d 714 (1959).

A warrant charging defendant with driving under the influence and reckless driving, which were treated as separate counts, was sufficient since each count charged all the essential elements constituting the violation of law charged. State v. Fuller, 24 N.C. App. 38, 209 S.E.2d 805 (1974).

VI. EVIDENCE.

Proof of Violation in Prosecution for Murder, Manslaughter or Assault. — North Carolina statutes on the subject of regulating the care to be used by those driving motor vehicles upon the State's highways are to secure the reasonable safety of persons in and upon the highways of the State, and where death or great bodily harm results, evidence that the accused was, at the time charged, violating these provisions may be properly received upon a trial for murder or for manslaughter in appropriate instances, or as evidence of an assault where no serious injury has resulted. State v. Sudderth, 184 N.C. 753, 114 S.E. 828 (1922).

Proximate Cause Is Question for Jury. — The violation of this and succeeding sections enacted for the safety of those driving upon the highway is negligence per se, and when such violation is admitted or established, the question of proximate cause is ordinarily for the jury. Godfrey v. Queen City Coach Co., 201 N.C. 264, 159 S.E. 412 (1931); King v. Pope, 202 N.C. 554, 163 S.E. 447 (1932).

The better rule under this and the following section is that except where the evidence is so conclusive that there could be, in the minds of reasonable men, no doubt as to the plaintiff's negligence contributing to the injury, the question should be left to the jury. Morris v. Sells-Floto Circus, Inc., 65 F.2d 782 (4th Cir. 1933).

Evidence that the individual defendant drove his car in a negligent manner in violation of this and other sections and that such negligence proximately caused injury to the plaintiff is held sufficient to have been submitted to the jury. Puckett v. Dyer, 203 N.C. 684, 167 S.E. 43 (1932).

Sufficiency of Evidence for Jury. — The State's evidence tending to show that defendant, driving 60 miles an hour, crashed into the rear of a car driven in the same direction on its right-hand side of the highway at 20 or 25 miles an hour, that the driver of the other car saw in his rearview mirror defendant approaching at an excessive speed but that defendant struck the car before its driver could get on the shoulders of the road, together with evidence showing that defendant's car struck the other car with terrific force, is held sufficient to be submitted to the jury upon a warrant charging defendant with reckless driving under this section. State v. Wilson, 218 N.C. 769, 12 S.E.2d 654 (1941).

Allegation that defendant violated the provisions of this section in that truck was operated carelessly and heedlessly in willful and wanton disregard of rights and safety of others, at a speed and in a manner to endanger or be likely to endanger person and property, and by operating same to the left when he could have turned to the right and passed without striking plaintiff's testator, was not supported by evidence. Tysinger v. Coble Dairy Prods., 225 N.C. 717, 36 S.E.2d 246 (1945).

Evidence held sufficient to be submitted to the jury on a charge of reckless driving in violation of this section. State v. Holbrook, 228 N.C. 620, 46 S.E.2d 843 (1948); State v. Blankenship, 229 N.C. 589, 50 S.E.2d 724 (1948); State v. Call, 236 N.C. 333, 72 S.E.2d 752 (1952).

Circumstantial evidence tending to identify defendant as the driver of the car which was driven in a reckless manner was held sufficient to be submitted to the jury. State v. Dooley, 232 N.C. 311, 59 S.E.2d 808 (1950).

Evidence held properly submitted to the jury on the charge of reckless driving. State v. Sawyer, 230 N.C. 713, 55 S.E.2d 464 (1949).

Evidence held insufficient to take the case to the jury on the charge of reckless driving. State v. Roberson, 240 N.C. 745, 83 S.E.2d 798 (1954).

When evidence tended to show that an ambulance on emergency duty, with its siren sounding at "peak," was traveling north along a four-lane street and entered an intersection with another, more heavily traveled, four-lane street against a red light, that a car traveling east and a cab traveling west along the intersecting street stopped, but that defendant's bus, traveling west in the northern lane of the intersecting street with its view obstructed by the stationary cab, etc., proceeded into the intersection with the green light and struck the right side of the ambulance in the northeastern part of the intersection, failed to show negligence on the part of the operator of the bus under this section or § 20-156. McEwen Funeral Serv. v. Charlotte City Coach Lines, 248 N.C. 146, 102 S.E.2d 816 (1958).

From the evidence it was inferable that the defendant in rounding a curve failed to exercise due care to maintain a proper lookout and to keep his car under control, and that he was driving recklessly in violation of this section. The evidence was sufficient to carry the case to the jury on the issue of actionable negligence. Tatem v. Tatem, 245 N.C. 587, 96 S.E.2d 725 (1957).

Evidence tending to show that defendant driver saw approaching a truck with a red flashing light on its front and a fogging machine in the truck emitting chemical fog which completely obscured the entire highway, that defendant driver slowed his vehicle but drove into the fog at a rather good rate of speed and so continued on his right side of the highway until he was hit head-on by a truck traveling in the opposite direction, was sufficient to require the submission to the jury of the question whether defendant was operating his vehicle in violation of this section. Moore v. Plymouth, 249 N.C. 423, 106 S.E.2d 695 (1959).

The evidence tended to show that defendant was negligent in the operation of his automobile in driving it upon the highway without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property in violation of this section. Stockwell v. Brown, 254 N.C. 662, 119 S.E.2d 795 (1961).

Same; In Prosecution for Manslaughter. — Evidence that defendant was driving on the public highways of the State while under the influence of intoxicating liquor in violation of § 20-138, and was driving recklessly in violation of this section, which proximately caused the death of a passenger in his car, is sufficient to be submitted to the jury in a prosecution for manslaughter. State v. Blankenship, 229 N.C. 589, 50 S.E.2d 724 (1948).

Evidence held sufficient to justify conviction of reckless driving. State v. Steelman, 228 N.C. 634, 46 S.E.2d 845 (1948).

The State's evidence tending to show that defendant was driving some 80 to 90 miles per hour over a highway on which several other vehicles were moving at the time is sufficient to overrule defendant's motion to nonsuit and sustain a conviction of reckless driving. State v. Vanhoy, 230 N.C. 162, 52 S.E.2d 278 (1949).

Evidence Not Disclosing Reckless Driving. — Evidence, while sufficient to present the question of negligence, did not disclose careless and reckless driving within the purview of this section. Williams v. Boulerice, 269 N.C. 499, 153 S.E.2d 95 (1967).

Sufficient Evidence to Sustain Negligence and Proximate Cause as a Matter of Law. — See Smith v. Miller, 209 N.C. 170, 183 S.E. 370 (1936).

Findings by Jury Supporting Conclusion of Violation of Section. — Findings by the jury that certain acts import a thoughtless disregard for the consequences or a heedless indifference to the safety and rights of others would support a conclusion that the minor plaintiff operated her car in violation of this section. That would constitute negligence per se and, if a proximate cause of the collision, would constitute actionable negligence. Ford v. Jones, 6 N.C. App. 722, 171 S.E.2d 103 (1969).

VII. INSTRUCTIONS.

The charge in a prosecution for reckless driving was held to be insubstantial compliance with the requirements of § 1-180. State v. Vanhoy, 230 N.C. 162, 52 S.E.2d 278 (1949).

If a party has properly pleaded reckless driving and the judge undertakes to charge upon it, § 1-180 requires him to tell the jury what facts they might find from the evidence would constitute reckless driving. Nance v. Williams, 2 N.C. App. 345, 163 S.E.2d 47 (1968); Roberts v. Pilot Freight Carriers, 273 N.C. 600, 160 S.E.2d 712 (1968); Ford v. Jones, 6 N.C. App. 722, 171 S.E.2d 103 (1969).

When the judge has correctly instructed the jury upon the law applicable to the various acts of negligence upon which the pleadings and evidence require a charge, there is no need to reassemble the parts and present them to the jury in a packaged proposition labeled reckless driving, for the whole is equal to the sum of its parts. If, however, he undertakes to do so, § 1-180 requires him to tell the jury what facts, which they might find from the evidence, would constitute reckless driving. Ingle v. Roy Stone Transf. Corp., 271 N.C. 276, 156 S.E.2d 265 (1967).

It is not sufficient for the judge to read this section and then leave it to the jury to apply the law to the facts and to decide for themselves what plaintiff did, if anything, which constituted reckless driving. Ingle v. Roy Stone Transf. Corp., 271 N.C. 276, 156 S.E.2d 265 (1967); Nance v. Williams, 2 N.C. App. 345, 163 S.E.2d 47 (1968); Roberts v. Pilot Freight Carriers, 273 N.C. 600, 160 S.E.2d 712 (1968); Ford v. Jones, 6 N.C. App. 722, 171 S.E.2d 103 (1969).

Charge on Lesser Included Offense to § 20-138. — The fact that the evidence indicated that defendant operated a motor vehicle upon a highway after consuming such quantity of intoxicating liquor as directly and visibly affected the operation of said vehicle, thereby satisfying the requisite elements of subsection (c) of this section, combined with the legislative mandate that such offense is a lesser included offense of driving under the influence of intoxicating liquor as defined in § 20-138, required a finding that the trial court should have instructed the jury that they could find defendant guilty of the lesser included offense of reckless driving as defined in subsection (c). State v. Burrus, 30 N.C. App. 250, 226 S.E.2d 677 (1976).

In a prosecution for driving under the influence of intoxicating liquor, where the record was devoid of any evidence tending to show that defendant's consumption of intoxicating liquor directly and visibly affected his operation of his motor vehicle immediately prior to his arrest for driving under the influence, the trial judge was not required to

charge the jury on the lesser included offense of reckless driving. State v. Pate, 29 N.C. App. 35, 222 S.E.2d 741 (1976).

Instruction Erroneous When Not Supported by Evidence. — Where there is no evidence that the person charged with negligence drove his vehicle in such a manner as to constitute reckless driving, it is error for the court to charge that reckless driving is an element of negligence to be considered by the jury. Ford v. Jones, 6 N.C. App. 722, 171 S.E.2d 103 (1969).

Instruction on Reckless Driving Held Reversible Error. — See State v. Folger, 211 N.C. 695, 191 S.E. 747 (1937).

In a manslaughter case based on reckless driving of defendant, an instruction on reckless driving which did not charge the jury to find that such reckless driving was the proximate cause of the wreck and resultant death of the deceased was erroneous. State v. Mundy, 243 N.C. 149, 90 S.E.2d 312 (1955).

VIII. CONVICTIONS.

Conviction Does Not Authorize Suspension of License. — The offense of reckless driving in violation of this section is not an offense for which the Department of Motor Vehicles is authorized by § 20-16 to suspend an operator's license. In re Bratton, 263 N.C. 70, 138 S.E.2d 809 (1964).

Nor Mandatory Revocation Thereof. — The offense of reckless driving in violation of this section is not an offense for which, upon conviction, the revocation of an operator's license is mandatory under § 20-17. In re Bratton, 263 N.C. 70, 138 S.E.2d 809 (1964).

An acquittal of reckless driving in the recorder's court will not bar a prosecution of manslaughter in the superior court arising out of the same occurence, the two offenses differing both in grade and kind and not being the same in law or in fact, and the one not being a lesser degree of the other, and the recorder being without jurisdiction over the charge of manslaughter, but having bound defendant over to the superior court on that charge. State v. Midgett, 214 N.C. 107, 198 S.E. 613 (1938).

An acquittal of reckless driving in a court having jurisdiction to try the defendant for that offense would not bar the prosecution of the defendant in the superior court for involuntary manslaughter arising out of the same occurence. Reckless driving and speed competition are not lesser included offenses of the charge of involuntary manslaughter. State v. Sawyer, 11 N.C. App. 81, 180 S.E.2d 387 (1971).

§ 20-140.1: Repealed by Session Laws 1973, c. 1330, s. 39.

§ 20-140.2. Overloaded or overcrowded vehicle. — No person shall operate upon a highway or public vehicular area a motor vehicle which is so loaded or crowded with passengers or property, or both, as to obstruct the operator's view of the highway or public vehicular area, including intersections, or so as to impair or restrict otherwise the proper operation of the vehicle. (1953, c. 1233; 1967, c. 674, s. 1; 1973, c. 1143, s. 2; c. 1330, s. 4.)

Cross Reference. — For present provisions requiring motorcycle riders to wear helmets, see § 20-140.4.

Applied in Snellings v. Roberts, 12 N.C. App. 476, 183 S.E.2d 872 (1971).

§ 20-140.3. Unlawful use of National System of Interstate and Defense Highways and other controlled-access highways. — On those sections of highways which are or become a part of the National System of Interstate and Defense Highways and other controlled-access highways, it shall be unlawful for any person:

(1) To drive a vehicle over, upon, or across any curb, central dividing section or other separation or dividing line on said highways.

(2) To make a left turn or a semicircular or U-turn except through an opening provided for that purpose in the dividing curb, separation section, or line on said highways.

(3) To drive any vehicle except in the proper lane provided for that purpose and in the proper direction and to the right of the central dividing curb, separation section, or line on said highways.

(4) To drive a vehicle onto or from any controlled-access highway except at such entrances and exits as are established by public authority.

(5) To stop, park, or leave standing any vehicle, whether attended or unattended, on any part or portion of the right-of-way of said highways,

except in the case of an emergency or as directed by a peace officer, or at designated parking areas.

(6) To fail to yield the right-of-way when entering the highway to any vehicle already travelling on the highway.

(7) Notwithstanding any other subdivision of this section, a member of the State Highway Patrol may cross the median of a divided highway when he has reasonable grounds to believe that a felony is being or has been committed, has personal knowledge that a vehicle is being operated at a speed or in a manner which is likely to endanger persons or property, or the patrol member has reasonable grounds to believe that his presence is immediately required at a location which would necessitate his crossing a median of a divided highway for this purpose. (1973, c. 1330, s. 5; 1977, c. 731, s. 1.)

Cross Reference. — See § 136-89.58.

Editor's Note. — The 1977 amendment added subdivision (7).

§ 20-140.4. Special provisions for motorcycles. — (a) No person shall operate a motorcycle upon a highway or public vehicular area:

(1) When the number of persons upon such motorcycle, including the operator, shall exceed the number of persons which it was designed to carry.

(2) Unless the operator and all passengers thereon wear safety helmets of a type approved by the Commissioner of Motor Vehicles.

(b) Violation of any provision of this section shall not be considered negligence per se or contributory negligence per se in any civil action. (1973, c. 1330, s. 6.)

Editor's Note. — For note on statutory requirement of safety helmets for motorcyclists, see 6 Wake Forest Intra. L. Rev. 349 (1970).

Constitutionality. — Former subsection (b) of § 20-140.2 did not contravene any provision of either State or federal Constitutions. State v. Anderson, 3 N.C. App. 124, 164 S.E.2d 48 (1968), aff'd, 275 N.C. 168, 166 S.E.2d 49 (1969).

The requirement of former subsection (b) of § 20-140.2 that the operator of a motorcycle on a public highway wear a protective helmet was constitutional as a valid exercise of the police power since the statute bore a real and substantial relationship to public safety. State v. Anderson, 275 N.C. 168, 166 S.E.2d 49 (1969).

§ 20-141. Speed restrictions. — (a) No person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing.

(b) Except as otherwise provided in this Chapter, it shall be unlawful to operate a vehicle in excess of the following speeds:

(1) Thirty-five miles per hour inside municipal corporate limits for all vehicles.

(2) Fifty-five miles per hour outside municipal corporate limits for all vehicles, except school buses and school activity buses.

(c) Except while towing another vehicle, or when an advisory safe-speed sign indicates a slower speed, or as otherwise provided by law, it shall be unlawful to operate a passenger vehicle upon the interstate and primary highway system at less than the following speeds:

(1) Forty miles per hour in a speed zone of 55 miles per hour.

(2) Forty-five miles per hour in a speed zone of 60 miles per hour or greater.

These minimum speeds shall be effective only when appropriate signs are posted indicating the minimum speed.

(d) (1) Whenever the Department of Transportation determines on the basis of an engineering and traffic investigation that any speed allowed by

subsection (b) is greater than is reasonable and safe under the conditions found to exist upon any part of a highway outside the corporate limits of a municipality or upon any part of a highway designated as part of the Interstate Highway System or other controlled-access highway (either inside or outside the corporate limits of a municipality), the Department of Transportation shall determine and declare a reasonable and safe speed limit.

(2) Whenever the Department of Transportation determines on the basis of an engineering and traffic investigation that a higher maximum speed than those set forth in subsection (b) is reasonable and safe under the conditions found to exist upon any part of a highway designated as part of the Interstate Highway System or other controlled-access highway (either inside or outside the corporate limits of a municipality) the Department of Transportation shall determine and declare a reasonable and safe speed limit. A speed limit set pursuant to this subsection may not exceed 70 miles per hour.

Speed limits set pursuant to this subsection are not effective until appropriate signs giving notice thereof are erected upon the parts of the highway affected.

(e) Local authorities, in their respective jurisdictions, may authorize by ordinance higher speeds or lower speeds than those set out in subsection (b) upon all streets which are not part of the State highway system; but no speed so fixed shall authorize a speed in excess of 55 miles per hour. Speed limits set pursuant to this subsection shall be effective when appropriate signs giving notice thereof are erected upon the part of the streets affected.

(f) Whenever local authorities within their respective jurisdictions determine upon the basis of an engineering and traffic investigation that a higher maximum speed than those set forth in subsection (b) is reasonable and safe, or that any speed hereinbefore set forth is greater than is reasonable and safe, under the conditions found to exist upon any part of a street within the corporate limits of a municipality and which street is a part of the State highway system (except those highways designated as part of the interstate highway system or other controlled-access highway) said local authorities shall determine and declare a safe and reasonable speed limit. A speed limit set pursuant to this subsection may not exceed 55 miles per hour. Limits set pursuant to this subsection shall become effective when the Department of Transportation has passed a concurring ordinance and signs are erected giving notice of the authorized speed limit.

(g) Whenever the Department of Transportation or local authorities within their respective jurisdictions determine on the basis of an engineering and traffic investigation that slow speeds on any part of a highway considerably impede the normal and reasonable movement of traffic, the Department of Transportation or such local authority may determine and declare a minimum speed below which no person shall operate a motor vehicle except when necessary for safe operation in compliance with law. Such minimum speed limit shall be effective when appropriate signs giving notice thereof are erected on said part of the highway. Provided, such minimum speed limit shall be effective as to those highways and streets within the corporate limits of a municipality which are on the State highway system only when ordinances adopting the minimum speed limit are passed and concurred in by both the Department of Transportation and the local authorities. The provisions of this subsection shall not apply to farm tractors and other motor vehicles operating at reasonable speeds for the type and nature of such vehicles.

(h) No person shall operate a motor vehicle on the highway at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law;

provided, this provision shall not apply to farm tractors and other motor vehicles operating at reasonable speeds for the type and nature of such vehicles.

(i) The Department of Transportation shall have authority to designate and appropriately mark certain highways of the State as truck routes.

(j) Any person convicted of violating this section by operating a vehicle on a street or highway in excess of 55 miles per hour and at least 15 miles per hour over the legal limit while fleeing or attempting to elude arrest or apprehension by a law-enforcement officer with authority to enforce the motor vehicle laws shall be punished by a fine of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000) or imprisonment for not more than two years, or both, in the discretion of the court.

(k) Notwithstanding any other provision contained in G.S. 20-141 or any other statute or law of this State, the maximum speed limit on any public highway within the State of North Carolina shall not exceed 55 miles per hour.

(l) Notwithstanding any other provision contained in G.S. 20-141 or any other statute or law of this State, including municipal charters, any speed limit on any portion of the public highways within the jurisdiction of this State shall be uniformly applicable to all types of motor vehicles using such portion of the highway, if on November 1, 1973, such portion of the highway had a speed limit which was uniformly applicable to all types of motor vehicles using it. Provided, however, that a lower speed limit may be established for any vehicle operating under a special permit because of any weight or dimension of such vehicle, including any load thereon. The requirement for a uniform speed limit hereunder shall not apply to any portion of the highway during such time as the condition of the highway, weather, an accident, or other condition creates a temporary hazard to the safety of traffic on such portion of the highway.

(m) The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the operator of a vehicle from the duty to decrease speed as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway, and to avoid injury to any person or property.

(n) Notwithstanding any other provision contained in G.S. 20-141 or any other statute or law of this State, the failure of a motorist to stop his vehicle within the radius of its headlights or the range of his vision shall not be held negligence per se or contributory negligence per se. (1937, c. 297, s. 2; c. 407, s. 103; 1939, c. 275; 1941, c. 347; 1947, c. 1067, s. 17; 1949, c. 947, s. 1; 1953, c. 1145; 1955, c. 398; c. 555, ss. 1, 2; c. 1042; 1957, c. 65, s. 11; c. 214; 1959, c. 640; c. 1264, s. 10; 1961, cc. 99, 1147; 1963, cc. 134, 456, 949; 1967, c. 106; 1971, c. 79, ss. 1-3; 1973, c. 507, s. 5; c. 1330, s. 7; 1975, c. 225; 1977, c. 367; c. 464, s. 34; c. 470.)

I. General Consideration.
II. Driving at Less than Maximum Rate.
III. Driving at Night.
IV. Examples of Exceptions.
V. Criminal Actions.
VI. Negligence.
VII. Evidence.
VIII. Instructions.

I. GENERAL CONSIDERATION.

Local Modification. — Burke: 1975, c. 533; Richmond: 1975, c. 17.

Cross Reference. — As to minimum speed on inside lanes of certain dual-lane highways, see § 20-146, subsection (e).

Editor's Note. — The 1975 amendment added subsections (k) and (l).

The first 1977 amendment added subsection (m).

The second 1977 amendment substituted "Department of Transportation" for "Board of Transportation" and "Board" throughout the section.

The third 1977 amendment added subsection (n).

For comment on the 1941 amendment, see 19 N.C.L. Rev. 455; on the 1949 amendment, see 27 N.C.L. Rev. 473; on the 1953 amendment, see 31 N.C.L. Rev. 415 (1953). For article on proof of

negligence in North Carolina, see 48 N.C.L. Rev. 731 (1970).

The cases cited below were decided under corresponding provisions of earlier laws or under this section as it stood before its revision by the second 1973 amendment.

Constitutionality of Former Provisions. — Former provisions of this section setting different speed limits for different types of vehicles were constitutional, since a difference in speed based upon weight and size of motor vehicles bears a real and substantial relationship to the public health, safety, morals or some other phase of the public welfare. State v. Bennor, 6 N.C. App. 188, 169 S.E.2d 393 (1969).

Legislative Purpose. — This section was enacted for the protection of persons and property and in the interest of public safety and the preservation of human life. State v. Norris, 242 N.C. 47, 86 S.E.2d 916 (1955); State v. Bennor, 6 N.C. App. 188, 169 S.E.2d 393 (1969).

The statutory regulation of speed at intersections has for its purpose the protection of those who are in, entering or about to enter, the intersecting highway. Hutchens v. Southard, 254 N.C. 428, 119 S.E.2d 205 (1961).

The reckless driving and speed statutes are designed for the protection of life, limb and property. State v. Ward, 258 N.C. 330, 128 S.E.2d 673 (1962).

This section was enacted to promote safe operation of motor vehicles on the highways. Stephens v. Southern Oil Co., 259 N.C. 456, 131 S.E.2d 39 (1963).

This section has been scrutinized and studied by the legislature at every session of that body and has been amended, changed and altered constantly in keeping with changes in highway construction and public safety. State v. Bennor, 6 N.C. App. 188, 169 S.E.2d 393 (1969).

Scope of Protection. — This section does not limit its protection to motorists who are within the law; it enjoins all motorists to avoid causing injury to any person or property either on or off the highway, in compliance with legal requirements and the duty of all persons to use due care. McNair v. Goodwin, 264 N.C. 146, 141 S.E.2d 22 (1965).

This section states several offenses, each of which is a separate crime independently of the others. State v. Mills, 181 N.C. 530, 106 S.E. 677 (1921). See also State v. Rountree, 181 N.C. 535, 106 S.E. 669 (1921).

This section prescribes a standard of care, "and the standard fixed by the legislature is absolute." Aldridge v. Hasty, 240 N.C. 353, 82 S.E.2d 331 (1954); Kellogg v. Thomas, 244 N.C. 722, 94 S.E.2d 903 (1956); Lamm v. Gardner, 250 N.C. 540, 108 S.E.2d 847 (1959); Bondurant v. Mastin, 252 N.C. 190, 113 S.E.2d 292 (1960); Hutchens v. Southard, 254 N.C. 428, 119 S.E.2d 205 (1961); Pittman v. Swanson, 255 N.C. 681, 122 S.E.2d 814 (1961).

Rights of Motorist Are Relative. — A motorist operates his vehicle on the public highways where others are apt to be. His rights are relative. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

Duty of Motorist Generally. — A motorist must operate his vehicle at a reasonable rate of speed, keep a lookout for persons on or near the highway, decrease his speed when any special hazard exists with respect to pedestrians, and, if circumstances warrant, he must give warning of his approach by sounding his horn. Morris v. Minix, 4 N.C. App. 634, 167 S.E.2d 494 (1969).

A driver must operate his vehicle at a reasonable rate of speed and keep a proper lookout for persons on or near the highway. Basden v. Sutton, 7 N.C. App. 6, 171 S.E.2d 77 (1969).

Right to Assume that Other Driver Will Observe Law. — The operator of an automobile traveling upon an intersecting highway traversing a designated main-traveled or through highway, is under no duty to anticipate that the operator of an automobile upon such designated highway, approaching the intersection of the two highways, will fail to observe the speed regulations and the rules of the road. Hawes v. Atlantic Ref. Co., 236 N.C. 643, 74 S.E.2d 17 (1953).

Section Prescribes Lawful Speeds. — This section prescribes speeds at which motor vehicles may be lawfully operated on the highways of the State. Short v. Chapman, 261 N.C. 674, 136 S.E.2d 40 (1964).

This section establishes the maximum speed at which motor vehicles are permitted to travel lawfully on the highways of the State and in other places. Clark v. Jackson, 4 N.C. App. 277, 166 S.E.2d 501 (1969).

Exemption of Police Officers. — Section 20-145 exempts a police officer from observing the speed limit set out in this section when such officer is operating an automobile in the chase or apprehension of a violator of the law, or persons charged or suspected of such violation, as long as the officer drives with due regard to the safety of others. Goddard v. Williams, 251 N.C. 128, 110 S.E.2d 820 (1959).

Under this section 55 miles per hour is the general maximum speed limit in the State, and the provisions of former subdivision (5) of subsection (b) [now subsection (d)] are in the nature of an exception. A defendant must bring himself within the provisions of the exception in order to receive the benefits of the exception. State v. Brown, 250 N.C. 209, 108 S.E.2d 233 (1959); Shue v. Scheidt, 252 N.C. 561, 114 S.E.2d 237 (1960).

The authority of the State Highway Commission (now Department of Transportation) under subdivision (d)(1) of this section does not stop at city limits, but extends to all State highways maintained by it,

regardless of whether such highways are within the corporate limits of a city or town. Davis v. Jessup, 257 N.C. 215, 125 S.E.2d 440 (1962).

Effect of Violation upon Recovery from Railroad. — The mere fact that the speed of an automobile exceeded that allowed by law, at the time of collision with a railroad train at a public crossing, does not of itself prevent a recovery by the owner where there is evidence of negligence on the part of the railroad, because it would, among other things, withdraw the question of proximate cause from the jury. Shepard v. Norfolk S.R.R., 169 N.C. 239, 84 S.E. 277 (1915).

Warrant held sufficient to charge violation of this section by speeding 80 miles per hour. State v. Daughtry, 236 N.C. 316, 72 S.E.2d 658 (1952).

Failure to Allege Character of District Where Accident Occurred. — Where plaintiff alleged that defendant was operating his automobile at a speed which was excessive under the existing conditions in violation of subsection (a), made no other allegation with reference to defendant's speed, and did not allege that the approach to the scene of the collision was either a business or a residential district or that the proper authorities had posted any signs giving notice of any determined speed limit for the area, subsection (a) and former subsection (b)(4) [now subdivision (b)(2)] were pertinent in judging the conduct of the defendant. Hensley v. Wallen, 257 N.C. 675, 127 S.E.2d 277 (1962).

Effect of Exercising Judgment Where Speed Limit Exceeded. — Where one recklessly drives an automobile without signal or warning, in excess of the speed limit fixed by ordinance and the general statute, and thereby injures or kills another at a street intersection of the town, his violating the law in this manner makes him criminally liable for the injury without regard to the exercise of his judgment at the time in endeavoring to avoid the injury or contributory negligence on the part of the one injured or killed. State v. McIver, 175 N.C. 761, 94 S.E. 682 (1917).

Ordinance in Conflict with Section Not Enforceable. — See State v. Stallings, 189 N.C. 104, 126 S.E. 187 (1925).

Municipal Ordinance Limiting Speed on Nonsystem Streets Ineffective without Signs. — See opinion of Attorney General to Mr. James B. Garland, Assistant Gastonia City Attorney, 41 N.C.A.G. 167 (1970).

Applied in Gaffney v. Phelps, 207 N.C. 553, 178 S.E. 231 (1935) (speed in entering intersection); Hancock v. Wilson, 211 N.C. 129, 189 S.E. 631 (1937); Sparks v. Willis, 228 N.C. 25, 44 S.E.2d 343 (1947); State v. Blankenship, 229 N.C. 589, 50 S.E.2d 724 (1948); Bobbitt v. Haynes, 231 N.C. 373, 57 S.E.2d 361 (1950); Whiteman v. Seashore Transp. Co., 231 N.C. 701, 58 S.E.2d 752 (1950); Bumgardner v. Allison, 238 N.C. 621, 78 S.E.2d 752 (1953); McClamrock v. White Packing Co., 238 N.C. 648, 78 S.E.2d 749 (1953) (as to subsection (e)); Gantt v. Hobson, 240 N.C. 426, 82 S.E.2d 384 (1954) (as to subsection (h)); Combs v. United States, 122 F. Supp. 280 (E.D.N.C. 1954) (as to subsection (a)); Wilson v. Webster, 247 N.C. 393, 100 S.E.2d 829 (1957); Bass v. Lee, 255 N.C. 73, 120 S.E.2d 570 (1961); Powell v. Clark, 255 N.C. 707, 122 S.E.2d 706 (1961); Scarborough v. Ingram, 256 N.C. 87, 122 S.E.2d 798 (1961); Bulluck v. Long, 256 N.C. 577, 124 S.E.2d 716 (1962); Phillips v. Alston, 257 N.C. 255, 125 S.E.2d 580 (1962); Benson v. Sawyer, 257 N.C. 765, 127 S.E.2d 549 (1962); Parker v. Bruce, 258 N.C. 341, 128 S.E.2d 561 (1962); Queen v. Jarrett, 258 N.C. 405, 128 S.E.2d 894 (1963); State v. Wells, 259 N.C. 173, 130 S.E.2d 299 (1963); Scott v. Clark, 261 N.C. 102, 134 S.E.2d 181 (1964); Taney v. Brown, 262 N.C. 438, 137 S.E.2d 827 (1964); Hall v. Little, 262 N.C. 618, 138 S.E.2d 282 (1964); Carolina Coach Co. v. Cox, 337 F.2d 101 (4th Cir. 1964); Knight v. Seymour, 263 N.C. 790, 140 S.E.2d 410 (1965); Reeves v. Campbell, 264 N.C. 224, 141 S.E.2d 296 (1965); Drumwright v. Wood, 266 N.C. 198, 146 S.E.2d 1 (1966); Wells v. Bissette, 266 N.C. 774, 147 S.E.2d 210 (1966); Atwood v. Holland, 267 N.C. 722, 148 S.E.2d 851 (1966); White v. Mote, 270 N.C. 544, 155 S.E.2d 75 (1967); State v. Massey, 271 N.C. 555, 157 S.E.2d 150 (1967); State v. Moses, 272 N.C. 509, 158 S.E.2d 617 (1968); Pelkey v. Bynum, 2 N.C. App. 183, 162 S.E.2d 586 (1968); Kinney v. Goley, 6 N.C. App. 182, 169 S.E.2d 525 (1969); Racine v. Boege, 6 N.C. App. 341, 169 S.E.2d 913 (1969); State v. Zimmerman, 7 N.C. App. 522, 173 S.E.2d 35 (1970); Meeks v. Atkeson, 7 N.C. App. 631, 173 S.E.2d 509 (1970); Doggett v. Welborn, 18 N.C. App. 105, 196 S.E.2d 36 (1973); State v. Crabtree, 286 N.C. 541, 212 S.E.2d 103 (1975); McDougald v. Doughty, 27 N.C. App. 237, 218 S.E.2d 482 (1975); Farmer v. Chaney, 29 N.C. App. 544, 225 S.E.2d 159 (1976); State v. Gainey, 292 N.C. 627, 234 S.E.2d 610 (1977).

Quoted in Butler v. Allen, 233 N.C. 484, 64 S.E.2d 561 (1951); Adcox v. Austin, 235 N.C. 591, 70 S.E.2d 837 (1952); as to subsection (e), in Keener v. Beal, 246 N.C. 247, 98 S.E.2d 19 (1957); Clifton v. Turner, 257 N.C. 92, 125 S.E.2d 339 (1962); Kanoy v. Hinshaw, 273 N.C. 418, 160 S.E.2d 296 (1968).

Stated in State v. Sumner, 232 N.C. 386, 61 S.E.2d 84 (1950); Freshman v. Stallings, 128 F. Supp. 179 (E.D.N.C. 1955); Parlier v. Barnes, 260 N.C. 341, 132 S.E.2d 684 (1963); Winters v. Burch, 284 N.C. 205, 200 S.E.2d 55 (1973).

Cited in State v. Mickle, 194 N.C. 808, 140 S.E. 150 (1927); State v. Palmer, 197 N.C. 135, 147 S.E. 817 (1929); Burke v. Carolina Coach Co., 198 N.C. 8, 150 S.E. 636 (1929); Lancaster v. B. & H. Coast Line, 198 N.C. 107, 150 S.E. 716 (1929); Rudd v. Holmes, 198 N.C. 640, 152 S.E. 894 (1930); Pittman v. Downing, 209 N.C. 219, 183 S.E. 362 (1936); Taft v. Maryland Cas. Co., 211

N.C. 507, 191 S.E. 10 (1937); Pearson v. Luther, 212 N.C. 412, 193 S.E. 739 (1937); Reeves v. Staley, 220 N.C. 573, 18 S.E.2d 239 (1942); Brown v. Southern Paper Prods. Co., 222 N.C. 626, 24 S.E.2d 334 (1943); Crone v. Fisher, 223 N.C. 635, 27 S.E.2d 642 (1943); Hobbs v. Queen City Coach Co., 225 N.C. 323, 34 S.E.2d 211 (1945); Matheny v. Central Motor Lines, 233 N.C. 673, 65 S.E.2d 361 (1951); Hansley v. Tilton, 234 N.C. 3, 65 S.E.2d 300 (1951); Pemberton v. Lewis, 235 N.C. 188, 69 S.E.2d 512 (1952); Childress v. Johnson Motor Lines, 235 N.C. 522, 70 S.E.2d 558 (1952); Jernigan v. Jernigan, 236 N.C. 430, 72 S.E.2d 912 (1952); Powell v. Daniel, 236 N.C. 489, 73 S.E.2d 143 (1952); Lowe v. Department of Motor Vehicles, 244 N.C. 353, 93 S.E.2d 448 (1956); Weaver v. C.W. Myers Trading Post, Inc., 245 N.C. 106, 95 S.E.2d 533 (1956); Hennis Freight Lines v. Burlington Mills Corp., 246 N.C. 143, 97 S.E.2d 850 (1957); Lookabill v. Regan, 247 N.C. 199, 100 S.E.2d 521 (1957); Durham v. McLean Trucking Co., 247 N.C. 204, 100 S.E.2d 348 (1957); Hollowell v. Archbell, 250 N.C. 716, 110 S.E.2d 262 (1959); Beaver v. Scheidt, 251 N.C. 671, 111 S.E.2d 881 (1960); Kennedy v. James, 252 N.C. 434, 113 S.E.2d 889 (1960); Pridgen v. Uzzell, 254 N.C. 292, 118 S.E.2d 755 (1961); Peeden v. Tait, 254 N.C. 489, 119 S.E.2d 450 (1961); Brewer v. Powers Trucking Co., 256 N.C. 175, 123 S.E.2d 608 (1962); Gilliam v. Propst Constr. Co., 256 N.C. 197, 123 S.E.2d 504 (1962); Dunlap v. Lee, 257 N.C. 447, 126 S.E.2d 62 (1962); Jewell Ridge Coal Corp. v. City of Charlotte, 204 F. Supp. 256 (W.D.N.C. 1962); Upchurch v. Hudson Funeral Home, 263 N.C. 560, 140 S.E.2d 17 (1965); State Hwy. Comm'n v. Raleigh Farmers Mkt., Inc., 263 N.C. 622, 139 S.E.2d 904 (1965); Cogdell v. Taylor, 264 N.C. 424, 142 S.E.2d 36 (1965); Wilkins v. Turlington, 266 N.C. 328, 145 S.E.2d 892 (1966); Webb v. Felton, 266 N.C. 707, 147 S.E.2d 219 (1966); Barefoot v. Joyner, 270 N.C. 388, 154 S.E.2d 543 (1967); Reeves v. Hill, 272 N.C. 352, 158 S.E.2d 529 (1968); Anderson v. Carter, 272 N.C. 426, 158 S.E.2d 607 (1968); Swain v. Williamson, 4 N.C. App. 622, 167 S.E.2d 491 (1969); Brewer v. Harris, 279 N.C. 288, 182 S.E.2d 345 (1971); Southwire Co. v. Long Mfg. Co., 12 N.C. App. 335, 183 S.E.2d 253 (1971); McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972); Wyatt v. Haywood, 22 N.C. App. 267, 206 S.E.2d 260 (1974); Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975); State v. Hill, 31 N.C. App. 733, 230 S.E.2d 579 (1976); Smith v. Garrett, 32 N.C. App. 108, 230 S.E.2d 775 (1977).

II. DRIVING AT LESS THAN MAXIMUM RATE.

Limitation upon Privilege of Driving at Maximum Rate. — The speed limit prescribed by statute at which an automobile driver may go at various places does not alone excuse those who drive within the limit specified by the statute, and it is likewise required that they use proper care where other conditions require it within the limitations given. State v. Whaley, 191 N.C. 387, 132 S.E. 6 (1926).

A motorist may not lawfully drive at a speed which is not reasonable and prudent under the circumstances, notwithstanding that the speed is less than limit set by this section. Kolman v. Silbert, 219 N.C. 134, 12 S.E.2d 915 (1941).

The driver of an automobile upon a through highway did not have the right to assume absolutely that a driver approaching the intersection along a servient highway would obey the stop sign before entering or crossing the through highway, but was required to keep a proper lookout and to keep his car at a reasonable speed under the circumstances in order to avoid injury to life or limb, and the driver of the car along the through highway forfeited his right to rely upon the assumption that the other driver would stop before entering or crossing the intersection when he approached and attempted to traverse it himself at an unlawful or excessive speed. Even when his speed was lawful he remained under duty to exercise due care to ascertain if the driver of the other car was going to violate the statutory requirement in order to avoid the consequences of such negligence. Groome v. Davis, 215 N.C. 510, 2 S.E.2d 771 (1939).

By provision of this section, speed in excess of that which is reasonable and prudent under the circumstances, when special hazards exist by reason of traffic, weather or highway conditions, is unlawful notwithstanding that the speed may be less than the prima facie limits prescribed. Hoke v. Atlantic Greyhound Corp., 226 N.C. 692, 40 S.E.2d 345 (1946).

The fact that a vehicle is being driven within the statutory speed limit does not render the speed lawful when by reason of special hazards the speed is greater than is reasonable and prudent under the existing conditions. Rollison v. Hicks, 233 N.C. 99, 63 S.E.2d 190 (1951).

The speed of a motor vehicle may be unlawful under the circumstances of a particular case, even though such speed is less than the definite statutory limit prescribed for the vehicle in the place where it is being driven. Sowers v. Marley, 235 N.C. 607, 70 S.E.2d 670 (1952); Wise v. Lodge, 247 N.C. 250, 100 S.E.2d 677 (1957); Lamm v. Gardner, 250 N.C. 540, 108 S.E.2d 847 (1959).

It is unlawful to drive at any time on a State highway at a speed greater than is reasonable and prudent under the conditions then existing. State v. Norris, 242 N.C. 47, 86 S.E.2d 916 (1955).

In light of the provisions of § 20-140 and this section, it is clear that whether or not a speed of 55 miles an hour is lawful depends upon the circumstances at the time. These sections provide that a motorist must at all times drive with due caution and circumspection and at a

speed and in a manner so as not to endanger or be likely to endanger any person or property. At no time may a motorist lawfully drive at a speed greater than is reasonable and prudent under the conditions then existing. Primm v. King, 249 N.C. 228, 106 S.E.2d 223 (1958).

Speed in excess of that which is reasonable and prudent under the existing conditions is unlawful notwithstanding that the speed may be less than the limits proscribed by statute. State v. Grissom, 17 N.C. App. 374, 194 S.E.2d 227 (1973).

Motorist Must Decrease Speed When Special Hazards Exist. — A speed greater than is reasonable and prudent under the conditions then existing is prohibited by this section, and the duty is imposed upon the driver to decrease the speed of his automobile when special hazard exists with respect to pedestrians or other traffic. Baker v. Perrott, 228 N.C. 558, 46 S.E.2d 461 (1948). See Williams v. Henderson, 230 N.C. 707, 55 S.E.2d 462 (1949); Riggs v. Akers Motor Lines, 233 N.C. 160, 63 S.E.2d 197 (1951); Price v. Miller, 271 N.C. 690, 157 S.E.2d 347 (1967).

The duty of a driver to decrease his speed is governed by the duty of all persons to use "due care," and is tested by the usual legal requirements and standards such as proximate cause. Day v. Davis, 268 N.C. 643, 151 S.E.2d 556 (1966).

The driver of an automobile is required at all times to operate his vehicle with due regard to traffic and conditions of the highway and to keep his car under control and decrease speed when special hazards exist by reason of weather or highway conditions or when necessary to avoid colliding with any other vehicle. This requirement, as expressed in this section and § 20-140, constitutes the hub of the motor vehicle law around which other provisions regulating the operation of motor vehicles revolve. Cox v. Lee, 230 N.C. 155, 52 S.E.2d 355 (1949); Singletary v. Nixon, 239 N.C. 634, 80 S.E.2d 676 (1954); Lamm v. Gardner, 250 N.C. 540, 108 S.E.2d 847 (1959).

A motorist is under statutory duty to decrease speed when special hazard exists by reason of weather and highway conditions, to the end that others using the highway may not be injured. Williams v. Tucker, 259 N.C. 214, 130 S.E.2d 306 (1963).

The fact that the speed of a vehicle is lower than that fixed by statute does not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, or when a hazard exists with respect to weather or highway conditions, and speed shall be reduced as may be necessary to avoid colliding with any vehicle on the highway. Keller v. Security Mills of Greensboro, Inc., 260 N.C. 571, 133 S.E.2d 222 (1963).

And in Extreme Cases Must Stop. — It has been held in extreme cases that where by reason of fog or other conditions visibility is practically nonexistent, motorists are under duty to refrain from entering the highway or to stop if already on the highway. Williams v. Tucker, 259 N.C. 214, 130 S.E.2d 306 (1963).

Speed Less than 20 Miles per Hour May Be Unlawful. — Speed less than 20 miles per hour, in a business district, residential district or elsewhere, if greater than is reasonable and prudent under the conditions then existing, is unlawful and negligence per se. Hinson v. Dawson, 241 N.C. 714, 86 S.E.2d 585 (1955).

Speed of 40 miles per hour on a highway on which snow is beginning to stick may be excessive. Fox v. Hollar, 257 N.C. 65, 125 S.E.2d 334 (1962).

Speed of 35 to 40 miles per hour on a highway covered with ice and snow may be excessive; the driver of the vehicle under such conditions must exercise care commensurate with the danger so as to keep his vehicle under control. Redden v. Bynum, 256 N.C. 351, 123 S.E.2d 734 (1962).

Skidding. — When the condition of a road is such that skidding may be reasonably anticipated, the driver of a vehicle must exercise care commensurate with the danger to keep the vehicle under control so as to avoid injury to occupants of the vehicle and others on or off the highway. Webb v. Clark, 264 N.C. 474, 141 S.E.2d 880 (1965); Clark v. Jackson, 4 N.C. App. 277, 166 S.E.2d 501 (1969).

The skidding of an automobile is not in itself, and without more, evidence of negligence. Bass v. McLamb, 268 N.C. 395, 150 S.E.2d 856 (1966).

The mere skidding of a motor vehicle is not evidence of, and does not imply, negligence. Clark v. Jackson, 4 N.C. App. 277, 166 S.E.2d 501 (1969).

But the skidding of an automobile may be evidence of negligence, if it appears that it was caused by a failure to exercise reasonable precaution to avoid it, when the conditions at the time made such a result probable in the absence of such precaution. Clark v. Jackson, 4 N.C. App. 277, 166 S.E.2d 501 (1969).

III. DRIVING AT NIGHT.

Regulation of Speed at Night. — The motorist upon a public highway on a dark, misty and foggy night is required to regulate the speed of his car with a view to his own safety according to the distance the light from his headlights is thrown in front of him upon the highway, and to observe the rule of the ordinary prudent man. Weston v. Southern Ry., 194 N.C. 210, 139 S.E. 237 (1927). See also Stewart v. Stewart, 221 N.C. 147, 19 S.E.2d 242 (1942).

Curves on the road and darkness are conditions a motorist is required to take into consideration in regulating his speed "as may be necessary to avoid colliding with any person, vehicle, or other conveyance." Allen v. Dr.

Pepper Bottling Co., 223 N.C. 118, 25 S.E.2d 388 (1943).

The court committed prejudicial error in instructing the jury to the effect that a failure or inability of the defendant, who was driving the automobile within the maximum speed limit on the highway, to stop the automobile within the radius of his lights would constitute a breach of legal duty and would be negligence per se. Salter v. Lovick, 257 N.C. 619, 127 S.E.2d 273 (1962).

If a motorist is traveling within the legal speed limit, his inability to stop within the range of his headlights is not negligence per se, but is only evidence of negligence to be considered with the other evidence in the case. May v. Southern Ry., 259 N.C. 43, 129 S.E.2d 624 (1963).

If the driver of a motor vehicle who is operating it within the maximum speed limits prescribed by this section fails to stop such vehicle within the radius of the lights of the vehicle or within the range of his vision, the courts may no longer hold such failure to be negligence per se, or contributory negligence per se, as the case may be, that is, negligence or contributory negligence, in and of itself; but the facts relating thereto may be considered by the jury, with other facts in such action, in determining whether the operator be guilty of negligence, or contributory negligence, as the case may be. Beasley v. Williams, 260 N.C. 561, 133 S.E.2d 227 (1963); Coleman v. Burris, 265 N.C. 404, 144 S.E.2d 241 (1965); Bass v. McLamb, 268 N.C. 395, 150 S.E.2d 856 (1966); Duke v. Tankard, 3 N.C. App. 563, 165 S.E.2d 524 (1969).

The duty of the nocturnal motorist to exercise ordinary care for his own safety does not extend so far as to require that he must be able to bring his automobile to an immediate stop on the sudden arising of a dangerous situation which he could not reasonably have anticipated. Rouse v. Peterson, 261 N.C. 600, 135 S.E.2d 549 (1964).

Inability to Stop within Radius of Lights. — When a motorist is traveling within the maximum speed limit, his inability to stop his vehicle within the radius of his headlights will not be held negligence or contributory negligence per se. Short v. Chapman, 261 N.C. 674, 136 S.E.2d 40 (1964).

Or within Range of Vision. — Plaintiff's inability to stop within the range of his vision was held not to be contributory negligence per se, but the facts relating thereto were held for consideration by the jury in determining the issue of contributory negligence. Brown v. Hale, 263 N.C. 176, 139 S.E.2d 210 (1964).

Colliding with Vehicle Parked on Highway at Night without Lights. — Plaintiff will not be held contributorily negligent as a matter of law in striking the rear of a vehicle left unattended on a highway at nighttime without lights, when plaintiff at the time is traveling within the statutory maximum speed limit. Beasley v. Williams, 260 N.C. 561, 133 S.E.2d 227 (1963).

Where there is evidence from which the jury could draw a reasonable inference that the defendant was driving at a speed in excess of the statutory limit, the court must instruct the jury, without special request therefor, that if it finds from the evidence that defendant was operating his motor vehicle in excess of the speed limit such conduct would constitute negligence per se. A failure to so instruct the jury is prejudicial error which requires reversal and a new trial. Edwards v. Mayes, 385 F.2d 369 (4th Cir. 1967).

Allegations held not to show contributory negligence as a matter of law in colliding with truck stopped on highway after dark, without rear lights. Weavil v. Myers, 243 N.C. 386, 90 S.E.2d 733 (1956).

Where a motorist is traveling within the maximum legal speed, he will not be held contributorily negligent as a matter of law in colliding with the rear of a vehicle left in his lane of traffic at nighttime without lights. Dezern v. Asheboro City Bd. of Educ., 260 N.C. 535, 133 S.E.2d 204 (1963).

Motorist who is driving his automobile within the maximum speed limit cannot be held contributorily negligent as a matter of law in outrunning his headlights and striking the rear end of a pickup truck stopped on the highway without lights. Rouse v. Peterson, 261 N.C. 600, 135 S.E.2d 549 (1964); Sharpe v. Hanline, 265 N.C. 502, 144 S.E.2d 574 (1965).

A motorist is not required to anticipate that an automobile will be stopped on the highway ahead of him at night, without lights or warning signals required by statute, but this does not relieve him of the duty of exercising reasonable care for his own safety, of keeping a proper lookout, and proceeding as a reasonably prudent person would under the circumstances to avoid a collision with the rear of a vehicle stopped or standing on the road. Bass v. McLamb, 268 N.C. 395, 150 S.E.2d 856 (1966).

IV. EXAMPLES OF EXCEPTIONS.

Speed When Driver Sees Person or Vehicle in His Line of Travel. — Any speed may be unlawful if the driver of a motor vehicle sees, or in the exercise of due care could and should have seen, a person or vehicle in his line of travel. Cassetta v. Compton, 256 N.C. 71, 123 S.E.2d 222 (1961).

Any speed may be unlawful and excessive if the operator of a motor vehicle knows or by the exercise of due care should reasonably anticipate that a person or vehicle is standing in his line of travel. Murray v. Wyatt, 245 N.C. 123, 95 S.E.2d 541 (1956).

Care as to Children. — The law requires more than ordinary care in regard to children. Moore v. Powell, 205 N.C. 636, 172 S.E. 327 (1934).

Evidence that a child less than five years old was on the hard surface of a highway, unattended and clearly visible to defendant while he traveled a distance of one-half mile, that the child ran across the highway toward her companion, another small child, when defendant was only some 40 feet away, and that defendant could not then avoid striking the child, notwithstanding he had reduced his speed from some 45 miles per hour to 25 miles per hour, was sufficient to be submitted to the jury. Henderson v. Locklear, 260 N.C. 582, 133 S.E.2d 164 (1963).

Passing Animals. — See Tudor v. Bowen, 152 N.C. 441, 67 S.E. 1015 (1910); Gaskins v. Hancock, 156 N.C. 56, 72 S.E. 80 (1911); Curry v. Fleer, 157 N.C. 16, 72 S.E. 626 (1911).

Curves and hills in the road are conditions a motorist is required to take into consideration in regulating his speed as may be necessary to avoid colliding with any person, vehicle, or other conveyance. Tyson v. Ford, 228 N.C. 778, 47 S.E.2d 251 (1948).

Care Required of Motorists at Intersections. — The duties of motorists, both those on dominant and those on servient highways, when approaching, entering or traversing intersections require that each driver exercise ordinary care under the particular circumstances in which he finds himself and that the failure to do so can constitute actionable negligence where injury results. Murrell v. Jennings, 15 N.C. App. 658, 190 S.E.2d 686 (1972).

This section does not require the driver of a vehicle to reduce the speed of his vehicle in all circumstances when approaching and crossing an intersection. Rogers v. Rogers, 2 N.C. App. 668, 163 S.E.2d 645 (1968); Murrell v. Jennings, 15 N.C. App. 658, 190 S.E.2d 686 (1972).

The fact that the speed of a vehicle is lower than the maximum speed limit at that particular place does not relieve the driver thereof from the duty to decrease speed when approaching and crossing an intersection, when, in the exercise of due care, he should decrease his speed in order to avoid causing injury to any person or property. A failure to do so is negligence per se, and if the proximate cause of an injury, would create liability. Rogers v. Rogers, 2 N.C. App. 668, 163 S.E.2d 645 (1968); Murrell v. Jennings, 15 N.C. App. 658, 190 S.E.2d 686 (1972).

The fact that the speed of defendant's automobile was 50 miles an hour did not relieve her from the duty to decrease speed when approaching and crossing an intersection. Hutchens v. Southard, 254 N.C. 428, 119 S.E.2d 205 (1961).

The above cases were decided under former subsection (c) of this section, which expressly required drivers to decrease speed on approaching and crossing an intersection as necessary to avoid collisions, etc. — Ed. note.

V. CRIMINAL ACTIONS.

Application of Section to Criminal Actions. — See James v. City of Charlotte, 183 N.C. 630, 112 S.E. 423 (1922); Piner v. Richter, 202 N.C. 573, 163 S.E. 561 (1932).

A reckless approach and traverse of an intersection may render one criminally liable for the consequences of his acts in addition to liability under this section. State v. Gash, 177 N.C. 595, 99 S.E. 337 (1919).

Necessity for Criminal Negligence. — Under an indictment with three counts, assault with a deadly weapon (an automobile), operating a motor vehicle on a public highway while under the influence of intoxicating liquor, and operating a motor vehicle recklessly, and in breach of this section, wherein it was admitted by the State that there was no evidence of intentional assault, and the jury having returned for their verdict that defendant "was guilty of an assault, but not with reckless driving," the admission and the verdict on the last two counts dispelled the element of criminal negligence and criminal intent, and a conviction on the first count will not be sustained. State v. Rawlings, 191 N.C. 265, 131 S.E. 632 (1926). See also State v. Rountree, 181 N.C. 535, 106 S.E. 669 (1921).

When Violation Amounts to Manslaughter. — Where one drives his automobile in violation of the statutory requirements, and thus directly, or without an independent intervening sole proximate cause, the death of another results, he is guilty of manslaughter, though the death was unintentionally caused by his act. But the violation also is insufficient unless it was the proximate cause of the death, and a charge disregarding the element of proximate cause is error. State v. Whaley, 191 N.C. 387, 132 S.E. 6 (1926).

VI. NEGLIGENCE.

Violation as Constituting Negligence. — It is negligence per se to drive an automobile upon a public highway at a speed greater than that permitted by statute, and in an action to recover damages for the negligent killing of plaintiff's intestate, a voluntary passenger in the car thus driven, a motion as of nonsuit upon such evidence is properly denied. Albritton v. Hill, 190 N.C. 429, 130 S.E. 5 (1925).

A violation of this section constitutes negligence, although such negligence is not actionable unless it is the proximate cause of the injuries complained of. Davis v. Imes, 13 N.C. App. 521, 186 S.E.2d 641 (1972).

One who fails to comply with the provisions of this section is negligent. Stephens v. Southern Oil Co., 259 N.C. 456, 131 S.E.2d 39 (1963).

Violation of this section constitutes negligence, because according to the uniform decisions of the Supreme Court, the violation of a statute imposing a rule of conduct in the

operation of a motor vehicle and enacted in the interest of safety has been held to constitute negligence per se, unless otherwise provided in the statute. Bridges v. Jackson, 255 N.C. 333, 121 S.E.2d 542 (1961).

It is well settled by an unbroken line of North Carolina Supreme Court decisions that the operation of a motor vehicle in excess of the applicable limits set forth in this section is negligence per se. Edwards v. Mayes, 385 F.2d 369 (4th Cir. 1967).

Operation at a speed in excess of that lawfully prescribed is a negligent act. Krider v. Martello, 252 N.C. 474, 113 S.E.2d 924 (1960).

A violation of subsection (a) of this section, which is a safety statute, is negligence per se. Black v. Gurley Milling Co., 257 N.C. 730, 127 S.E.2d 515 (1962).

A violation of subsection (a) would be negligence per se, and if injury proximately result therefrom, it would be actionable. Tarrant v. Pepsi-Cola Bottling Co., 221 N.C. 390, 20 S.E.2d 565 (1942).

A motorist is required to act as a reasonably prudent man and to drive with due caution and circumspection and at a speed or in a manner so as not to endanger or be likely to endanger any person or property, and his failure to do so is negligence. Crotts v. Overnite Transp. Co., 246 N.C. 420, 98 S.E.2d 502 (1957).

It is unlawful for a person to operate a vehicle upon a public highway at a speed that is greater than is reasonable and prudent under existing circumstances. One who violates this statute is guilty of negligence. Rouse v. Jones, 254 N.C. 575, 119 S.E.2d 628 (1961).

If a person drives a vehicle on a highway at a speed greater than is reasonable and prudent under conditions then existing, such person is guilty of negligence per se, that is, as a matter of law, notwithstanding the fact that the speed does not exceed the applicable maximum limits set forth in subsection (b). Cassetta v. Compton, 256 N.C. 71, 123 S.E.2d 222 (1961); Edwards v. Mayes, 385 F.2d 369 (4th Cir. 1967).

If an automobile was driven at a speed greater than 55 miles per hour, or faster than was reasonable and prudent under existing conditions, the operator was negligent. Rector v. Roberts, 264 N.C. 324, 141 S.E.2d 482 (1965).

Where defendant was driving in excess of the maximum speed which would have been reasonable and prudent under the conditions then prevailing and failed to reduce his speed in approaching and entering an intersection, he was driving in violation of this section, and was guilty of negligence. Raper v. Byrum, 265 N.C. 269, 144 S.E.2d 38 (1965).

If defendant approached an intersection at a speed in excess of 60 miles per hour, he violated this section and was thus guilty of negligence per se. Jones v. Horton, 264 N.C. 549, 142 S.E.2d 351 (1965).

Evidence of greatly excessive speed in violation of the speed restrictions of this section, and of reckless driving in violation of § 20-140, was sufficient to make out a case of actionable negligence. Bell v. Maxwell, 246 N.C. 257, 98 S.E.2d 33 (1957); Hutchens v. Southard, 254 N.C. 428, 119 S.E.2d 205 (1961).

All the evidence tended to show that plaintiff's decedent was killed by the actionable negligence of the driver of the automobile in which he was a passenger in driving it at an excessive speed in violation of this section, and in a reckless manner in violation of § 20-140. Bridges v. Graham, 246 N.C. 371, 98 S.E.2d 492 (1957).

Violation of subsection (a) and former subsection (c) of this section constituted negligence per se. Rundle v. Grubb Motor Lines, 300 F.2d 333 (4th Cir. 1962).

A violation of former subdivision (b)(3) of this section was negligence per se. Smart v. Fox, 268 N.C. 284, 150 S.E.2d 403 (1966).

A violation of former subdivision (b)(4) of this section was negligence per se. Stegall v. Sledge, 247 N.C. 718, 102 S.E.2d 115 (1958); Rudd v. Stewart, 255 N.C. 90, 120 S.E.2d 601 (1961); Price v. Miller, 271 N.C. 690, 157 S.E.2d 347 (1967); Basden v. Sutton, 7 N.C. App. 6, 171 S.E.2d 77 (1969).

Proof of the breach of former subsection (c) of this section was negligence. In essence, that is the meaning of "per se." Hutchens v. Southard, 254 N.C. 428, 119 S.E.2d 205 (1961).

A violation of former subsection (c) was negligence per se. Pittman v. Swanson, 255 N.C. 681, 122 S.E.2d 814 (1961).

Failure to observe the statutory duty imposed by former subsection (c) rendered a motorist negligent, and such negligence may consist of traveling at excessive speed, failure to keep a proper lookout, or failure to maintain reasonable control of vehicle. Redden v. Bynum, 256 N.C. 351, 123 S.E.2d 734 (1962).

As to violation of statutory speed limit as constituting negligence per se, see also Norfleet v. Hall, 204 N.C. 573, 169 S.E. 143 (1933); James v. Carolina Coach Co., 207 N.C. 742, 178 S.E. 607 (1935); Exum v. Baumrind, 210 N.C. 650, 188 S.E. 200 (1936). As to evidence establishing negligence per se but not wanton negligence, see Turner v. Lipe, 210 N.C. 627, 188 S.E. 108 (1936). See also Smart v. Rodgers, 217 N.C. 560, 8 S.E.2d 833 (1940).

Violation Must Proximately Cause Injury. — A violation of this section has legal significance in a civil action only if it proximately causes injury. Cassetta v. Compton, 256 N.C. 71, 123 S.E.2d 222 (1961).

If the negligence resulting from failure to comply with the provisions of this section proximately causes injury, liability results. Stephens v. Southern Oil Co., 259 N.C. 456, 131 S.E.2d 39 (1963).

The violation of former subsection (c) constituted negligence per se. However, in order for there to be actionable negligence, such violation had to have been a proximate cause of the injury in suit, including the essential element of foreseeability. Day v. Davis, 268 N.C. 643, 151 S.E.2d 556 (1966).

VII. EVIDENCE.

The mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed or was following too closely. Huggins v. Kye, 10 N.C. App. 221, 178 S.E.2d 127 (1970).

The physical facts at the scene of an accident may disclose that the operator of the vehicle was travelling at excessive speed. Keller v. Security Mills of Greensboro, Inc., 260 N.C. 571, 133 S.E.2d 222 (1963).

What Must Be Proved before Speed Limit Can Be Determined. — In the absence of a stipulation, it is necessary to prove the character of the district before the maximum speed permitted by law can be determined. Hensley v. Wallen, 257 N.C. 675, 127 S.E.2d 277 (1962).

Testimony of Witness as to Speed Limit in Particular Area Violates Opinion Rule. — To permit a witness to say what a speed limit was for a particular area at a given time is to allow him to give his inferences from facts which he has observed. Such testimony violates the opinion rule and invades the province of the jury. Hensley v. Wallen, 257 N.C. 675, 127 S.E.2d 277 (1962).

But Witness May Testify as to Presence of Highway Sign. — If a highway sign declaring the speed limit to be a given speed has been posted, it would be competent for a witness to say so, describe the sign, and testify as to its location. Hensley v. Wallen, 257 N.C. 675, 127 S.E.2d 277 (1962).

And Inference Is that Highway Sign Was Erected by Proper Authorities. — When a sign is present, nothing else appearing, there is a logical inference that it was erected by the proper authorities pursuant to this section. Hensley v. Wallen, 257 N.C. 675, 127 S.E.2d 277 (1962).

Opinion Testimony as to Speed of Vehicle. — It is the rule in this State that any person of ordinary intelligence who has had a reasonable opportunity to observe is competent to testify as to the rate of speed of an automobile. Jones v. Horton, 264 N.C. 549, 142 S.E.2d 351 (1965).

Plaintiff's opinion testimony that the defendant's vehicle was traveling "in excess of 60 miles per hour, between 75-80 miles per hour" was competent. Its weight and credibility were for the jury. Jones v. Horton, 264 N.C. 549, 142 S.E.2d 351 (1965).

Judging Speed by Movement of Lights. — At night, a witness may judge the speed of an automobile by the movement of its lights, if his observation is for such a distance as to enable him to form an intelligent opinion. Jones v. Horton, 264 N.C. 549, 142 S.E.2d 351 (1965).

Circumstantial Evidence. — Though the evidence on the part of plaintiff is not direct, but circumstantial, yet it may be sufficient evidence to be submitted to the jury that defendant was exceeding the speed limit contrary to the law of this section. Jones v. Bagwell, 207 N.C. 378, 177 S.E. 170 (1934).

Burden of Showing Proximate Cause. — Plaintiff in a civil action has the burden of showing that excessive speed, when relied upon by him, was a proximate cause of injury. Hoke v. Atlantic Greyhound Corp., 226 N.C. 692, 40 S.E.2d 345 (1946).

Evidence of Excessive Speed Is Not Prima Facie Evidence of Proximate Cause. — Speed in excess of 21 miles per hour in a business district is prima facie evidence that the speed is excessive and unlawful, but such evidence is not prima facie proof of proximate cause, but is merely evidence to be considered with other evidence in determining actionable negligence. Templeton v. Kelley, 215 N.C. 577, 2 S.E.2d 696 (1939).

The mere fact that it can be reasonably inferred from the evidence that an automobile was traveling at a very rapid speed when it wrecked is not sufficient to permit a jury to find that such speed caused its wreck, and that its driver was guilty of actionable negligence. Crisp v. Medlin, 264 N.C. 314, 141 S.E.2d 609 (1965).

Proximate Cause Is for Jury. — Where there is evidence that defendant was driving his automobile on the highway at a speed of 65 miles per hour and that the injury in suit was proximately caused by such excessive speed, it is sufficient to be submitted to the jury on the issue of actionable negligence. Norfleet v. Hall, 204 N.C. 573, 169 S.E. 143 (1933).

Whether a violation of the provisions of this section is the proximate cause of an injury is for the jury to determine. Stephens v. Southern Oil Co., 259 N.C. 456, 131 S.E.2d 39 (1963).

What is the speed limit is a mixed question of fact and law, except where the State Highway Commission (now the Board of Transportation) or local authorities, pursuant to the statute, have determined a reasonable and safe speed for a particular area and have declared it by erecting appropriate signs. Hensley v. Wallen, 257 N.C. 675, 127 S.E.2d 277 (1962).

Reasonableness of Speed Is Question for Jury. — It is ultimately for the jury, not for a witness, to determine what speed under subsection (a) of this section would have been "reasonable and prudent under the conditions" which existed at the time and place of a collision. Peterson v. Taylor, 10 N.C. App. 297, 178 S.E.2d 227 (1971).

Jury Question Presented as to Slow Speed. — Where the evidence tends to show that the plaintiff or defendant was traveling at a slow speed, a jury question was presented as to whether under the circumstances the speed was so slow as to impede reasonable movement of traffic, and whether there was justification for the slow speed. Fonville v. Dixon, 16 N.C. App. 664, 193 S.E.2d 406 (1972).

Evidence Showing Excessive Speed. — See State v. Goins, 233 N.C. 460, 64 S.E.2d 289 (1951).

The principle that the mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed, was following too closely, or failed to keep a proper lookout is not absolute; the negligence, if any, depends upon the circumstances. Powell v. Cross, 263 N.C. 764, 140 S.E.2d 393 (1965).

Driver held driving at a speed greater than was reasonable and prudent under the conditions existing. Cronenberg v. United States, 123 F. Supp. 693 (E.D.N.C. 1954).

Mute evidence of extensive damage to front end of defendant's car, of blood spots on car and of car coming to rest 365 feet from where other blood spots began, tends to show that defendant had not slackened his speed of 75 to 80 miles per hour up to the moment of striking deceased, that he was violating this section. State v. Phelps, 242 N.C. 540, 89 S.E.2d 132 (1955).

Evidence Tending to Show "Speed Greater than Is Reasonable and Prudent". — Evidence tending to show that the driver of a truck was traveling 35 to 40 miles per hour in an early morning fog which limited visibility to 100 or 125 feet, that he had overtaken a vehicle traveling in the same direction and was attempting to pass such vehicle 250 or 300 feet before reaching a curve, and collided with plaintiff's car which approached from the opposite direction, was held sufficient to be submitted to the jury on the issue of the negligence of the driver of the truck. Winfield v. Smith, 230 N.C. 392, 53 S.E.2d 251 (1949).

Evidence Negativing Excessive Speed. — In Tysinger v. Coble Dairy Prods., 225 N.C. 717, 36 S.E.2d 246 (1945), it was held that in the light of admitted facts as to the length of marks on the shoulder of highway and the point at which truck came to rest, suggestion of a speed of 45 miles per hour as the truck was leaving the highway and going on the shoulder was contrary to human experience.

Evidence held sufficient to be submitted to the jury on the question of the negligence of a driver in traveling at excessive speed and in failing to maintain a proper lookout and in failing to keep his car under proper control. Blalock v. Hart, 239 N.C. 475, 80 S.E.2d 373 (1954).

Evidence that defendant failed to yield the right-of-way to the plaintiff who was on the right, and that defendant was driving at 50 miles per hour through the intersection, raised the issue of defendant's negligence, and the motion for nonsuit at the close of all the evidence was properly denied. Price v. Gray, 246 N.C. 162, 97 S.E.2d 844 (1957).

The evidence tended to show that defendant was guilty of negligence in not decreasing speed when approaching and entering an intersection at a speed of 60 to 70 miles an hour in violation of former subsection (c) of this section. Stockwell v. Brown, 254 N.C. 662, 119 S.E.2d 795 (1961).

Evidence held insufficient to be submitted to jury on question of maximum speed limit for business district where it did not bring locale of collision within statutory definition of such district. Tillman v. Bellamy, 242 N.C. 201, 87 S.E.2d 253 (1955).

Evidence held to show violation of this section, and to warrant submission to the jury of the issue of defendants' negligence. Winfield v. Smith, 230 N.C. 392, 53 S.E.2d 251 (1949); Brafford v. Cook, 232 N.C. 699, 62 S.E.2d 327 (1950).

Evidence Sufficient to Show Violation of Subsection (a). — See Register v. Gibbs, 233 N.C. 456, 64 S.E.2d 280 (1951).

Sufficient Evidence to Overrule Defendant's Motion to Nonsuit in Prosecution for Manslaughter. — Evidence that the defendant was driving his car at a speed of from 50 to 55 miles per hour, on or near the center of the highway, when he collided with another car, resulting in the death of the driver thereof, was held sufficient to overrule defendant's motion to nonsuit in a prosecution for manslaughter, although defendant introduced evidence in sharp conflict. State v. Webber, 210 N.C. 137, 185 S.E. 659 (1936).

The State's evidence tending to show that defendant was driving some 80 to 90 miles per hour over a highway whereon several other vehicles were moving at the time is sufficient to overrule defendant's motion to nonsuit and sustain a conviction of reckless driving under § 20-140, and driving at a speed in excess of 55 miles per hour in violation of this section. State v. Vanhoy, 230 N.C. 162, 52 S.E.2d 278 (1949).

VIII. INSTRUCTIONS.

Charge Held Sufficient. — The charge, in a prosecution for reckless driving and driving at an excessive speed, both as to the statement of the evidence and the law arising on the essential features of the evidence, was held to be in substantial compliance with the requirements of § 1-180. State v. Vanhoy, 230 N.C. 162, 52 S.E.2d 278 (1949).

Instruction charging duty of motorist operating a vehicle with worn, slick tires on a wet and slippery highway held sufficient. First Union Nat'l Bank v. Hackney, 270 N.C. 437, 154 S.E.2d 512 (1967).

Instruction Held without Error. — The trial court's instruction correctly defining "residential district" and charging that the lawful speed therein was 25 miles an hour, but that this limitation did not relieve the driver from further reducing his speed if made necessary by special hazards in order to avoid colliding with any person or vehicle, was without error. Reid v. City Coach Co., 215 N.C. 469, 2 S.E.2d 578, 123 A.L.R. 140 (1939).

Instruction Held Not Prejudicial. — Under this section prior to the 1947 amendment, where plaintiff's evidence tended to show that the driver was operating defendant's bus at a rate of 40 to 50 miles an hour in heavy traffic around a curve or an upgrade, an instruction that a speed of 45 miles per hour, rather than a speed in excess of 45 miles per hour, was prima facie evidence that the speed was unlawful, was held not prejudicial in view of the requirement in former subsection (c) to reduce speed below the prima facie limit prescribed in traversing a curve or when special hazards exist with respect to other traffic. Garvey v. Atlantic Greyhound Corp., 228 N.C. 166, 45 S.E.2d 58 (1947).

Instruction failing to charge provisions of this section, in civil action, held error. Barnes v. Teer, 219 N.C. 823, 15 S.E.2d 379 (1941).

Mere Reading of Section Held Insufficient. — The mere reading of the statutory speed regulations laid down in this section, without separating the irrelevant provisions from those pertinent to the evidence and without application of the relevant provisions of the evidence adduced, is insufficient to meet the requirements of § 1-180. Lewis v. Watson, 229 N.C. 20, 47 S.E.2d 484 (1948).

The jury should have been instructed on the effect of violations of subsection (a) and former subsection (c) of this section, where, under proper instruction, it would have been possible for the jury to conclude that defendant, in the exercise of due and reasonable care, could or should have seen the decedent's vehicle stopped on the highway. Edwards v. Mayes, 385 F.2d 369 (4th Cir. 1967).

Necessity for Instruction as to Former Subsection (c). — Where the trial court instructed the jury that the evidence was insufficient to show that the area where the collision occurred was a residential district and therefore the maximum allowable speed was 55 miles per hour, it was held on appeal that defendant was entitled to have the jury instructed as to provisions of former subsection (c) of this section. Medlin v. Spurrier & Co., 239 N.C. 48, 79 S.E.2d 209 (1953).

Where the court in its charge quoted almost verbatim the provisions of subsection (a), but neither charged nor explained in form or substance, nor made any reference to, the provisions of former subsection (c) in any part of the charge, this affected a substantive right of plaintiff, and was prejudicial error, even in the absence of a special request for instructions. Pittman v. Swanson, 255 N.C. 681, 122 S.E.2d 814 (1961).

So material was the application of former subsection (c) to questions of liability arising out of violation of statutory speed regulations where special hazards or unusual circumstances were shown that in Kolman v. Silbert, 219 N.C. 134, 12 S.E.2d 915 (1941), it was held error that the trial court in that case charged the jury as to the speed limits fixed by this section without calling attention to the subsection above referred to. Garvey v. Atlantic Greyhound Corp., 228 N.C. 166, 45 S.E.2d 58 (1947).

§ 20-141.1. Speed limits in school zones. — The Board of Transportation or local authorities within their respective jurisdictions may, by ordinance, set speed limits lower than those designated in G.S. 20-141 for areas adjacent to or near a public, private or parochial school. Limits set pursuant to this section shall become effective when signs are erected giving notice of the school zone, the authorized speed limit, and the days and hours when the lower limit is effective. Limits set pursuant to this section may be enforced only on days when school is in session, and no speed limit below 20 miles per hour may be set under the authority of this section. (1977, c. 902, s. 2.)

Editor's Note. — Former § 20-141.1 was repealed by Session Laws 1973, c. 1330, s. 39.

§ 20-141.2. Prima facie rule of evidence as to operation of motor vehicle altered so as to increase potential speed. — Proof of the operation upon any street or highway of North Carolina at a speed in excess of the limits provided by law of any motor vehicle when the motor, or any mechanical part or feature, or the design of the motor vehicle has been changed or altered so that there is a variation between such motor vehicle as changed or altered and the motor

vehicle as constructed according to specification of the original motor vehicle manufacturer, with the result that the potential speed of such vehicle has been increased beyond that which existed prior to such change or alteration, or the proof of operation upon any street or highway of North Carolina at a speed in excess of the limits provided by law of any motor vehicle assembled from parts of two or more different makes of motor vehicles, whether or not any specially made or specially designed parts or appliances are included in the manufacture and assembly thereof, shall be prima facie evidence that such motor vehicle was operated at such time by the registered owner thereof. (1953, c. 1220.)

Editor's Note. — For brief comment on this section, see 31 N.C.L. Rev. 418 (1953).

§ 20-141.3. Unlawful racing on streets and highways. — (a) It shall be unlawful for any person to operate a motor vehicle on a street or highway willfully in prearranged speed competition with another motor vehicle. Any person violating the provisions of this subsection shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than five hundred dollars ($500.00) or imprisonment for not less than 60 days, or both, in the discretion of the court.

(b) It shall be unlawful for any person to operate a motor vehicle on a street or highway willfully in speed competition with another motor vehicle. Any person willfully violating the provisions of this subsection shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than fifty dollars ($50.00), or imprisonment of not more than two years, or by both such fine and imprisonment in the discretion of the court.

(c) It shall be unlawful for any person to authorize or knowingly permit a motor vehicle owned by him or under his control to be operated on a public street, highway, or thoroughfare in prearranged speed competition with another motor vehicle, or to place or receive any bet, wager, or other thing of value from the outcome of any prearranged speed competition on any public street, highway, or thoroughfare. Any person violating the provisions of this subsection shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine or imprisonment not to exceed two years, or both, in the discretion of the court.

(d) The Commissioner of Motor Vehicles shall revoke the operator's or chauffeur's license or privilege to drive of every person convicted of violating the provisions of subsection (a) or subsection (c) of this section, said revocation to be for three years; provided any person whose license has been revoked under this section may apply for a new license after 18 months from revocation. Upon filing of such application the Division may issue a new license upon satisfactory proof that the former licensee has been of good behavior for the past 18 months and that his conduct and attitude are such as to entitle him to favorable consideration and upon such terms and conditions which the Division may see fit to impose for the balance of the three-year revocation period, which period shall be computed from the date of the original revocation.

(e) The Commissioner may suspend the operator's or chauffeur's license or privilege to drive of every person convicted of violating the provisions of subsection (b) of this section. Such suspension shall be for a period of time within the discretion of the Commissioner, but not to exceed one year.

(f) All suspensions and revocations made pursuant to the provisions of this section shall be in the same form and manner and shall be subject to all procedures as now provided for suspensions and revocations made under the provisions of Article 2 of Chapter 20 of the General Statutes.

(g) When any officer of the law discovers that any person has operated or is operating a motor vehicle willfully in prearranged speed competition with another motor vehicle on a street or highway, he shall seize the motor vehicle

and deliver the same to the sheriff of the county in which such offense is committed, or the same shall be placed under said sheriff's constructive possession if delivery of actual possession is impractical, and the vehicle shall be held by the sheriff pending the trial of the person or persons arrested for operating such motor vehicle in violation of subsection (a) of this section. The sheriff shall restore the seized motor vehicle to the owner upon execution by the owner of a good and valid bond, with sufficient sureties, in an amount double the value of the property, which bond shall be approved by said sheriff and shall be conditioned on the return of the motor vehicle to the custody of the sheriff on the day of trial of the person or persons accused. Upon the acquittal of the person charged with operating said motor vehicle willfully in prearranged speed competition with another motor vehicle, the sheriff shall return the motor vehicle to the owner thereof.

Notwithstanding the provisions for sale set out above, on petition by a lienholder, the court, in its discretion and upon such terms and conditions as it may prescribe, may allow reclamation of the vehicle by the lienholder. The lienholder shall file with the court an accounting of the proceeds of any subsequent sale of the vehicle and pay into the court any proceeds received in excess of the amount of the lien.

Upon conviction of the operator of said motor vehicle of a violation of subsection (a) of this section, the court shall order a sale at public auction of said motor vehicle and the officer making the sale, after deducting the expenses of keeping the motor vehicle, the fee for the seizure, and the costs of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise, at said hearing or in other proceeding brought for said purpose, as being bona fide, and shall pay the balance of the proceeds to the proper officer of the county who receives fines and forfeitures to be used for the school fund of the county. All liens against a motor vehicle sold under the provisions of this section shall be transferred from the motor vehicle to the proceeds of its sale. If, at the time of hearing, or other proceeding in which the matter is considered, the owner of the vehicle can establish to the satisfaction of the court that said motor vehicle was used in prearranged speed competition with another motor vehicle on a street or highway without the knowledge or consent of the owner, and that the owner had no reasonable grounds to believe that the motor vehicle would be used for such purpose, the court shall not order a sale of the vehicle but shall restore it to the owner, and the said owner shall, at his request, be entitled to a trial by jury upon such issues.

If the owner of said motor vehicle cannot be found, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or, if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if said owner shall not appear within 10 days after the last publication of the advertisement, the property shall be sold, or otherwise disposed of in the manner set forth in this section.

When any vehicle confiscated under the provisions of this section is found to be specially equipped or modified from its original manufactured condition so as to increase its speed, the court shall, prior to sale, order that the special equipment or modification be removed and destroyed and the vehicle restored to its original manufactured condition. However, if the court should find that such equipment and modifications are so extensive that it would be impractical to restore said vehicle to its original manufactured condition, then the court may order that the vehicle be turned over to such governmental agency or public official within the territorial jurisdiction of the court as the court shall see fit, to be used in the performance of official duties only, and not for resale, transfer, or disposition other than as junk: Provided, that nothing herein contained shall

affect the rights of lienholders and other claimants to said vehicles as set out in this section. (1955, c. 1156; 1957, c. 1358; 1961, c. 354; 1963, c. 318; 1967, c. 446; 1969, c. 186, s. 3; 1973, c. 1330, s. 8; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsection (d).

The word "race," when used in conjunction with the operation of a motor vehicle on the highway, describes "speed competition with another motor vehicle" and is sufficient to charge a violation of this section. State v. Turner, 13 N.C. App. 603, 186 S.E.2d 681 (1972).

The violation of subsections (a) and (b) of this section is negligence per se. Those who participate are on a joint venture and are encouraging and inciting each other. The primary negligence involved is the race itself. All who willfully participate in speed competition between motor vehicles on a public highway are jointly and concurrently negligent and, if damage to one not involved in the race proximately results from it, all participants are liable, regardless of which of the racing cars actually inflicts the injury, and regardless of the fact that the injured person was a passenger in one of the racing vehicles. Boykin v. Bennett, 253 N.C. 725, 118 S.E.2d 12 (1961).

All Engaged in Race Are Liable. — Racing on the public highways is a plain and serious danger to every other person using the way, and a danger it is often impossible to avoid. When persons are making such unlawful use of the highways and another is injured thereby, the former are liable in damages for the injuries sustained by the latter. And where a person is injured by such racing, all engaged in the race are liable although only one, or even none, of the vehicles came in contact with the injured person. Boykin v. Bennett, 253 N.C. 725, 118 S.E.2d 12 (1961).

Prosecution for Involuntary Manslaughter. — In a prosecution for involuntary manslaughter arising out of a violation of this section, the instruction is erroneous where it would permit the jury to find the defendant guilty of involuntary manslaughter without first finding beyond a reasonable doubt that the speed competition was a proximate cause of the collision. State v. Sawyer, 11 N.C. App. 81, 180 S.E.2d 387 (1971).

An acquittal of reckless driving in a court having jurisdiction to try the defendant for that offense would not bar the prosecution of the defendant in the superior court for involuntary manslaughter arising out of the same occurrence. Reckless driving and speed competition are not lesser included offenses of the charge of involuntary manslaughter. State v. Sawyer, 11 N.C. App. 81, 180 S.E.2d 387 (1971).

Applied in State v. Daniel, 255 N.C. 717, 122 S.E.2d 704 (1961); Mason v. Gillikin, 256 N.C. 527, 124 S.E.2d 537 (1962).

Cited in Orange Speedway, Inc. v. Clayton, 247 N.C. 528, 101 S.E.2d 406 (1958).

§ 20-141.4. Death by vehicle. — (a) Whoever shall unintentionally cause the death of another person while engaged in the violation of any State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic shall be guilty of death by vehicle when such violation is the proximate cause of said death.

(b) A violation of this section shall constitute a misdemeanor, punishable by a fine of not more than five hundred dollars ($500.00) or imprisonment for not more than two years, or both, in the discretion of the court.

(c) No person who has been placed in jeopardy upon a charge of death by vehicle shall subsequently be prosecuted for the offense of manslaughter arising out of the same death; and no person who has been placed in jeopardy upon a charge of manslaughter shall subsequently be prosecuted for death by vehicle arising out of the same death. (1973, c. 1330, s. 9.)

Intent of Legislature. — The intention of the legislature in enacting this section was to define a crime of lesser degree of manslaughter wherein criminal responsibility for death by vehicle is not dependent upon the presence of culpable or criminal negligence. State v. Freeman, 31 N.C. App. 93, 228 S.E.2d 516, cert. denied, 291 N.C. 449, 230 S.E.2d 766 (1976).

The purpose of subsection (c) is not to prevent the courts from treating one offense as a lesser included offense of the other, but rather to prevent the State from bringing a new prosecution against a defendant for death by vehicle after he has already been convicted or acquitted of manslaughter. State v. Freeman, 31 N.C. App. 93, 228 S.E.2d 516, cert. denied, 291 N.C. 449, 230 S.E.2d 766 (1976).

Every element of this section is embraced in the common-law definition of involuntary manslaughter. State v. Freeman, 31 N.C. App. 93, 228 S.E.2d 516, cert. denied, 291 N.C. 449, 230 S.E.2d 766 (1976).

§ 20-142. Railroad warning signals must be obeyed. — Whenever any person driving a vehicle approaches a railway grade crossing, and any signal given by a mechanical or electrical device, gate, or flagman indicates the approach of a train or railroad car, it shall be unlawful for the driver to fail to bring the vehicle to a complete stop and ascertain that further movement can be made in safety before traversing such grade crossing. (1937, c. 407, s. 104; 1973, c. 1330, s. 10.)

§ 20-143. Vehicles must stop at certain railway grade crossings. — The Department of Transportation or local authorities are hereby authorized to designate dangerous railroad grade crossings and to erect stop signs thereat. When such stop signs are erected the driver of any vehicle shall stop within 50 feet but not less than 10 feet from the nearest rail of such railroad and shall proceed only upon exercising due care. (1937, c. 407, s. 105; 1969, c. 1231, s. 1; 1973, c. 1330, s. 11; 1977, c. 464, s. 34.)

Editor's Note. — The 1977 amendment substituted "Department of Transportation" for "Board of Transportation" in the first sentence.

For article on automobile accidents at railroad crossings, see 23 N.C.L. Rev. 223. For note on contributory negligence and obstructions of view at railroad crossings, see 29 N.C.L. Rev. 245.

The cases treated below were decided under corresponding provisions of an earlier law, or under this section as it stood before the 1973 amendment.

Duty to Stop May Be Mixed Question of Law and Fact. — A driver of an automobile is not required under all circumstances to stop before driving upon a railroad grade crossing, and whether he is required to do so under the particular circumstances disclosed by the evidence is ordinarily a mixed question of law and fact to be submitted to the jury upon proper instruction from the court. Keller v. Southern Ry., 205 N.C. 269, 171 S.E. 73 (1933).

Test. — The test is whether a reasonably prudent man, knowing the custom of the crossing signals by bell and whistle and also the automatic signals, would approach the track in the reasonable belief that no train was approaching. Earnhardt v. Southern Ry., 281 F. Supp. 585 (M.D.N.C. 1968), aff'd, 405 F.2d 877 (1969).

Extenuating Circumstances May Relax Diligence Required of Traveller. — While ordinarily a driver would be guilty of contributory negligence as a matter of law because he did not stop when he was 25 feet from the track where he could have seen the train if he had looked, extenuating circumstances may relax the diligence required of the traveller. In the instant case the jury could reasonably conclude the driver was listening for crossing signals, but they were not given, and looking for the automatic signals which normally would warn him if a train was approaching, and at the time he got within 25 feet of the track, he was misled by the failure of the automatic signals and the failure of the defendant to give any warning of any kind of the train which approached at 60 miles per hour or 88 feet per second. Earnhardt v. Southern Ry., 281 F. Supp. 585 (M.D.N.C. 1968), aff'd, 405 F.2d 877 (1969).

Necessity for Section. — Although a railroad is a highway (Hinton v. Southern Ry., 172 N.C. 587, 90 S.E. 756 (1916)), an amendment of the statute was necessary in order to compel the operator of a motor vehicle to bring it to a full stop before crossing or attempting to cross a railroad track. State v. Stallings, 189 N.C. 104, 126 S.E. 187 (1925).

Failure to Stop as Negligence Per Se; Contributory Negligence. — The failure of a motorist to stop his automobile before crossing a railroad at a grade crossing on a public highway, as directed by this section, at a distance not exceeding 50 feet from the nearest rail, does not constitute contributory negligence per se in his action against the railroad company to recover damages to his car caused by a collision with a train standing upon the tracks, but where the evidence tends only to show that the proximate cause of the plaintiff's injury was his own negligence in exceeding the speed he should have used under the circumstances, a judgment as of nonsuit thereon should be entered on defendant's motion therefor properly entered. Weston v. Southern Ry., 194 N.C. 210, 139 S.E. 237 (1927).

The failure of a motorist to come to a full stop before entering upon a railroad crossing as required by statute is not contributory negligence per se, but such failure is a circumstance to be considered by the jury with the other evidence in the case upon the question. White v. North Carolina R.R., 216 N.C. 79, 3 S.E.2d 310 (1939).

§ 20-143.1. Certain vehicles must stop at railroad grade crossings. — (a) The driver of every school bus, every motor vehicle carrying passengers for compensation and every property-hauling motor vehicle licensed in excess of 10,000 pounds which is carrying explosives or any dangerous article as a cargo or part of a cargo, before crossing at grade any track or tracks of a railroad, shall stop such vehicle within 50 feet but not less than 10 feet from the nearest rail of such railroad and while so stopped shall listen and look in both directions along such track for any approaching train and for any signals indicating the approach of a train, except as hereinafter provided, and shall not proceed until he can do so safely. Upon proceeding, the driver of such vehicle shall cross only in such gear of the vehicle that there shall be no necessity for changing gears and the driver shall not change gears while crossing the track or tracks.

(b) The provisions of this section shall not require the driver of a vehicle to stop:

(1) At railroad tracks used exclusively for industrial switching purposes within a business district.

(2) At a railroad grade crossing which a police officer or crossing flagman directs traffic to proceed.

(3) At a railroad grade crossing protected by a gate or flashing signal designed to stop traffic upon the approach of a train, when such gate or flashing signal does not indicate the approach of a train.

(4) At an abandoned railroad grade crossing which is marked with a sign indicating that the rail line is abandoned.

(5) At an industrial or spur line railroad grade crossing marked with a sign reading "Exempt Crossing," which sign has been erected by or with the consent of the appropriate State or local authority.

(c) "Dangerous article" shall mean any flammable liquids, flammable solids, oxidizing materials, corrosive liquids, compressed gases, poisonous substances or radioactive materials as hereinafter defined.

(1) "Flammable liquids" shall mean any liquid which gives off flammable vapors, (as determined by flash point from Tagliabue's open-cup tester as used for test of burning oil) at or below a temperature of 80 degrees F.

(2) "Flammable solids" shall mean any solid substance which is liable, under conditions incident to transportation, to cause fires through friction, through absorption of moisture, through spontaneous chemical changes, or as a result of retained heat from its manufacturing or processing.

(3) "Oxidizing materials" shall mean any substance such as chlorate, permanganate, peroxide, or a nitrate, that yields oxygen readily to stimulate the combustion of organic matter.

(4) "Corrosive liquids" shall mean those acids, alkaline caustic liquids and other corrosive liquids which, when in contact with living tissue, will cause severe damage of such tissue by chemical action, or in case of leakage, will materially damage or destroy other freight by chemical action, or are liable to cause fire when in contact with organic matter or with certain chemicals.

(5) "Compressed gas" shall mean any material or mixture having in the container either an absolute pressure exceeding 40 pounds per square inch at 70 degrees F., or an absolute pressure exceeding 104 pounds per square inch at 130 degrees F., or both, or any liquid flammable material having a Reid vapor pressure exceeding 40 pounds per square inch absolute at 100 degrees F.

(6) "Poisonous substances" shall mean liquids and gases of such nature that a very small amount of the gas or vapor of the liquid mixed with air is dangerous to life, or such liquid or solid substance as, upon contact with fire or when exposed to air, gives off dangerous or intensely irritating fumes or substances, which are chiefly dangerous by external contact with the body or by being taken internally.

(7) "Radioactive materials" shall mean any material or combination of materials that spontaneously emits ionizing radiation.

(d) It shall be unlawful to transport by motor vehicle upon the highways of this State any dangerous article without conspicuously marking or placarding such motor vehicle on each side and on the rear thereof with the word "DANGEROUS" or the common or generic name of the article transported or its principal hazard. Additionally, the rear of every such vehicle shall be conspicuously marked with the words "THIS VEHICLE STOPS AT RAILROAD CROSSINGS."

(e) The provisions of this section shall not apply to taxicabs nor to vehicles subject to the rules and regulations adopted by the North Carolina Utilities Commission and the United States Department of Transportation. (1969, c. 1231, s. 2; 1973, c. 1330, s. 12.)

Marking of Vehicles Required to Stop at Railroad Crossings. — See opinion of Attorney General to Mr. Joe W. Garrett, Commissioner, N.C. Department of Motor Vehicles, 40 N.C.A.G. 432 (1970).

§ 20-144. Special speed limitation on bridges. — It shall be unlawful to drive any vehicle upon any public bridge, causeway or viaduct at a speed which is greater than the maximum speed which can with safety to such structure be maintained thereon, when such structure is signposted as provided in this section.

The Department of Transportation, upon request from any local authorities, shall, or upon its own initiative may, conduct an investigation of any public bridge, causeway or viaduct, and if it shall thereupon find that such structure cannot with safety to itself withstand vehicles traveling at the speed otherwise permissible under this Article, the Division shall determine and declare the maximum speed of vehicles which such structure can withstand, and shall cause or permit suitable signs stating such maximum speed to be erected and maintained at a distance of 100 feet beyond each end of such structure. The findings and determination of the Department of Transportation shall be conclusive evidence of the maximum speed which can with safety to any such structure be maintained thereon. (1937, c. 407, s. 106; 1957, c. 65, s. 11; 1973, c. 507, ss. 5, 21; 1975, c. 716, s. 5; 1977, c. 464, s. 34.)

Cross Reference. — As to power of Department of Transportation to fix maximum load limits on bridges, see § 136-72.

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the second paragraph.

The 1977 amendment substituted "Department of Transportation" for "Board of Transportation" in two places.

Prosecution for Involuntary Manslaughter. — In a prosecution for involuntary manslaughter arising out of a violation of this section, the instruction is erroneous where it fails to require the jury to find beyond a reasonable doubt that the deliberate and intentional violation of the speed statute upon the part of the defendant was a proximate cause of the collision which inflicted the injuries resulting in death. State v. Sawyer, 11 N.C. App. 81, 180 S.E.2d 387 (1971).

§ 20-145. When speed limit not applicable. — The speed limitations set forth in this Article shall not apply to vehicles when operated with due regard for

safety under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation, nor to fire department or fire patrol vehicles when traveling in response to a fire alarm, nor to public or private ambulances and rescue squad emergency service vehicles when traveling in emergencies, nor to vehicles operated by county fire marshals and civil preparedness coordinators when traveling in the performances of their duties, nor to vehicles operated by the duly authorized officers, agents and employees of the North Carolina Utilities Commission when traveling in performance of their duties in regulating and checking the traffic and speed of buses, trucks, motor vehicles and motor vehicle carriers subject to the regulations and jurisdiction of the North Carolina Utilities Commission. This exemption shall not, however, protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others. (1937, c. 407, s. 107; 1947, c. 987; 1971, c. 5; 1977, c. 52, s. 3.)

Editor's Note. — The 1977 amendment inserted "nor to vehicles operated by county fire marshals and civil preparedness coordinators when traveling in the performances of their duties" near the middle of the first sentence.

For note on municipal liability for accident involving fire truck responding to emergency call for inhalator, see 30 N.C.L. Rev. 89 (1951). For note discussing effect of this section on standard of care required of police officers in performance of official duties, see 39 N.C.L. Rev. 460 (1961).

Section Does Not Preclude Other Exemptions for Police Vehicles. — The legislature, by including the express exemption for police vehicles when operated with due regard for safety in this section, did not thereby evidence an intent that there be no exemption under any circumstances from other sections of the Motor Vehicle Act for police vehicles while being similarly operated. Collins v. Christenberry, 6 N.C. App. 504, 170 S.E.2d 515 (1969).

Standard of Care Applicable to Police Officers. — The fact that a police vehicle is exempt from the operation of traffic regulations, or enjoys certain prior rights over other vehicles, does not permit the operator of such vehicle to drive in reckless disregard of the safety of others; nor does it relieve him from the general duty of exercising due care. Goddard v. Williams, 251 N.C. 128, 110 S.E.2d 820 (1959).

In an action alleging actionable negligence on the part of a police officer the court said: "We do not hold that an officer, when in pursuit of a lawbreaker, is under no obligation to exercise a reasonable degree of care to avoid injury to others who may be on the public roads and streets. What we do hold is that, when so engaged, he is not to be deemed negligent merely because he fails to observe the requirements of the Motor Vehicle Act. His conduct is to be examined and tested by another standard. He is required to observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances. We know of no better standard by which to determine a claim of negligence on the part of a police officer than by comparing his conduct to the care which a reasonably prudent man would exercise, in the discharge of official duties of like nature under like circumstances." Goddard v. Williams, 251 N.C. 128, 110 S.E.2d 820 (1959).

Applied in Campbell v. O'Sullivan, 4 N.C. App. 581, 167 S.E.2d 450 (1969).

§ 20-146. Drive on right side of highway; exceptions. — (a) Upon all [highways] of sufficient width a vehicle shall be driven upon the right half of the highway except as follows:

(1) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;

(2) When an obstruction exists making it necessary to drive to the left of the center of the highway; provided, any person so doing shall yield the right-of-way to all vehicles traveling in the proper direction upon the unobstructed portion of the highway within such distance as to constitute an immediate hazard;

(3) Upon a highway divided into three marked lanes for traffic under the rules applicable thereon; or

(4) Upon a highway designated and signposted for one-way traffic.

(b) Upon all highways any vehicle proceeding at less than the legal maximum speed limit shall be driven in the right-hand lane then available for thru traffic,

or as close as practicable to the right-hand curb or edge of the highway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn.

(c) Upon any highway having four or more lanes for moving traffic and providing for two-way movement of traffic, no vehicle shall be driven to the left of the centerline of the highway, except when authorized by official traffic-control devices designating certain lanes to the left side of the center of the highway for use by traffic not otherwise permitted to use such lanes or except as permitted under subsection (a)(2) hereof.

(d) Whenever any street has been divided into two or more clearly marked lanes for traffic, the following rules in addition to all others consistent herewith shall apply.

(1) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

(2) Upon a street which is divided into three or more lanes and provides for the two-way movement of traffic, a vehicle shall not be driven in the center lane except when overtaking and passing another vehicle traveling in the same direction when such center lane is clear of traffic within a safe distance, or in the preparation for making a left turn or where such center lane is at the time allocated exclusively to traffic moving in the same direction that the vehicle is proceeding and such allocation is designated by official traffic-control device.

(3) Official traffic-control devices may be erected directing specified traffic to use a designated lane or designating those lanes to be used by traffic moving in a particular direction regardless of the center of the street and drivers of vehicles shall obey the direction of every such device.

(4) Official traffic-control devices may be installed prohibiting the changing of lanes on sections of streets, and drivers of vehicles shall obey the directions of every such device.

(e) Notwithstanding any other provisions of this section, when appropriate signs have been posted, it shall be unlawful for any person to operate a motor vehicle over and upon the inside lane, next to the median of any dual-lane highway at a speed less than the posted speed limit when the operation of said motor vehicle over and upon said inside lane shall impede the steady flow of traffic except when preparing for a left turn. "Appropriate signs" as used herein shall be construed as including "Slower Traffic Keep Right" or designations of similar import. Any person violating the provisions of this section shall be guilty of a misdemeanor punishable as provided in G.S. 20-176. (1937, c. 407, s. 108; 1965, c. 678, s. 2; 1973, c. 1330, s. 13; 1975, c. 593.)

Editor's Note. — The 1975 amendment added subsection (e).

Some of the cases cited under this section were decided under corresponding provisions of the former law.

For discussion of the subject matter of statutes similar to this and succeeding sections, see 2 N.C.L. Rev. 178; 5 N.C.L. Rev. 248.

The purpose of this section is the protection of occupants of other vehicles then using the public highway and pedestrians and property thereon. Powell v. Clark, 255 N.C. 707, 122 S.E.2d 706 (1961).

This section prescribes a standard of care for a motorist, and the standard fixed by the legislature is absolute. Bondurant v. Mastin, 252 N.C. 190, 113 S.E.2d 292 (1960).

Violation of this section is negligence per se. Boyd v. Harper, 250 N.C. 334, 108 S.E.2d 598 (1959); Anderson v. Webb, 267 N.C. 745, 148 S.E.2d 846 (1966).

One who fails to comply with the provisions of this section is negligent. Stephens v. Southern Oil Co., 259 N.C. 456, 131 S.E.2d 39 (1963).

A violation of this section is negligence per se, and when proximate cause of injury or damage is shown, such violation constitutes actionable negligence. Reeves v. Hill, 272 N.C. 352, 158 S.E.2d 529 (1968); Lassiter v. Williams, 272 N.C. 473, 158 S.E.2d 593 (1968).

Violation of this section is negligence per se, which, when it is the proximate cause of injury, constitutes actionable negligence. Smith v. Kilburn, 13 N.C. App. 449, 186 S.E.2d 214 (1972).

A violation of this section, when the proximate cause of injury, constitutes actionable negligence. Anderson v. Webb, 267 N.C. 745, 148 S.E.2d 846 (1966).

A violation of this section constitutes negligence, although such negligence is not actionable unless it is the proximate cause of the injuries complained of. Davis v. Imes, 13 N.C. App. 521, 186 S.E.2d 641 (1972).

A violation of this section is negligence per se, but to be actionable, such negligence must be proximate cause of injury. Tysinger v. Coble Dairy Prods., 225 N.C. 717, 36 S.E.2d 246 (1945). See Hoke v. Atlantic Greyhound Corp., 226 N.C. 692, 40 S.E.2d 345 (1946); Watters v. Parrish, 252 N.C. 787, 115 S.E.2d 1 (1960).

A violation of this section is negligence per se, but such negligence is not actionable unless there is a causal relation between the breach and the injury. Grimes v. Carolina Coach Co., 203 N.C. 605, 166 S.E. 599 (1932). See Stovall v. Ragland, 211 N.C. 536, 190 S.E. 899 (1937); McCombs v. McLean Trucking Co., 252 N.C. 699, 114 S.E.2d 683 (1960).

And May Be Culpable Negligence. — The rule in the application of the law with respect to an intentional or unintentional violation of a safety statute such as this section is simply this: The violation of a safety statute which results in injury or death will constitute culpable negligence if the violation is willful, wanton, or intentional. But, where there is an unintentional or inadvertent violation of the statute, such violation standing alone does not constitute culpable negligence. The inadvertent or unintentional violation of the statute must be accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or of a heedless indifference to the safety of others. State v. Hancock, 248 N.C. 432, 103 S.E.2d 491 (1958).

Proximate Cause. — A safety statute, such as this section, is pertinent when, and only when, there is evidence tending to show a violation thereof proximately caused the alleged injuries. Powell v. Clark, 255 N.C. 707, 122 S.E.2d 706 (1961).

If the negligence resulting from the failure to comply with the provisions of this section proximately causes injury, liability results. Stephens v. Southern Oil Co., 259 N.C. 456, 131 S.E.2d 39 (1963).

Whether a violation of the provisions of this section is the proximate cause of an injury is for the jury to determine. Stephens v. Southern Oil Co., 259 N.C. 456, 131 S.E.2d 39 (1963).

A person walking along a public highway pushing a handcart is a pedestrian within the purview of § 20-174(d), and is not a driver of a vehicle within the meaning of this section and § 20-149. Lewis v. Watson, 229 N.C. 20, 47 S.E.2d 484 (1948).

Right to Assume that Approaching Vehicle Will Remain on Its Own Side of Road. — A motorist, who is proceeding on his right side of the highway, is not required to anticipate that an automobile, which is coming from the opposite direction on its own side of the road, will suddenly leave its side of the road and turn into his path. He has the right to assume under such circumstances that the approaching automobile will remain on its own side of the road until the vehicles meet and pass in safety. Johnson v. Douglas, 6 N.C. App. 109, 169 S.E.2d 505 (1969).

Driving Left of Center of Highway. — Where plaintiff sues for injuries or damages caused by an automobile collision and offers evidence showing that defendant was driving left of the center of the highway when the collision occurred, such evidence makes out a prima facie case of actionable negligence. Reeves v. Hill, 272 N.C. 352, 158 S.E.2d 529 (1968); Lassiter v. Williams, 272 N.C. 473, 158 S.E.2d 593 (1968).

Where evidence that defendant was driving to his left of the center of the highway when a collision occurred is circumstantial, i.e., based on testimony as to the physical facts at the scene, such evidence may be sufficiently strong to infer negligence and take the cause to the jury. Lassiter v. Williams, 272 N.C. 473, 158 S.E.2d 593 (1968).

Driving to Left to Avoid Collision. — Where bus driver cut his bus to the left and crossed the centerline in an effort to avoid the collision, it was held that under the circumstances of the case, such act was not negligence. Ingram v. Smoky Mt. Stages, Inc., 225 N.C. 444, 35 S.E.2d 337 (1945).

Both Drivers to Left of Center. — Where plaintiff passenger was injured in a head-on collision of two automobiles on a dirt road in the dust raised by a third car, testimony of witnesses respectively that at least a part of each driver's vehicle was to the left of his center of the highway takes the issue as to the negligence of each driver to the jury. Forte v. Goodwin, 261 N.C. 608, 135 S.E.2d 552 (1964).

Burden on Plaintiff to Establish Negligence. — Where plaintiff's evidence leaves in speculation and conjecture the determinative fact of whether defendant's car was being driven on the wrong side of the highway at the time of the collision, defendant's motion to nonsuit is properly granted, the burden being on plaintiff to establish the negligence of defendant. Cheek v. Barnwell Whse. & Brokerage Co., 209 N.C. 569, 183 S.E. 729 (1936).

Instruction Held without Error. — An instruction that the violation of statutes regulating the operation of motor vehicles and the conduct of pedestrians on the highway would constitute negligence per se, and would be actionable if the proximate cause of injury, is

held without error when it appears that the instruction was applied solely to this section and § 20-174, prescribing that vehicles should be operated on the right-hand side of the highway and that warning should be given pedestrians. Williams v. Woodward, 218 N.C. 305, 10 S.E.2d 913 (1940).

Evidence Sufficient to Show Violation of Section. — See State v. Goins, 233 N.C. 460, 64 S.E.2d 289 (1951).

Where there was testimony of witnesses who were at the scene of the collision almost immediately after it occurred to the effect that they saw glass, flour and mud on the south side of the highway, intestate's right side and defendant's left side of the highway, and nothing of the kind on the opposite side of the highway, the north side, it was held that this was evidence that defendant's truck was being operated in violation of this section and §§ 20-147 and 20-148, which required defendant to drive his truck on his right side of the highway and to give plaintiff's coupe half of the main-traveled portion of the roadway as nearly as possible, and that this violation proximately caused the collision which resulted in the death of plaintiff's intestate. Wyrick v. Ballard & Ballard Co., 224 N.C. 301, 29 S.E.2d 900 (1944).

A passenger in the truck driven by intestate testified to the effect that intestate was driving on his right side of the road in an ordinary manner, that defendant's tractor with trailer-tanker was traveling in the opposite direction, and that the truck hit the trailer-tanker which was sticking out to its left as the tractor was being driven to its right of the road, resulting in intestate's death. It was held that the testimony is sufficient to support an inference that the defendant violated this section in failing to drive his tractor-trailer on his right half of the highway, proximately causing the death of plaintiff's intestate, and compulsory nonsuit was error. Gladden v. Setzer, 230 N.C. 269, 52 S.E.2d 804 (1949).

Blood spots held to indicate that when defendant's car struck deceased its left wheels were on or over the center of the highway in violation of this section. State v. Phelps, 242 N.C. 540, 89 S.E.2d 132 (1955).

When a plaintiff suing to recover damages for injuries sustained in a collision offers evidence tending to show that the collision occurred when the defendant was driving to the left of the center of the highway, such evidence makes out a prima facie case of actionable negligence. The defendant, of course, may rebut the inference arising from such evidence by showing that he was on the wrong side of the road from a cause other than his own negligence. Anderson v. Webb, 267 N.C. 745, 148 S.E.2d 846 (1966); Smith v. Kilburn, 13 N.C. App. 449, 186 S.E.2d 214 (1972).

Plaintiff in a wrongful death action offered sufficient evidence — including physical evidence of tire marks at the scene and the defendant's statements to the investigating officer — to support a jury finding that the defendant was driving on the left-hand side of the street when he struck the plaintiff's intestate. Smith v. Kilburn, 13 N.C. App. 449, 186 S.E.2d 214 (1972).

Evidence Insufficient to Show Intentional, Willful or Wanton Violation. — See State v. Hancock, 248 N.C. 432, 103 S.E.2d 491 (1958); State v. Eller, 256 N.C. 706, 124 S.E.2d 806 (1962).

Applied in Hancock v. Wilson, 211 N.C. 129, 189 S.E. 631 (1937); Newbern v. Leary, 215 N.C. 134, 1 S.E.2d 384 (1939). See also State v. Toler, 195 N.C. 481, 142 S.E. 715 (1928); State v. Durham, 201 N.C. 724, 161 S.E. 398 (1931); Queen City Coach Co. v. Lee, 218 N.C. 320, 11 S.E.2d 341 (1940); Horton v. Peterson, 238 N.C. 446, 78 S.E.2d 181 (1953); State v. Turberville, 239 N.C. 25, 79 S.E.2d 359 (1953); Combs v. United States, 122 F. Supp. 280 (E.D.N.C. 1954); Hennis Freight Lines v. Burlington Mills Corp., 246 N.C. 143, 97 S.E.2d 850 (1957); Kirkman v. Baucom, 246 N.C. 510, 98 S.E.2d 922 (1957); Parker v. Flythe, 256 N.C. 548, 124 S.E.2d 530 (1962); Hardin v. American Mut. Fire Ins. Co., 261 N.C. 67, 134 S.E.2d 142 (1964); Bass v. Roberson, 261 N.C. 125, 134 S.E.2d 157 (1964); Threadgill v. Kendall, 262 N.C. 751, 138 S.E.2d 625 (1964); Stewart v. Gallimore, 265 N.C. 696, 144 S.E.2d 862 (1965); Atwood v. Holland, 267 N.C. 722, 148 S.E.2d 851 (1966); State v. Massey, 271 N.C. 555, 157 S.E.2d 150 (1967); State v. Moses, 272 N.C. 509, 158 S.E.2d 617 (1968); Broadnax v. Deloatch, 8 N.C. App. 620, 175 S.E.2d 314 (1970).

Quoted in Maddox v. Brown, 232 N.C. 542, 61 S.E.2d 613 (1950).

Cited in White v. Cason, 251 N.C. 646, 111 S.E.2d 887 (1960); Brewer v. Powers Trucking Co., 256 N.C. 175, 123 S.E.2d 608 (1962); Wagner v. Eudy, 257 N.C. 199, 125 S.E.2d 598 (1962); McPherson v. Haire, 262 N.C. 71, 136 S.E.2d 224 (1964); State Highway Comm'n v. Raleigh Farmers Mkt., Inc., 263 N.C. 622, 139 S.E.2d 904 (1965); Hunt v. Carolina Truck Supplies, Inc., 266 N.C. 314, 146 S.E.2d 84 (1966); Champion v. Waller, 268 N.C. 426, 150 S.E.2d 783 (1966); Brewer v. Harris, 279 N.C. 288, 182 S.E.2d 345 (1971); State v. Boone, 16 N.C. App. 368, 192 S.E.2d 13 (1972).

§ 20-146.1. Operation of motorcycles. — (a) All motorcycles are entitled to full use of a lane and no motor vehicle shall be driven in such a manner as to deprive any motorcycle of the full use of a lane. This subsection shall not apply to motorcycles operated two abreast in a single lane.

(b) Motorcycles shall not be operated more than two abreast in a single lane. (1965, c. 909; 1973, c. 1330, s. 14; 1975, c. 786.)

Editor's Note. — The 1975 amendment rewrote this section.

§ 20-147. Keep to the right in crossing intersections or railroads. — In crossing an intersection of highways or the intersection of a highway by a railroad right-of-way, the driver of a vehicle shall at all times cause such vehicle to travel on the right half of the highway unless such right side is obstructed or impassable. (1937, c. 407, s. 109.)

Motorists Required to Exercise Ordinary Care at Intersections. — The duties of motorists, both those on dominant and those on servient highways, when approaching, entering or traversing intersections require that each driver exercise ordinary care under the particular circumstances in which he finds himself and that the failure to do so can constitute actionable negligence where injury results. Murrell v. Jennings, 15 N.C. App. 658, 190 S.E.2d 686 (1972).

Violation of Section Is Negligence. — A motorist is required by statute to remain on the right side of the highway at a crossing or intersection and the violation of this statute is negligence. Crotts v. Overnite Transp. Co., 246 N.C. 420, 98 S.E.2d 502 (1957).

Applied in Stutts v. Burcham, 271 N.C. 176, 155 S.E.2d 742 (1967).

Cited in Hardy v. Tesh, 5 N.C. App. 107, 167 S.E.2d 848 (1969).

§ 20-148. Meeting of vehicles. — Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one half of the main-traveled portion of the roadway as nearly as possible. (1937, c. 407, s. 110.)

Cross Reference. — See notes to § 20-146.

Editor's Note. — Some of the cases cited below were decided under the corresponding provisions of the former law.

This section prescribes a standard of care for a motorist and the standard fixed by the legislature is absolute. Bondurant v. Mastin, 252 N.C. 190, 113 S.E.2d 292 (1960).

The standard of care fixed for a motorist in this section by the legislature is absolute. McGinnis v. Robinson, 258 N.C. 264, 128 S.E.2d 608 (1962).

It is not relevant to a three-lane highway. State v. Duncan, 264 N.C. 123, 141 S.E.2d 23 (1965).

Violation as Negligence. — Violation of this section is negligence per se. Hobbs v. Queen City Coach Co., 225 N.C. 323, 34 S.E.2d 211 (1945); Boyd v. Harper, 250 N.C. 334, 108 S.E.2d 598 (1959); McCombs v. McLean Trucking Co., 252 N.C. 699, 114 S.E.2d 683 (1960); Watters v. Parrish, 252 N.C. 787, 115 S.E.2d 1 (1960); Carswell v. Lackey, 253 N.C. 387, 117 S.E.2d 51 (1960); Anderson v. Webb, 267 N.C. 745, 148 S.E.2d 846 (1966).

A violation of this section would be negligence per se, and if such violation were proximate cause of the injury it would be actionable. Wallace v. Longest, 226 N.C. 161, 37 S.E.2d 112 (1946); Hoke v. Atlantic Greyhound Corp., 226 N.C. 692, 40 S.E.2d 345 (1946); McGinnis v. Robinson, 258 N.C. 264, 128 S.E.2d 608 (1962).

A violation of this section is negligence per se, and, when proximate cause of injury or damage is shown, such violation constitutes actionable negligence. Reeves v. Hill, 272 N.C. 352, 158 S.E.2d 529 (1968); Lassiter v. Williams, 272 N.C. 473, 158 S.E.2d 593 (1968).

A violation of this section constitutes negligence although such negligence is not actionable unless it is the proximate cause of the injuries complained of. Davis v. Imes, 13 N.C. App. 521, 186 S.E.2d 641 (1972).

Violation as Culpable Negligence. — The violation of a safety statute which results in injury or death will constitute culpable negligence if the violation is willful, wanton, or intentional. But, where there is an unintentional or inadvertent violation of the statute, such violation standing alone does not constitute culpable negligence. The inadvertent or

unintentional violation of the statute must be accompanied by recklessness of probable consequences of a dangerous nature when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or of a heedless indifference to the safety of others. State v. Roop, 255 N.C. 607, 122 S.E.2d 363 (1961).

Violation Must Be Proximate Cause of Injury. — A safety statute, such as this section, is pertinent when, and only when, there is evidence tending to show a violation thereof proximately caused the alleged injuries or death. State v. Duncan, 264 N.C. 123, 141 S.E.2d 23 (1965).

A violation of this section, when the proximate cause of injury, constitutes actionable negligence. Anderson v. Webb, 267 N.C. 745, 148 S.E.2d 846 (1966).

Driving on Wrong Side of Road. — See same catchline in note to § 20-140.

Driving Left of Center of Highway. — Where plaintiff sues for injuries or damages caused by an automobile collision and offers evidence showing that defendant was driving left of the center of the highway when the collision occurred, such evidence makes out a prima facie case of actionable negligence. Reeves v. Hill, 272 N.C. 352, 158 S.E.2d 529 (1968); Lassiter v. Williams, 272 N.C. 473, 158 S.E.2d 593 (1968).

Where evidence that defendant was driving to the left of the center of the highway when a collision occurred is circumstantial, i.e., based on testimony as to the physical facts at the scene, such evidence may be sufficiently strong to infer negligence and take the case to the jury. Lassiter v. Williams, 272 N.C. 473, 158 S.E.2d 593 (1968).

A motorist, although in his proper lane of traffic, must exercise ordinary care to avoid injuring persons or vehicles in his lane if he discovers their peril or in the exercise of ordinary care could discover it. It is his duty to slow down and have his vehicle under control and to pull over on the shoulder, if by doing so, he can avoid injury. Rundle v. Wyrick, 194 F. Supp. 630 (M.D.N.C. 1961), aff'd sub nom. Rundle v. Grubb Motor Lines, 300 F.2d 333 (4th Cir. 1962).

Assumption that Vehicle Will Turn to Right. — When the driver of one of the automobiles is not observing the rule of this section, as the automobiles approach each other, the other may assume that before the automobiles meet the driver of the approaching automobile will turn to his right, so that the two automobiles may pass each other in safety. Shirley v. Ayers, 201 N.C. 51, 158 S.E. 840 (1931). See also James v. Carolina Coach Co., 207 N.C. 742, 178 S.E. 607 (1935); Hancock v. Wilson, 211 N.C. 129, 189 S.E. 631 (1937); Hoke v. Atlantic Greyhound Corp., 227 N.C. 412, 42 S.E.2d 593 (1947); Morgan v. Saunders, 236 N.C. 162, 72 S.E.2d 411 (1952).

Ordinarily, a motorist has the right to assume that the driver of a vehicle approaching on the same side or on his left-hand side will yield half of the highway or turn out in time to avoid a collision, but this right is not absolute. It may be qualified by the particular circumstances existing at the time. Brown v. Southern Paper Prods. Co., 222 N.C. 626, 24 S.E.2d 334 (1943); Hoke v. Atlantic Greyhound Corp., 227 N.C. 412, 42 S.E.2d 593 (1947); Lamm v. Gardner, 250 N.C. 540, 108 S.E.2d 847 (1959).

The right of a motorist to assume that the driver of a negligently operated automobile will observe the law in time to avoid collision is not absolute, but may be qualified by the particular circumstances at the time, such as the proximity and movement of the other vehicle and the condition and width of the road. Morgan v. Saunders, 236 N.C. 162, 72 S.E.2d 411 (1952); Lamm v. Gardner, 250 N.C. 540, 108 S.E.2d 847 (1959).

The driver of an automobile who is himself observing the law as set out in this section in meeting and passing an automobile proceeding in the opposite direction has the right ordinarily to assume that the driver of the approaching automobile will also observe the rule and avoid a collision. Lucas v. White, 248 N.C. 38, 102 S.E.2d 387 (1958).

The right of a motorist to assume that vehicles approaching from the opposite direction will remain on their right side of the highway is not absolute, and when a motorist approaches a machine emitting a chemical fog obscuring the entire highway, he may not rely on such assumption when a reasonably prudent man might reasonably anticipate that a motorist might be on the highway meeting him and unable to keep safely on his side of the highway on account of the fog. Moore v. Town of Plymouth, 249 N.C. 423, 106 S.E.2d 695 (1959).

The rule that a motorist traveling on his right or seasonably turning thereto has the right to assume that a car approaching from the opposite direction will comply with this section, and turn to its right in time to avoid a collision, is not applicable to a motorist who runs completely off the road to his right, loses control, and hits a car standing still completely off the hard surface on its left side of the highway with its lights on, since the rule merely absolves a motorist from blame if he continues at a reasonable rate of speed in his line of travel in reliance on the assumption, but does not relieve him from the duty of knowing the position of his car on the highway from his own observation. Webb v. Hutchins, 228 N.C. 1, 44 S.E.2d 350 (1947).

Notwithstanding the right of a motorist to so assume, still this does not lessen his duty to conform to the requirement of exercising due care under the existing circumstances, that is, to conform to the rule of the reasonably prudent man. Hoke v. Atlantic Greyhound Corp., 227

N.C. 412, 42 S.E.2d 593 (1947), citing Sebastian v. Horton Motor Lines, 213 N.C. 770, 197 S.E. 539 (1938).

Proximate Cause Is for Jury. — Proximate cause is a matter for consideration of the jury under the law as declared by the court. Wallace v. Longest, 226 N.C. 161, 37 S.E.2d 112 (1946); McCombs v. McLean Trucking Co., 252 N.C. 699, 114 S.E.2d 683 (1960).

Where evidence tended to show that driver of defendant's truck, in meeting the pickup truck in which plaintiffs were riding, was not passing on his right side of highway, and was not giving oncoming truck at least one half of the main-traveled portion of the roadway as nearly as possible, in violation of the provisions of this section, question of whether defendant's truck was on left side of highway and, if so, whether proximate cause of collision would be for jury. Wallace v. Longest, 226 N.C. 161, 37 S.E.2d 112 (1946).

Evidence held sufficient to show violation of this section. State v. Wooten, 228 N.C. 628, 46 S.E.2d 868 (1948).

When a plaintiff suing to recover damages for injuries sustained in a collision offers evidence tending to show that the collision occurred when the defendant was driving to his left of the center of the highway, such evidence makes out a prima facie case of actionable negligence. The defendant, of course, may rebut the inference arising from such evidence by showing that he was on the wrong side of the road from a cause other than his own negligence. Anderson v. Webb, 267 N.C. 745, 148 S.E.2d 846 (1966).

Evidence held to show violation of this section and to warrant submission to the jury of the issue of defendants' negligence. Winfield v. Smith, 230 N.C. 392, 53 S.E.2d 251 (1949).

Evidence tending to show that the driver of a truck was traveling 35 to 40 miles per hour in an early morning fog which limited visibility to 100 or 125 feet, that he had overtaken a vehicle traveling in the same direction and was attempting to pass such vehicle 250 or 300 feet before reaching a curve, and collided with plaintiff's car which approached from the opposite direction, was held sufficient to be submitted to the jury on the issue of the negligence of the driver of the truck. Winfield v. Smith, 230 N.C. 392, 53 S.E.2d 251 (1949).

Evidence Showing Failure to Yield One Half of Roadway. — See State v. Goins, 233 N.C. 460, 64 S.E.2d 289 (1951).

Charge to Jury. — In an action for damages caused by the collision of two motor vehicles, a charge that "If plaintiff has satisfied you from the evidence and by the greater weight that on this occasion the driver of the defendant's truck at the time of the collision failed to drive the defendant's truck upon the right half of the highway, then that would constitute negligence on the part of defendant's driver," seems to be in accord with this section. Hopkins v. Colonial Stores, Inc., 224 N.C. 137, 29 S.E.2d 455 (1944).

An instruction confusing the privisions of § 20-149, pertaining to the duty of the driver of any vehicle overtaking another vehicle proceeding in the same direction, with the provisions of this section, prescribing the respective duties of drivers of vehicles proceeding in opposite directions when meeting, was prejudicial error. Lookabill v. Regan, 245 N.C. 500, 96 S.E.2d 421 (1957).

An instruction on the right of a motorist to assume that an approaching vehicle would yield one half the highway in passing was held not objectionable in limiting such right to a motorist himself observing the requirements of the statute, when such instruction, considered in context, was to the effect that a motorist was not entitled to rely on such assumption if such motorist was himself then driving on his left side of the highway and was thereby contributing to the hazard and emergency that existed immediately prior to the collision. Blackwell v. Lee, 248 N.C. 354, 103 S.E.2d 703 (1958).

§ 20-149. Overtaking a vehicle. — (a) The driver of any such vehicle overtaking another vehicle proceeding in the same direction shall pass at least two feet to the left thereof, and shall not again drive to the right side of the highway until safely clear of such overtaken vehicle. This subsection shall not apply when the overtaking and passing is done pursuant to the provisions of G.S. 20-150.1.

(b) Except when overtaking and passing on the right is permitted, the driver of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle on audible signal and shall not increase the speed of his vehicle until completely passed by the overtaking vehicle. (1937, c. 407, s. 111; 1955, c. 913, s. 3; 1959, c. 247; 1973, c. 1330, s. 15.)

Local Modification. — Durham, Mecklenburg, Vance and Wake, as to subsection (a): 1953, c. 772.

Editor's Note. — Some of the cases cited below were decided under corresponding provisions of the former law.

Purpose of Section. — This section was enacted for the protection of the public upon the roads and highways of the State, and its violation is negligence per se entitling the person injured to his damages when there is a causal connection between the negligent act and the injury complained of. Wolfe v. Independent Coach Line, 198 N.C. 140, 150 S.E. 876 (1929).

The principal purpose of this section is the protection of the "overtaken vehicle" and its occupants. McGinnis v. Robinson, 252 N.C. 574, 114 S.E.2d 365 (1960).

The object of this section is not only the protection of the overtaken vehicle and its occupants, but also the protection of the passing vehicle and its occupants. Boykin v. Bissette, 260 N.C. 295, 132 S.E.2d 616 (1963).

Section Inapplicable Where Forward Vehicle Is in Left-Turn Lane. — The rule of the road contained in this section does not apply where there are three lanes available to the motorist and the forward vehicle is in the left-turn lane and the overtaking vehicle is in the through-traffic lane. Anderson v. Talman Office Supplies, Inc., 234 N.C. 142, 66 S.E.2d 677 (1951). See Anderson v. Talman Office Supplies, Inc., 236 N.C. 519, 73 S.E.2d 141 (1952).

Or Where Vehicles Are Proceeding in Opposite Directions. — Absent unusual circumstances, this section has no bearing where the collision is between vehicles proceeding in opposite directions. McGinnis v. Robinson, 252 N.C. 574, 114 S.E.2d 365 (1960).

Violation of subsection (a) is negligence and if such negligence was the proximate cause of plaintiff's injuries, the defendant, nothing else appearing, is liable to the plaintiff in this action. Stovall v. Ragland, 211 N.C. 536, 190 S.E. 899 (1937).

A violation of subsection (a) would be negligence per se and if injury proximately result therefrom, it would be actionable. Tarrant v. Pepsi-Cola Bottling Co., 221 N.C. 390, 20 S.E.2d 565 (1942); Clark v. Emerson, 245 N.C. 387, 95 S.E.2d 880 (1957).

A violation of subsection (a) of this section is negligence per se. Kleibor v. Colonial Stores, Inc., 159 F.2d 894 (4th Cir. 1947).

Common-law rule of ordinary care applies. Cowan v. Murrows Transfer, Inc., 262 N.C. 550, 138 S.E.2d 228 (1964).

Where Driver of Forward Vehicle Has Signaled Intention to Turn Left. — Where the driver of a preceding vehicle traveling in the same direction gives a clear signal of his intention to turn left into an intersecting road and leaves sufficient space to his right to permit the overtaking vehicle to pass in safety, the provisions of subsection (a) of this section do not apply, and the overtaking vehicle may pass to the right of the overtaken vehicle, but this rule does not relieve the driver of the overtaking vehicle of the duty of observing other pertinent statutes. Ward v. Cruse, 236 N.C. 400, 72 S.E.2d 835 (1952).

Notwithstanding the provisions of this statute, a motorist may, in the exercise of ordinary care, pass another vehicle, going in the same direction, on the right of the overtaken vehicle when the driver of that vehicle has given a clear signal of his intention to make a left turn and has left sufficient space to the right to permit the overtaking vehicle to pass in safety. This rule, however, does not mean that the act of passing on the right of a left-turning vehicle at an intersection may not be accomplished in such a manner as to constitute negligence. Ford v. Smith, 6 N.C. App. 539, 170 S.E.2d 548 (1969).

Generally, the overtaking driver is justified in proceeding along the right side of the highway in attempting to pass the forward vehicle where the driver of the latter gives a left-turn signal or pulls over to the left as though intending to make a left turn. Ford v. Smith, 6 N.C. App. 539, 170 S.E.2d 548 (1969).

Where Driver of Forward Vehicle Fails to Signal Intention to Turn Left. — Though the forward driver fails to signal before making a left turn, yet the driver overtaking and passing the forward driver may be guilty of contributory negligence for not complying with this section. Lyerly v. Griffin, 237 N.C. 686, 75 S.E.2d 730 (1953).

Where the driver of the stopped truck has given no clear signal of his intention to make a left turn, but the truck standing on the right of the highway merely has on the left rear and left fender a red light flashing on and off, it would seem that the driver of an automobile approaching at night from the rear, in the exercise of ordinary care, is bound to approach with his automobile under control, so as to reduce his speed or stop, if necessary, to avoid injury. Weavil v. C.W. Myers Trading Post, Inc., 245 N.C. 106, 95 S.E.2d 533 (1956).

As to duty of driver of overtaking vehicle to give audible warning and effect of his failure to do so under subsection (b) of this section as it stood before the 1973 amendment, see Ervin v. Cannon Mills Co., 233 N.C. 415, 64 S.E.2d 431 (1951); Ward v. Cruse, 236 N.C. 400, 72 S.E.2d 835 (1952); Lyerly v. Griffin, 237 N.C. 686, 75 S.E.2d 730 (1953); Sheldon v. Childers, 240 N.C. 449, 82 S.E.2d 396 (1954); Tallent v. Talbert, 249 N.C. 149, 105 S.E.2d 426 (1958); Schloss v. Hallman, 255 N.C. 686, 122 S.E.2d 513 (1961); Boykin v. Bissette, 260 N.C. 295, 132 S.E.2d 616 (1963); McPherson v. Haire, 262 N.C. 71, 136 S.E.2d 224 (1964); Cowan v. Murrows Transf., Inc., 262 N.C. 550, 138 S.E.2d 228 (1964); Webb v. Felton, 266 N.C. 707, 147 S.E.2d 219 (1966); Lowe v. Futrell, 271 N.C. 550, 157 S.E.2d 92 (1967); Kinney v. Goley, 4 N.C. App. 325, 167 S.E.2d 97 (1969).

The two-foot clearance requirement is a minimum requirement by the express terms of

the statute. Murchison v. Powell, 269 N.C. 656, 153 S.E.2d 352 (1967).

It Applies to Overtaking and Passing Another Vehicle. — The two-foot clearance required by this section applies to the overtaking and passing of another vehicle, not a horse subject to fright by a sudden noise. Murchison v. Powell, 269 N.C. 656, 153 S.E.2d 352 (1967).

Vehicle Need Not Pass Two Feet to Left of Centerline. — Subsection (a) of this section does not require that a vehicle must pass at least two feet to the left of the centerline of the highway in passing another vehicle traveling in the same direction, but only that it pass at least two feet to the left of the other vehicle. Eason v. Grimsley, 255 N.C. 494, 121 S.E.2d 885 (1961).

The rule of the road set out in § 20-152 does not apply where one motorist is overtaking and passing another, as authorized by this section, or where there are two lanes available to the motorist and the forward vehicle is in the outer lane and the overtaking vehicle is in the passing lane. Maddox v. Brown, 232 N.C. 542, 61 S.E.2d 613 (1950).

A person walking along a public highway pushing a handcart is a pedestrian within the purview of § 20-174(d) and is not a driver of a vehicle within the meaning of § 20-146 and this section. Lewis v. Watson, 229 N.C. 20, 47 S.E.2d 484 (1948).

Contributory Negligence as Question for Jury. — The evidence tended to show that plaintiff's vehicle was following that of defendant, that defendant's truck slowed down and pulled to its left of the highway, that a person in the rear of the truck motioned plaintiff's driver to go ahead, and that as plaintiff's vehicle started to pass defendant's vehicle on its right, the driver of defendant's truck turned right to enter a private driveway, and the two vehicles collided. It was held that nonsuit on the ground of contributory negligence was erroneously entered, since, whether plaintiff's driver was guilty of contributory negligence in attempting to pass defendant's vehicle on the right is a question for the determination of the jury under the circumstances. Levy v. Carolina Aluminum Co., 232 N.C. 158, 59 S.E.2d 632 (1950).

Evidence Sufficient to Raise Issue of Last Clear Chance. — Where the evidence tended to show that plaintiff, in order to avoid striking a chicken standing on the hard surface of the highway, drove his automobile gradually to the left, so that the car was traveling in about the center of the highway at the time of the accident in suit, and that a bus belonging to defendant was traveling in the same direction and hit plaintiff's car when the bus attempted to pass, it was held that, conceding plaintiff was negligent in driving to the left without giving any signal or ascertaining if the car could be driven to the left in safety, defendant's motion to nonsuit was erroneously granted, since the pleadings and evidence are sufficient to raise the issue of the last clear chance upon the evidence tending to establish defendant's negligence in failing to keep a safe distance between the vehicles and in failing to take the precautions and give the signals required by this section for passing cars on the highway. Morris v. Seashore Transp. Co., 208 N.C. 807, 182 S.E. 487 (1935).

Instruction Embracing Requirements of Section Held Error. — In an action involving the alleged negligence of defendant in failing to yield to plaintiff's intestate one half the highway as the respective vehicles, traveling in opposite directions, passed each other, an instruction embracing the statutory duty of a driver of a vehicle overtaking and passing another vehicle traveling in the same direction is prejudicial error. Lookabill v. Regan, 245 N.C. 500, 96 S.E.2d 421 (1957).

Where the uncontroverted evidence supports a finding that the driver of the defendant's car violated subsection (a) of this section as to the duty of the driver of an overtaking vehicle, but there is neither allegation nor evidence that such violation was a proximate cause of the collision, an instruction based on that subsection is erroneous and prejudicial. McGinnis v. Robinson, 252 N.C. 574, 114 S.E.2d 365 (1960).

Applied in State v. Holbrook, 228 N.C. 620, 46 S.E.2d 843 (1948); Clifton v. Turner, 257 N.C. 92, 125 S.E.2d 339 (1962); Pate v. Hair, 208 F. Supp. 455 (W.D.N.C. 1962); Bass v. Roberson, 261 N.C. 125, 134 S.E.2d 157 (1964); Farmers Oil Co. v. Miller, 264 N.C. 101, 141 S.E.2d 41 (1965); Simpson v. Lyerly, 265 N.C. 700, 144 S.E.2d 870 (1965); Welch v. Jenkins, 271 N.C. 138, 155 S.E.2d 763 (1967); Almond v. Bolton, 272 N.C. 78, 157 S.E.2d 709 (1967).

Stated in Inman v. Harper, 2 N.C. App. 103, 162 S.E.2d 629 (1968); Bell v. Wallace, 32 N.C. App. 370, 232 S.E.2d 305 (1977).

Cited in Citizens Nat'l Bank v. Phillips, 236 N.C. 470, 73 S.E.2d 323 (1952); Harris v. Davis, 244 N.C. 579, 94 S.E.2d 649 (1956); Rudd v. Stewart, 255 N.C. 90, 120 S.E.2d 601 (1961); Porter v. Philyaw, 204 F. Supp. 285 (W.D.N.C. 1962); Caudill v. Nationwide Mut. Ins. Co., 264 N.C. 674, 142 S.E.2d 616 (1965); Bateman v. Elizabeth City State College, 5 N.C. App. 168, 167 S.E.2d 838 (1969).

§ 20-150. Limitations on privilege of overtaking and passing. — (a) The driver of a vehicle shall not drive to the left side of the center of a highway, in overtaking and passing another vehicle proceeding in the same direction, unless

such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety.

(b) The driver of a vehicle shall not overtake and pass another vehicle proceeding in the same direction upon the crest of a grade or upon a curve in the highway where the driver's view along the highway is obstructed within a distance of 500 feet.

(c) The driver of a vehicle shall not overtake and pass any other vehicle proceeding in the same direction at any railway grade crossing nor at any intersection of highway unless permitted so to do by a traffic or police officer. For the purposes of this section the words "intersection of highway" shall be defined and limited to intersections designated and marked by the Department of Transportation by appropriate signs, and street intersections in cities and towns.

(d) The driver of a vehicle shall not drive to the left side of the centerline of a highway upon the crest of a grade or upon a curve in the highway where such centerline has been placed upon such highway by the Department of Transportation, and is visible.

(e) The driver of a vehicle shall not overtake and pass another on any portion of the highway which is marked by signs or markers placed by the Department of Transportation stating or clearly indicating that passing should not be attempted.

(f) The foregoing limitations shall not apply upon a one-way street nor to the driver of a vehicle turning left in or from an alley, private road, or driveway. (1937, c. 407, s. 112; 1955, c. 862; c. 913, s. 2; 1957, c. 65, s. 11; 1969, c. 13; 1973, c. 507, s. 5; c. 1330, s. 16; 1977, c. 464, s. 34.)

Editor's Note. — The 1977 amendment substituted "Department of Transportation" for "Board of Transportation" in subsections (c), (d) and (e).

Some of the cases cited below were decided under the corresponding provisions of the former law.

Purpose. — The manifest purpose of this section is to promote safety in the operation of automobiles on the highways and not to obstruct vehicular traffic. Lawson v. Benton, 272 N.C. 627, 158 S.E.2d 805 (1968).

Application. — This section applies only to vehicles overtaking and passing another vehicle traveling in the same direction. State v. Boone, 16 N.C. App. 368, 192 S.E.2d 13 (1972).

Interpretation. — This safety statute must be given a reasonable and realistic interpretation to effect the legislative purpose. Lawson v. Benton, 272 N.C. 627, 158 S.E.2d 805 (1968).

No rule of law compels one vehicle to travel indefinitely behind the other. Farmers Oil Co. v. Miller, 264 N.C. 101, 141 S.E.2d 41 1965).

And no rule gives one the unqualified right to overtake and pass the other. Farmers Oil Co. v. Miller, 264 N.C. 101, 141 S.E.2d 41 (1965).

Statutes of this kind have no application to multiple-land highways. Byerly v. Shell, 312 F.2d 141 (4th Cir. 1962).

The provisions of subsections (d) and (e) were plainly not intended to apply to multiple highways which furnish parallel lanes on which vehicles moving in the same direction may pass without encountering traffic coming from the opposite direction. Byerly v. Shell, 312 F.2d 141 (4th Cir. 1962).

That multiple-lane highways were not within the contemplation of the North Carolina legislature when this section was passed is indicated by subsections (d) and (e) of this section which provide that the driver of a vehicle shall not drive to the left side of the center of the highway upon the crest of a grade or upon a curve in the highway and that a driver of a vehicle shall not pass another vehicle on any part of the highway marked by prohibitory signs placed by the State Highway Commission (now Department of Transportation). Byerly v. Shell, 312 F.2d 141 (4th Cir. 1962).

And It Is Not Negligence to Pass at Intersection on Dual Highway. — Under the proper interpretation of the North Carolina statutes, it is not unlawful and negligent per se for one vehicle to pass another at an intersection on a dual highway. Byerly v. Shell, 312 F.2d 141 (4th Cir. 1962).

But the exercise of careful lookout is especially indicated on a highway having a passing lane. State v. Fuller, 259 N.C. 111, 130 S.E.2d 61 (1963).

Negligence Per Se. — It is negligence per se for the operator of a motor vehicle to overtake and pass another vehicle traveling in the same direction at a railroad grade crossing. Murray v. Atlantic Coast Line R.R., 218 N.C. 392, 11 S.E.2d 326 (1940).

It is negligence per se for a motorist to overtake and pass another vehicle proceeding in

the same direction at an intersection of a highway, unless permitted to do so by a traffic officer. Donivant v. Swain, 229 N.C. 114, 47 S.E.2d 707 (1948); Cole v. Fletcher Lumber Co., 230 N.C. 616, 55 S.E.2d 86 (1949); Ferris v. Whitaker, 123 F. Supp. 356 (E.D.N.C. 1954); Adams v. Godwin, 252 N.C. 471, 114 S.E.2d 76 (1960).

This section prohibits a motorist from overtaking and passing at highway intersections, and the violation of this section is negligence. Crotts v. Overnite Transp. Co., 246 N.C. 420, 98 S.E.2d 502 (1957).

A violation of this section, relating to the limitations on privilege of overtaking and passing another vehicle, is negligence per se, and, if injury proximately results therefrom, the injured party is entitled to recover. Johnson v. Harris, 166 F. Supp. 417 (M.D.N.C. 1958); Rouse v. Jones, 254 N.C. 575, 119 S.E.2d 628 (1961).

Violation of subsection (c) has been held to constitute negligence per se if injury proximately results therefrom. Carter v. Scheidt, 261 N.C. 702, 136 S.E.2d 105 (1964); Teachey v. Woolard, 16 N.C. App. 249, 191 S.E.2d 903 (1972).

Where plaintiff's driver overtook and attempted to pass defendant's truck at an intersection within a municipality, he was guilty of negligence per se under subsection (c) of this section, and this was so without regard to his knowledge of whether he was within the city limits of the municipality. Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 289 N.C. 7, 220 S.E.2d 536 (1975).

A private driveway is not an intersecting highway within the meaning of subsection (c) of this section. Levy v. Carolina Aluminum Co., 232 N.C. 158, 59 S.E.2d 632 (1950); Farmers Oil Co. v. Miller, 264 N.C. 101, 141 S.E.2d 41 (1965).

Litigation between Overtaking Motorist and Driver of Overtaken Vehicle. — Although this section is designed primarily to prevent collision between an overtaking automobile and a vehicle coming from the opposite direction, its provisions are germane to litigation between an overtaking motorist and the driver of an overtaking vehicle if there is evidence to the effect that the underlying accident was occasioned by an unsuccessful effort on the part of the former to pass the latter upon a marked curve. The driver of the overtaken vehicle is certainly not required in such case to anticipate that the latter will attempt to pass in violation of the section. Walker v. American Bakeries Co., 234 N.C. 440, 67 S.E.2d 459 (1951).

Subsections (b) and (d) of this section are harmonious rather than conflictive. They are not designed to regulate the behavior of the operator of an overtaking automobile in any event unless he is traveling upon a curve in the highway. Whether the one statutory regulation or the other applies to the driver of an overtaking vehicle proceeding upon a curve in the highway depends on whether the curve is marked by a visible centerline placed upon the highway by the State Highway Commission (now Department of Transportation). Where the curve is so marked, the action of the operator of the overtaking automobile is governed by subdivision (d), which forbids him to drive to the left side of the centerline in order to pass the overtaken vehicle; and where the curve is not so marked, the conduct of the driver of the overtaking automobile is controlled by subdivision (b), which permits him to pass the overtaken vehicle unless his view along the highway is obstructed within a distance of 500 feet. Walker v. American Bakeries Co., 234 N.C. 440, 67 S.E.2d 459 (1951).

The meaning of subsection (c) of this section is that one motorist may not pass another going in the same direction under either of two conditions: (1) at any place designated and marked by the State Highway Commission (now Department of Transportation) as an intersection; (2) at any street intersection in any city or town. Adams v. Godwin, 252 N.C. 471, 114 S.E.2d 76 (1960).

In the case of a two-lane roadway in which traffic moves in both directions, the need to prohibit passing at intersections is obvious since the driver in the rear may reasonably anticipate that the car in the lead may desire to turn to the left. To such a situation the statute clearly applies. Byerly v. Shell, 312 F.2d 141 (4th Cir. 1962).

Since subsection (c) of this section does not contain the words "knowingly," "willfully" or any other words of like import, it was the obvious intent of the legislature to make the performance of a specific act a criminal violation and to thereby place upon the individual the burden to know whether his conduct is within the statutory prohibition. Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 289 N.C. 7, 220 S.E.2d 536 (1975).

Subsection (c) of this section is a safety statute enacted for the public's common safety and welfare. Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 289 N.C. 7, 220 S.E.2d 536 (1975).

Subsection (c) of this section requires one to observe street intersections within corporate limits whether marked or unmarked. Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 289 N.C. 7, 220 S.E.2d 536 (1975).

An intersection under subsection (c) of this section must be designated and marked by the Highway Commission (now Department of Transportation) by appropriate signs, and overtaking and passing another vehicle at "a crossover" is not a violation of this section, and therefore not negligence per se. Bennet v. Livingston, 250 N.C. 586, 108 S.E.2d 843 (1959).

Area of Special Hazard. — Attempt of truck driver to pass backfiller tractor traveling in same direction in area of special hazard held not negligence as a matter of law under the circumstances, but truck driver's negligence and contributory negligence of tractor driver were questions for the jury. Sloan v. Glenn, 245 N.C. 55, 95 S.E.2d 81 (1956).

Signs in construction area marked "One-Way Road," "Slow" and "Men Working," the presence of dirt piled along the highway and a ditch-digging machine at work on side of the highway constituted notice to driver of oil transport truck that he was approaching a zone of special hazard. Sloan v. Glenn, 245 N.C. 55, 95 S.E.2d 81 (1956).

Purpose of Yellow Lines. — Yellow lines are designed primarily to prevent collision between an overtaking and passing automobile and a vehicle coming from the opposite direction, and to protect occupants of other cars, pedestrians and property on the highway. Rushing v. Polk, 258 N.C. 256, 128 S.E.2d 675 (1962); Farmers Oil Co. v. Miller, 264 N.C. 101, 141 S.E.2d 41 (1965).

Presence and crossing of yellow line are evidential details in the totality of circumstances in a case. Farmers Oil Co. v. Miller, 264 N.C. 101, 141 S.E.2d 41 (1965).

Negligence Proximate Cause of Collision. — A collision occurred when an overtaking motorist attempted to pass a truck while the latter was making a left turn at an intersection, without passing beyond the center of the intersection as then required by § 20-153. It was held that the act of the motorist in violating subsection (c) of this section was the sole proximate cause of the collision. Ferris v. Whitaker, 123 F. Supp. 356 (E.D.N.C. 1954).

Contributory Negligence as Barring Recovery. — Even though the driver of a truck which collided with plaintiff's automobile failed to observe certain statutory requirements, where the evidence is equally clear in showing that the collision occurred when plaintiff was attempting to overtake and pass the truck proceeding in the same direction at a highway intersection, without permission so to do by a traffic or police officer, in violation of this section, contributory negligence on the part of the plaintiff bars recovery. Cole v. Fletcher Lumber Co., 230 N.C. 616, 55 S.E.2d 86 (1949).

Where plaintiff's evidence tended to show that he started passing a truck 275 feet from an intersection, nonsuit on the ground that plaintiff was contributorily negligent in attempting to pass at an intersection was properly denied, since the evidence was susceptible to the inference that plaintiff could have passed the truck before it reached the intersection had not the driver of the truck turned suddenly to the left 75 feet from the intersection in "cutting the corner." Howard v. Bingham, 231 N.C. 420, 57 S.E.2d 401 (1950).

Nonsuit on the ground of contributory negligence was erroneously entered, since on such motion only plaintiff's evidence should be considered, and since plaintiff's evidence did not compel the inference that his negligence contributed as a proximate cause to his injury and damage. Pruett v. Inman, 252 N.C. 520, 114 S.E.2d 360 (1960).

Evidence Sufficient to Show Violation of Section. — See State v. Goins, 233 N.C. 460, 64 S.E.2d 289 (1951).

The evidence tended to show that the driver of an automobile overtook and attempted to pass a truck proceeding in the same direction at an intersection of streets in a municipality at which no traffic officer was stationed, and that the vehicle collided when the driver of the truck made a left turn at the intersection. It was held that it was error for the court to instruct the jury that the provisions of subsection (c) of this section did not apply. Donivant v. Swain, 229 N.C. 114, 47 S.E.2d 707 (1948).

Evidence tending to show that the driver of a truck was traveling 35 to 40 miles per hour in an early morning fog which limited visibility to 100 or 126 feet, that he had overtaken a vehicle traveling in the same direction and was attempting to pass such vehicle 250 or 300 feet before reaching a curve, and collided with plaintiff's car which approached from the opposite direction, was held sufficient to be submitted to the jury on the issue of the negligence of the driver of the truck. Winfield v. Smith, 230 N.C. 392, 53 S.E.2d 251 (1949).

Evidence held to show violation of this section and to warrant submission to the jury of the issue of defendants' negligence. Winfield v. Smith, 230 N.C. 392, 53 S.E.2d 251 (1949).

Sufficient Evidence to Submit Question of Negligence to Jury. — Evidence that the driver of a truck, in attempting to pass cars going in the same direction, pulled out in the center of the road and hit the car which plaintiff was driving in the opposite direction, causing damage to the car and injury to plaintiff, was held sufficient to be submitted to the jury on the question of the actionable negligence of the driver of the truck. Joyner v. Dail, 210 N.C. 663, 188 S.E. 209 (1936).

Evidence Insufficient to Show Violation of Section. — Evidence held not to compel the conclusion that plaintiff's driver attempted to pass defendant's vehicle at an intersection in violation of this section. Carolina Cas. Ins. Co. v. Cline, 238 N.C. 133, 76 S.E.2d 374 (1953).

Instruction Erroneous as Nullifying Provisions of Section. — See Walker v. American Bakeries Co., 234 N.C. 440, 67 S.E.2d 459 (1951).

Applied in Bass v. Roberson, 261 N.C. 125, 134 S.E.2d 157 (1964); Taney v. Brown, 262 N.C. 438, 137 S.E.2d 827 (1964); Knight v. Seymour, 263 N.C. 790, 140 S.E.2d 410 (1965); Duckworth v. Metcalf, 268 N.C. 340, 150 S.E.2d 485 (1966);

Wands v. Cauble, 270 N.C. 311, 154 S.E.2d 425 (1967); Stutts v. Burcham, 271 N.C. 176, 155 S.E.2d 742 (1967); Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 26 N.C. App. 6, 214 S.E.2d 605 (1975).

Stated in Tysinger v. Coble Dairy Prods., 225 N.C. 717, 36 S.E.2d 246 (1945).

Cited in State v. Palmer, 197 N.C. 135, 147 S.E. 817 (1929); Cook v. Horne, 198 N.C. 739, 153 S.E. 315 (1930); Queen City Coach Co. v. Lee, 218 N.C. 320, 11 S.E.2d 341 (1940); Citizens Nat'l Bank v. Phillips, 236 N.C. 470, 73 S.E.2d 323 (1952); Sheldon v. Childers, 240 N.C. 449, 82 S.E.2d 396 (1954) (as to subsection (c)); Kirkman v. Baucom, 246 N.C. 510, 98 S.E.2d 922 (1957); McGinnis v. Robinson, 252 N.C. 574, 114 S.E.2d 365 (1960); Bundy v. Belue, 253 N.C. 31, 116 S.E.2d 200 (1960); McPherson v. Haire, 262 N.C. 71, 136 S.E.2d 224 (1964); Wyatt v. Haywood, 22 N.C. App. 267, 206 S.E.2d 260 (1974).

§ 20-150.1. When passing on the right is permitted. — The driver of a vehicle may overtake and pass upon the right of another vehicle only under the following conditions:

(1) When the vehicle overtaken is in a lane designated for left turns;

(2) Upon a street or highway with unobstructed pavement of sufficient width which have been marked for two or more lanes of moving vehicles in each direction and are not occupied by parked vehicles;

(3) Upon a one-way street, or upon a highway on which traffic is restricted to one direction of movement when such street or highway is free from obstructions and is of sufficient width and is marked for two or more lanes of moving vehicles which are not occupied by parked vehicles;

(4) When driving in a lane designating a right turn on a red traffic signal light. (1953, c. 679.)

Editor's Note. — For brief comment on this section, see 31 N.C.L. Rev. 418 (1953).

When Passing on Right Constitutes Negligence Per Se. — Passing on the right when not sanctioned by this section constitutes negligence per se if found to be the proximate cause of a collision. Teachey v. Woolard, 16 N.C. App. 249, 191 S.E.2d 903 (1972).

Applied in Schloss v. Hallman, 255 N.C. 686, 122 S.E.2d 513 (1961).

§ 20-151. Driver to give way to overtaking vehicle. — The driver of a vehicle about to be overtaken and passed by another vehicle approaching from the rear shall, unless the overtaking and passing is being made upon the right as permitted in G.S. 20-150.1, give way to the right in favor of the overtaking vehicle on suitable and audible signal being given by the driver of the overtaking vehicle. In any event the driver of the overtaken vehicle shall not increase the speed of his vehicle until completely passed by the overtaking vehicle. (1937, c. 407, s. 113; 1955, c. 913, s. 4.)

Editor's Note. — Some of the cases treated below were decided under the corresponding provisions of the earlier law, but should be of assistance in the interpretation of the present section.

A violation of this section is negligence per se. Rouse v. Jones, 254 N.C. 575, 119 S.E.2d 628 (1961).

Duty of Driver of Overtaken Car. — The driver of an overtaken car was driving in the proper lane at approximately the maximum lawful speed, but there was evidence that when an overtaking car drew abreast his car it was apparent that the overtaking vehicle was in a position of peril by reason of the near approach of a meeting vehicle. The driver of the overtaken car did not reduce speed but accelerated his speed and raced the passing car. Under the circumstances thus presented, it was the duty of the driver of the overtaken car not to to increase the speed of his car until the overtaking car had completely passed. Rouse v. Jones, 254 N.C. 575, 119 S.E.2d 628 (1961).

Exemption of Police Vehicles in Case of "Running Roadblock". — The provision of this section requiring the driver of a vehicle about to be overtaken to yield the right-of-way does not apply to a highway patrolman who sets up a "running roadblock" in an attempt to stop a stolen car being pursued by another patrolman, since an exemption for police vehicles from this section in case of a running roadblock may be reasonably implied. Collins v. Christenberry, 6 N.C. App. 504, 170 S.E.2d 515 (1969).

Degree of Care in Observing Traffic in Rear. — The driver of an autotruck along a public

highway is not held to the same degree of care in observing those who may wish to pass him coming from the rear, as in front, and is not required to turn to the right for such purpose, unless he is appraised by the one who wishes to pass, by proper signal, of his intention to do so. Dreher v. Divine, 192 N.C. 325, 135 S.E. 29 (1926).

Duty to Turn to Right. — The driver of an automobile upon the signal of a faster car approaching from the rear, must turn to the right so that the other may pass to his left, when the conditions existing there at the time are reasonably safe to permit the other to pass. Dreher v. Divine, 192 N.C. 325, 135 S.E. 29 (1926).

When Question One of Reasonable Prudence. — Where the driver of an automobile violates the statutes by turning to the right to avoid a motorcycle traveling in the same direction upon a public road, and collides therewith, and action is brought to recover damages therefor, and the evidence is conflicting as to whether the motorcycle was unexpectedly turned out in the wrong direction, resulting in the injury, the question of proximate cause depends upon whether the driver of the automobile acted with reasonable prudence under the circumstances, to avoid the injury, or whether the collision was caused by the wrongful and unexpected act of the one on the motorcycle. Cooke v. Jerome, 172 N.C. 626, 90 S.E. 767 (1916).

Duty of Passer from Rear. — The driver of an automobile who wishes to pass another ahead of him, must keep his automobile under control, so as to avoid a collision if the driver ahead of him apparently does not hear his signals or is not aware of his intention to pass, or the condition of the road makes it unsafe not only to himself, but to those who are driving from the opposite direction. Dreher v. Divine, 192 N.C. 325, 135 S.E. 29 (1926).

Proof of Violation in Trial for Resulting Crime. — See State v. Rountree, 181 N.C. 535, 106 S.E. 669 (1921); State v. Jessup, 183 N.C. 771, 111 S.E. 523 (1922).

Violation as Evidence of Intent to Assault. — Since the intentional driving of a motor vehicle on the wrong side of the road in disregard of the statute is malum prohibitum, not malum in se, the performance of this unlawful act is not evidence of a specific intent to commit an assault. State v. Rawlings, 191 N.C. 265, 131 S.E. 632 (1926).

Act Must Have Been Likely to Cause Harm. — One who violated the provisions of this section, not intentionally or recklessly, but merely through a failure to exercise due care and thereby proximately caused the death would not be culpably negligent unless in the light of the attendant circumstances his negligent act was likely to result in death or bodily harm. State v. Stansell, 203 N.C. 69, 164 S.E. 580 (1932).

Questions for Jury. — Where there was evidence that the plaintiff, desiring to pass a truck on the highway going in the same direction, blew his horn, and that the driver of the truck heard the signal, but instead of driving to the right of the center of the road to allow the plaintiff to pass on the left, drove to the left and stopped or came almost to a stop, that the plaintiff, thinking that the truck was going to stop, and having his car under control, attempted to pass on the right, when the truck suddenly turned to the right, forcing the plaintiff to turn to the right to avoid hitting the truck, causing the plaintiff's car to run off the embankment on the right of the road, resulting in the injury in suit. It was held that the evidence should have been submitted to the jury upon issues of negligence, contributory negligence and damages. Stevens v. Rostan, 196 N.C. 314, 145 S.E. 555 (1928).

Applied in Cole v. Fletcher Lumber Co., 230 N.C. 616, 55 S.E.2d 86 (1949); Pate v. Hair, 208 F. Supp. 455 (W.D.N.C. 1962); Queen v. Jarrett, 258 N.C. 405, 128 S.E.2d 894 (1963).

Cited in Jones v. C.B. Atkins Co., 259 N.C. 655, 131 S.E.2d 371 (1963).

§ 20-152. Following too closely. — (a) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.

(b) The driver of any motor vehicle traveling upon a highway outside of a business or residential district and following another motor vehicle shall, whenever conditions permit, leave sufficient space so that an overtaking vehicle may enter and occupy such space without danger, except that this shall not prevent a motor vehicle from overtaking and passing another motor vehicle. This provision shall not apply to funeral processions. (1937, c. 407, s. 114; 1949, c. 1207, s. 4; 1973, c. 1330, s. 17.)

Editor's Note. — For article on proof of negligence in North Carolina, see 48 N.C.L. Rev. 731 (1970).

Subsection (a) of this section is a statutory declaration of the common law that the driver of a motor vehicle shall not follow another

vehicle more closely than is reasonable and prudent, with regard for the safety of others and due regard to the speed of such vehicles and the traffic upon and condition of the highway. Black v. Gurley Milling Co., 257 N.C. 730, 127 S.E.2d 515 (1962).

The rule of the road set out in this section does not apply where one motorist is overtaking and passing another, as authorized by § 20-149, or where there are two lanes available to the motorist and the forward vehicle is in the outer lane and the overtaking vehicle is in the passing lane. Maddox v. Brown, 232 N.C. 542, 61 S.E.2d 613 (1950).

This section fixes no specific distance at which one automobile may lawfully follow another. Beanblossom v. Thomas, 266 N.C. 181, 146 S.E.2d 36 (1966).

Determining Proper Space to Be Maintained between Vehicles. — In determining the proper space to be maintained between his vehicle and the one preceding him, a motorist must take into consideration such variables as the locality, road and weather conditions, other traffic on the highway, the characteristics of the vehicle he is driving, as well as that of the one ahead, the relative speeds of the two, and his ability to control and stop his vehicle should an emergency require it. Thus, the space is determined according to the standard of reasonable care and should be sufficient to enable the operator of the car behind to avoid danger in case of a sudden stop or decrease in speed by the vehicle ahead under circumstances which should reasonably be anticipated by the following driver. Beanblossom v. Thomas, 266 N.C. 181, 146 S.E.2d 36 (1966).

Section Inapplicable to Act of Passing. — If the defendant were in the act of passing, then this section would have no application and provide no standard by which the court might judge. Gowens v. Morgan & Sons Poultry Co., 238 F. Supp. 399 (M.D.N.C. 1964).

Inferences from Fact of Collision. — Ordinarily the mere fact of a collision with the vehicle ahead furnishes some evidence that the motorist to the rear was not keeping a proper lookout or that he was following too closely. Burnett v. Corbett, 264 N.C. 341, 141 S.E.2d 468 (1965).

Unless the driver of the leading vehicle is himself guilty of negligence, or unless an emergency is created by some third person or other highway hazard, the mere fact of a collision with the vehicle ahead furnishes some evidence that the motorist in the rear was not keeping a proper lookout or that he was following too closely. Beanblossom v. Thomas, 266 N.C. 181, 146 S.E.2d 36 (1966).

The mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed or was following too closely. Griffin v. Ward, 267 N.C. 296, 148 S.E.2d 133 (1966); Huggins v. Kye, 10 N.C. App. 221, 178 S.E.2d 127 (1970).

Though the mere fact of a collision with a vehicle furnishes some evidence of a violation of this section, or of failure to keep a proper lookout, the mere proof of a collision with a preceding vehicle does not compel either of these conclusions. It merely raises a question for the jury to determine. Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966).

Drivers Charged with Notice That Operation of Each Car in Line Is Affected by Car in Front of It. — Where the plaintiff and defendant had been driving their cars behind a line of cars for a substantial distance, the drivers, in the exercise of reasonable care, were charged with notice that the operation of each car was affected by the one in front of it. They had to maintain such distance, keep such a lookout, and operate at such speed, under these conditions, that they could control their cars under ordinarily foreseeable developments. The defendant did so and was able to stop when it became necessary because the car leading the procession stopped to make a left turn. No less responsibility was cast upon the plaintiff, and therefore a motion to nonsuit the plaintiff's cause of action should have been allowed. Griffin v. Ward, 267 N.C. 296, 148 S.E.2d 133 (1966).

The following driver is not an insurer against rear-end collisions, for, even when he follows at a distance reasonable under the existing conditions, the space may be too short to permit a stop under any and all eventualities. White v. Mote, 270 N.C. 544, 155 S.E.2d 75 (1967).

Sudden Peril. — If the peril suddenly confronting a defendant is due to his failure to keep a safe distance behind another vehicle and maintain a proper lookout, the fact that care was exercised after discovery of the peril would not excuse the negligent conduct. Gowens v. Morgan & Sons Poultry Co., 238 F. Supp. 399 (M.D.N.C. 1964).

The condition and effectiveness of his brakes must be taken into consideration by a motorist in determining what is a safe distance and a safe speed at which he may follow another vehicle. Crotts v. Overnite Transp. Co., 246 N.C. 420, 98 S.E.2d 502 (1957).

Vehicles Stopping One Behind the Other. — The statutory prohibition against following too closely a vehicle traveling in the same direction has no application to the distance between vehicles stopping one behind another on the highway. There is no prescribed distance within which one car must stop behind another stopped car. Royal v. McClure, 244 N.C. 186, 92 S.E.2d 762 (1956).

Negligence Per Se. — A violation of subsection (a) would be negligence per se, and, if injury proximately results therefrom, it would

be actionable. Murray v. Atlantic Coast Line R.R., 218 N.C. 392, 11 S.E.2d 326 (1940); Smith v. Rawlins, 253 N.C. 67, 116 S.E.2d 184 (1960); Fox v. Hollar, 257 N.C. 65, 125 S.E.2d 334 (1962); Hamilton v. McCash, 257 N.C. 611, 127 S.E.2d 214 (1962); Gowens v. Morgan & Sons Poultry Co., 238 F. Supp. 399 (M.D.N.C. 1964); Beanblossom v. Thomas, 266 N.C. 181, 146 S.E.2d 36 (1966).

A violation of this section is negligence per se. Burnett v. Corbett, 264 N.C. 341, 141 S.E.2d 468 (1965); Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966).

The driver of a motor vehicle is negligent if he violates the requirement of subsection (a) of this section, and his negligence in that particular is actionable if it proximately causes injury to the person or property of another. Cozart v. Hudson, 239 N.C. 279, 78 S.E.2d 881 (1954).

A motorist is prohibited by this section from following another vehicle more closely than is reasonable and prudent under the circumstances with regard to the traffic and condition of the highway, and the violation of this section is negligence. Crotts v. Overnite Transp. Co., 246 N.C. 420, 98 S.E.2d 502 (1957).

Contributory Negligence. — In Killough v. Williams, 224 N.C. 254, 29 S.E.2d 697 (1944), plaintiff was held not guilty of contributory negligence in following too closely in the rear of a truck with which he collided.

Charge to Jury. — Where the court, in its charge on contributory negligence, does not call attention to this section, an exception to the charge will not be sustained in the absence of a special request for such instructions. Alexander v. Southern Pub. Util. Co., 207 N.C. 438, 177 S.E. 427 (1934), decided under corresponding provisions of the former law.

Applied in State v. Holbrook, 228 N.C. 620, 46 S.E.2d 843 (1948); Pacific Fire Ins. Co. v. Sistrunk Motors, Inc., 241 N.C. 67, 84 S.E.2d 301 (1954); Hall v. Little, 262 N.C. 618, 138 S.E.2d 282 (1964); Brown v. Hale, 263 N.C. 176, 139 S.E.2d 210 (1964).

Stated in State v. Steelman, 228 N.C. 634, 46 S.E.2d 845 (1948).

Cited in Hobbs v. Mann, 199 N.C. 532, 155 S.E. 163 (1930); Smith v. Carolina Coach Co., 214 N.C. 314, 199 S.E. 90 (1938); Clifton v. Turner, 257 N.C. 92, 125 S.E.2d 339 (1962); Dunlap v. Lee, 257 N.C. 447, 126 S.E.2d 62 (1962); Jones v. C.B. Atkins Co., 259 N.C. 655, 131 S.E.2d 371 (1963); Southwire Co. v. Long Mfg. Co., 12 N.C. App. 335, 183 S.E.2d 253 (1971).

§ 20-153. Turning at intersections. — (a) Right Turns. — Both the approach for a right turn and a right turn shall be made as close as practicable to the right-hand curb or edge of the roadway.

(b) Left Turns. — The driver of a vehicle intending to turn left at any intersection shall approach the intersection in the extreme left-hand lane lawfully available to traffic moving in the direction of travel of such vehicle, and, after entering the intersection, the left turn shall be made so as to leave the intersection in a lane lawfully available to traffic moving in such direction upon the roadway being entered. Whenever practicable the left turn shall be made in that portion of the intersection to the left of the center of the intersection.

(c) Local authorities and the Department of Transportation, in their respective jurisdictions, may modify the foregoing method of turning at intersections by clearly indicating by buttons, markers, or other direction signs within an intersection the course to be followed by vehicles turning thereat, and it shall be unlawful for any driver to fail to turn in a manner as so directed. (1937, c. 407, s. 115; 1955, c. 913, s. 5; 1973, c. 1330, s. 18; 1977, c. 464, s. 34.)

Editor's Note. — The 1977 amendment substituted "Department of Transportation" for "Board of Transportation" in subsection (c).

Provision Intended for Protection of Vehicle Coming in from Left on Intersecting Road. — This section which requires that the driver of a vehicle when intending to turn to the left shall pass beyond the center of the intersection is intended for the protection of a vehicle coming in from the left on the intersecting road. Ferris v. Whitaker, 123 F. Supp. 356 (E.D.N.C. 1954).

When a motorist approaches from the rear a vehicle standing in the left-turn lane, he has the right to assume that the driver of that vehicle will turn to the left upon the change of traffic signal. He has the right, and it is his duty, to pass the vehicle on its right. Anderson v. Talman Office Supplies, Inc., 234 N.C. 142, 66 S.E.2d 677 (1951). See Anderson v. Talman Office Supplies, Inc., 236 N.C. 519, 73 S.E.2d 141 (1952).

A violation of subsection (a) is negligence per se and if injury proximately results therefrom, violation is actionable. Tarrant v. Pepsi-Cola Bottling Co., 221 N.C. 390, 20 S.E.2d

565 (1942); Simmons v. Rogers, 247 N.C. 340, 100 S.E.2d 849 (1957); Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

Negligence Not Proximate Cause of Collision. — A collision occurred when an overtaking motorist attempted to pass a truck while the latter was making a left turn at an intersection, without passing "beyond the center of the intersection" as then required by § 20-153. It was held that the act of the motorist in violating § 20-150(c), prohibiting an overtaking driver from passing at an intersection, was the sole proximate cause of the collision. Ferris v. Whitaker, 123 F. Supp. 356 (E.D.N.C. 1954).

Circumstances Warranting Inference of Negligence. — The plaintiff was lawfully in an intersection, standing in a position where he was clearly visible to the driver of the defendant's taxicab as the latter approached the intersection. The taxi driver, had he been keeping a proper lookout, could have seen plaintiff in ample time to avoid a collision. Instead he "cut the corner" in violation of subsection (a) of this section without giving any signal or warning of his approach. A collision resulted. These circumstances, unrebutted, warranted an inference of negligence and were sufficient to require the submission of appropriate issues to the jury. Ward v. Bowles, 228 N.C. 273, 45 S.E.2d 354 (1947).

Inferences from Fact of Collision. — The principle that the mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed, was following too closely, or failed to keep a proper lookout is not absolute; the negligence, if any, depends upon the circumstances. Powell v. Cross, 263 N.C. 764, 140 S.E.2d 393 (1965).

Question for Jury. — If plaintiff violated this section by turning left without passing beyond the center of the intersection and was guilty of contributory negligence per se, it was for the jury to say whether such negligence proximately caused or contributed to plaintiff's injuries and damage, bearing in mind that reasonable foreseeability is an essential element of proximate cause. White v. Lacey, 245 N.C. 364, 96 S.E.2d 1 (1957).

Charge to Jury. — When the failure to explain the law so the jury could apply it to the facts is specifically called to the court's attention by a juror's request for information, it should tell the jury how to find the intersection of the streets as fixed by subdivision (12) of former § 20-38 [now subdivision (16) of § 20-4.01] and how, when the motorist reaches the intersection, he is required to drive in making a left turn. Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

Evidence Insufficient to Show Violation. — The evidence, as distinguished from defendant's allegations, was insufficient to constitute a basis for the contention that plaintiff violated this section. Kidd v. Burton, 269 N.C. 267, 152 S.E.2d 162 (1967).

Applied in Cole v. Fletcher Lumber Co., 230 N.C. 616, 55 S.E.2d 86 (1949); Stewart v. Gallimore, 265 N.C. 696, 144 S.E.2d 862 (1965); Wands v. Cauble, 270 N.C. 311, 154 S.E.2d 425 (1967).

Quoted in Ervin v. Cannon Mills Co., 233 N.C. 415, 64 S.E.2d 431 (1951).

Cited in Smith v. United States, 94 F. Supp. 681 (W.D.N.C. 1951); Hudson v. Petroleum Transit Co., 250 N.C. 435, 108 S.E.2d 900 (1959); Ray v. French Broad Elec. Membership Corp., 252 N.C. 380, 113 S.E.2d 806 (1960); McPherson v. Haire, 262 N.C. 71, 136 S.E.2d 224 (1964); Almond v. Bolton, 272 N.C. 78, 157 S.E.2d 709 (1967); Hardy v. Tesh, 5 N.C. App. 107, 167 S.E.2d 848 (1969).

§ 20-154. Signals on starting, stopping or turning. — (a) The driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement. The driver of a vehicle shall not back the same unless such movement can be made with safety and without interfering with other traffic.

(b) The signal herein required shall be given by means of the hand and arm in the manner herein specified, or by any mechanical or electrical signal device approved by the Division, except that when a vehicle is so constructed or loaded as to prevent the hand and arm signal from being visible, both to the front and rear, the signal shall be given by a device of a type which has been approved by the Division.

Whenever the signal is given the driver shall indicate his intention to start, stop, or turn by extending the hand and arm from and beyond the left side of the vehicle as hereinafter set forth.

Left turn — hand and arm horizontal, forefinger pointing.

Right turn — hand and arm pointed upward.

Stop — hand and arm pointed downward.

All hand and arm signals shall be given from the left side of the vehicle and all signals shall be maintained or given continuously for the last 100 feet traveled prior to stopping or making a turn. Provided, that in all areas where the speed limit is 45 miles per hour or higher and the operator intends to turn from a direct line of travel, a signal of intention to turn from a direct line of travel shall be given continuously during the last 200 feet traveled before turning; and provided further that the violation of this section shall not constitute negligence per se.

Any motor vehicle in use on a highway shall be equipped with, and required signal shall be given by, a signal lamp or lamps or mechanical signal device when the distance from the center of the top of the steering post to the left outside limit of the body, cab or load of such motor vehicle exceeds 24 inches, or when the distance from the center of the top of the steering post to the rear limit of the body or load thereof exceeds 14 feet. The latter measurement shall apply to any single vehicle, also to any combination of vehicles except combinations operated by farmers in hauling farm products.

(c) No person shall operate over the highways of this State a right-hand-drive motor vehicle or a motor vehicle equipped with the steering mechanism on the right-hand side thereof unless said motor vehicle is equipped with mechanical or electrical signal devices by which the signals for left turns and right turns may be given. Such mechanical or electrical devices shall be approved by the Division.

(d) A violation of this section shall not constitute negligence per se. (1937, c. 407, s. 116; 1949, c. 1016, s. 1; 1951, cc. 293, 360; 1955, c. 1157, s. 9; 1957, c. 488, s. 2; 1965, c. 768; 1973, c. 1330, s. 19; 1975, c. 716, s. 5.)

I. General Consideration.
II. Turning Movements.
III. Signals.
IV. Negligence and Proximate Cause.
V. Evidence.

I. GENERAL CONSIDERATION.

Cross Reference. — As to applicability of section to vehicles meeting as they approach intersection, see note to § 20-155.

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the first paragraph of subsection (b) and in subsection (c).

A number of the cases cited in the note below were decided prior to the 1965 amendment to subsection (b), which added the proviso as to violation not constituting negligence per se, and the 1973 amendment, which added subsection (d), to the same effect.

For note on "Turning and Stopping — Signals by Drivers," see 29 N.C.L. Rev. 439. For article on proof of negligence in North Carolina, see 48 N.C.L. Rev. 731 (1970).

In General. — One driving an automobile upon a public highway is required by provision of this section to give specific signals before stopping or turning thereon, and the failure of one so driving to give the signal required by statute is negligence, and when the proximate cause of injury, damages may be recovered therefor by the one injured. Murphy v. Asheville-Knoxville Coach Co., 200 N.C. 92, 156 S.E. 550 (1931).

The manifest object of this section is to promote vehicular travel. In the very nature of things, drivers of motor vehicles act on external appearances. These matters being true, the language of this section must be accorded a reasonable and realistic interpretation to effect the legislative purpose. Cooley v. Baker, 231 N.C. 533, 58 S.E.2d 115 (1950).

The manifest purpose of this section is to promote safety in the operation of automobiles on the highways, and not to obstruct vehicular traffic. Farmers Oil Co. v. Miller, 264 N.C. 101, 141 S.E.2d 41 (1965).

Construction. — This section must be given a reasonable and realistic interpretation to effect the legislative purpose. Farmers Oil Co. v. Miller, 264 N.C. 101, 141 S.E.2d 41 (1965).

Application to Bicyclist. — Under ordinary circumstances, it is the duty of a bicyclist, before turning from a direct line of travel, to ascertain that the movement can be made in safety, and to signal his intention to make the movement if the operation of any other vehicle will be thereby affected. Webb v. Felton, 266 N.C. 707, 147 S.E.2d 219 (1966).

This section imposes two duties upon a motorist intending to turn: (1) to see that the movement can be made in safety, and (2) to give the required signal when the operation of any other vehicle may be affected. Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962); Farmers Oil Co. v. Miller, 264 N.C. 101, 141 S.E.2d 41 (1965).

This section requires of one operating a motor vehicle before starting or stopping or turning from the direct line that he is traveling to first see that such movement can be made in safety, and when the operation of another vehicle by such movement may be affected, to give a signal plainly visible to the driver of the other vehicle of his intent to make such movement. Porter v. Philyaw, 204 F. Supp. 285 (W.D.N.C. 1962).

The provisions of this section impose two duties upon a motorist intending to turn from a direct line upon a highway: (1) to exercise reasonable care to see that such movement can be made in safety, and (2) to give the required signal whenever the operation of any other vehicle may be affected by such movement, plainly visible to the driver of such other vehicle, of the intention to make such movement. McNamara v. Outlaw, 262 N.C. 612, 138 S.E.2d 287 (1964).

This safety statute requires a motorist intending to turn from a direct line (1) to see that the movement can be made in safety, and (2) to give the required signal when the operation of any other vehicle may be affected. The first requirement does not mean that a motorist may not make a left turn unless the circumstances are absolutely free from danger. It means that a motorist must exercise reasonable care under existing conditions to ascertain that such movement can be made with safety. Infallibility is not required. Clarke v. Holman, 274 N.C. 425, 163 S.E.2d 783 (1968); Johnson v. Douglas, 6 N.C. App. 109, 169 S.E.2d 505 (1969).

The duties imposed upon the driver intending to turn from a direct line are twofold: (1) he must first ascertain whether the move can be made in safety and (2) upon ascertaining that another vehicle might be affected, must give a signal, plainly visible, of his intention so to move. Sharpe v. Grindstaff, 329 F. Supp. 405 (M.D.N.C. 1970), rev'd on other grounds, 446 F.2d 152 (1971).

Section Not Applicable Where Driver Has No Choice. — This section, which provides that the driver of a motor vehicle shall not stop without first seeing that he can do so in safety and that he must give a signal of his intention where the operation of other cars might be affected, is not applicable where the driver has no choice, such as where the driver is confronted with a situation which demands that he stop because the line of cars in front of him has done so, he cannot turn left because of oncoming traffic, and it has been raining and the windows of his car are up so he can give no hand signal. Griffin v. Ward, 267 N.C. 296, 148 S.E.2d 133 (1966).

Where plaintiff failed to give any signal indicating that he was going to stop, but defendant's own evidence established that plaintiff had no time in which to give a signal, plaintiff is not guilty of contributory negligence when defendant strikes him from rear, because he was under no statutory duty to give a signal where he has no choice but to stop because of the situation. Harris v. Freeman, 18 N.C. App. 85, 196 S.E.2d 48 (1973).

The approach of a police vehicle giving a signal by siren does not nullify or suspend the provisions of this section, or relieve a motorist of the duty to ascertain, before turning to his right, that such movement can be made in safety, or to signal any vehicle approaching from the rear. Anderson v. Talman Office Supplies, 234 N.C. 142, 66 S.E.2d 677 (1951). See Anderson v. Talman Office Supplies, 236 N.C. 519, 73 S.E.2d 141 (1952).

Duty on Starting after Having Stopped for Red Light. — After stopping for a red light at an intersection, before starting again, a driver should not only have the green light or go sign facing him, but he should also see and determine in the exercise of due care that such movement can be made in safety. Troxler v. Central Motor Lines, 240 N.C. 420, 82 S.E.2d 342 (1954).

Stopping on Traveled Portion of Highway Does Not Necessarily Constitute Negligence. — The mere fact that a driver stops his vehicle on the traveled portion of a highway for the purpose of receiving or discharging a passenger, nothing else appearing, does not constitute negligence. Strickland v. Powell, 10 N.C. App. 225, 178 S.E.2d 136 (1970), aff'd, 279 N.C. 183, 181 S.E.2d 464 (1971).

The stopping of a bus on the traveled portion of the highway to receive or discharge a passenger must be done with due regard to the provisions of this section. Banks v. Shepard, 230 N.C. 86, 52 S.E.2d 215 (1949).

Violation of Section as Question for Jury. — Whether defendant observed the rule of the road by ascertaining, first, if such turn would affect the operation of any other vehicle, and, second, by giving the required signal, under this section, held to raise an issue of fact for the jury. Mason v. Johnston, 215 N.C. 95, 1 S.E.2d 379 (1939).

Whether, according to the evidence, red signal lights on a stopped truck flashing on and off were sufficient to indicate a left turn of the truck was for the jury to decide. Weavil v. C.W. Myers Trading Post, Inc., 245 N.C. 106, 95 S.E.2d 533 (1956).

Whether signal lights would blink, and whether, if they would blink, they were "plainly visible" as required by this section, are questions for the jury. Eason v. Grimsley, 255 N.C. 494, 121 S.E.2d 885 (1961).

It was for the jury to determine whether plaintiff should have reasonably anticipated that the operation of any other vehicle might be affected by his making a right-hand turn. Kidd v. Burton, 269 N.C. 267, 152 S.E.2d 162 (1967).

Instructions Held Erroneous. — An instruction stating in substance that defendants must first prove that plaintiff failed to ascertain safe turning conditions and, having proved this, must go further and prove that plaintiff failed to signal his intention to turn, and that the failure to signal was the proximate cause of the collision, placed an unwarranted burden on defendants. Mitchell v. White, 256 N.C. 437, 124 S.E.2d 137 (1962).

Where there is no evidence that defendant driver failed to give the signal for a left turn, as required by this section, and no evidence that defendant was traveling at excessive speed at the time, it is error for the court to instruct the jury upon the issue of the driver's negligence in regard to turn signals and excessive speed. Textile Motor Freight, Inc. v. DuBose, 260 N.C. 497, 133 S.E.2d 129 (1963).

Applied in Badders v. Lassiter, 240 N.C. 413, 82 S.E.2d 357 (1954); Shoe v. Hood, 251 N.C. 719, 112 S.E.2d 543 (1960); Scarborough v. Ingram, 256 N.C. 87, 122 S.E.2d 798 (1961); Parker v. Bruce, 258 N.C. 341, 128 S.E.2d 561 (1962); Queen v. Jarrett, 258 N.C. 405, 128 S.E.2d 894 (1963); Faulk v. Althouse Chem. Co., 259 N.C. 395, 130 S.E.2d 684 (1963); Carolina Coach Co. v. Cox, 337 F.2d 101 (4th Cir. 1964); Mayberry v. Allred, 263 N.C. 780, 140 S.E.2d 406 (1965); Stewart v. Gallimore, 265 N.C. 696, 144 S.E.2d 862 (1965); Simpson v. Lyerly, 265 N.C. 700, 144 S.E.2d 870 (1965); Webb v. Felton, 266 N.C. 707, 147 S.E.2d 219 (1966); Stutts v. Burcham, 271 N.C. 176, 155 S.E.2d 742 (1967); Roberts v. Pilot Freight Carriers, 273 N.C. 600, 160 S.E.2d 712 (1968); Key v. Merritt-Holland Welding Supplies, 273 N.C. 609, 160 S.E.2d 687 (1968); Smith v. Perdue, 7 N.C. App. 314, 172 S.E.2d 246 (1970).

Quoted in Kanoy v. Hinshaw, 273 N.C. 418, 160 S.E.2d 296 (1968); Strickland v. Powell, 279 N.C. 183, 181 S.E.2d 464 (1971).

Stated in Hall v. Kimber, 6 N.C. App. 669, 171 S.E.2d 99 (1969).

Cited in Smith v. Carolina Coach Co., 214 N.C. 314, 199 S.E. 90 (1938); Newbern v. Leary, 215 N.C. 134, 1 S.E.2d 384 (1939); Matheny v. Central Motor Lines, 233 N.C. 673, 65 S.E.2d 361 (1951); Morrisette v. A.G. Boone Co., 235 N.C. 162, 69 S.E.2d 239 (1952); Aldridge v. Hasty, 240 N.C. 353, 82 S.E.2d 331 (1954); Emerson v. Munford, 242 N.C. 241, 87 S.E.2d 306 (1955); Hollowell v. Archbell, 250 N.C. 716, 110 S.E.2d 262 (1959); McPherson v. Haire, 262 N.C. 71, 136 S.E.2d 224 (1964); Correll v. Gaskins, 263 N.C. 212, 139 S.E.2d 202 (1964); Vann v. Hayes, 266 N.C. 713, 147 S.E.2d 186 (1966); Underwood v. Gay, 268 N.C. 715, 151 S.E.2d 596 (1966); Bateman v. Elizabeth City State College, 5 N.C. App. 168, 167 S.E.2d 838 (1969); Brown v. Boren Clay Prods. Co., 5 N.C. App. 418, 168 S.E.2d 452 (1969); Kinney v. Goley, 6 N.C. App. 182, 169 S.E.2d 525 (1969); Odell v. Lipscomb, 12 N.C. App. 318, 183 S.E.2d 299 (1971); Southwire Co. v. Long Mfg. Co., 12 N.C. App. 335, 183 S.E.2d 253 (1971); Teachey v. Woolard, 16 N.C. App. 249, 191 S.E.2d 903 (1972).

II. TURNING MOVEMENTS.

Driver Must First See that Turn Can Be Made in Safety. — Every driver who intends to turn, or partly turn, from a direct line shall first see that such movement can be made in safety. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

The signal would be futile if the movement could not be made in safety; and, therefore, there is a complete failure of duty upon the part of the driver of the turning car if he does not first use reasonable care to see that the turn may be made in safety. Ervin v. Cannon Mills Co., 233 N.C. 415, 64 S.E.2d 431 (1951).

The requirement that a motorist shall not turn from a straight line until he has first seen that the movement can be made in safety does not mean that he may not make a left turn on the highway unless the circumstances be absolutely free from danger, but only that he exercise reasonable care under the circumstances in ascertaining that such movement can be made with safety to himself and others. Cooley v. Baker, 231 N.C. 533, 58 S.E.2d 115 (1950); White v. Lacey, 245 N.C. 364, 96 S.E.2d 1 (1957); Williams v. Tucker, 259 N.C. 214, 130 S.E.2d 306 (1963); Farmers Oil Co. v. Miller, 264 N.C. 101, 141 S.E.2d 41 (1965).

Subsection (a) of this section does not mean that a motorist may not make a left turn on a highway unless the circumstances be absolutely free from danger. Only reasonable care must be exercised in determining that the movement may be made in safety. Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962).

A motorist is not required to ascertain that a turning motion is absolutely free from danger. Cowan v. Murrows Transf., Inc., 262 N.C. 550, 138 S.E.2d 228 (1964); Hales v. Flowers, 7 N.C. App. 46, 171 S.E.2d 113 (1969); Hudgens v. Goins, 15 N.C. App. 203, 189 S.E.2d 633 (1972).

The provisions of subsection (a) do not require infallibility of a motorist, and do not mean that he cannot make a left turn upon a highway unless the circumstances be absolutely free from danger. McNamara v. Outlaw, 262 N.C. 612, 138 S.E.2d 287 (1964); Almond v. Bolton, 272 N.C. 78, 157 S.E.2d 709 (1967).

While it is true that subsection (a) of this section does not mean that a motorist may not make a left turn on a highway unless the circumstances be absolutely free from danger, he is required to exercise reasonable care in determining that his intended movement can be

made in safety. Petree v. Johnson, 2 N.C. App. 336, 163 S.E.2d 87 (1968).

The statutory provisions that "the driver of any vehicle upon a highway before . . . turning from a direct line shall first see that such movement can be made in safety" does not mean that a motorist may not make a left turn on a highway unless the circumstances render such turning absolutely free from danger. It is simply designed to impose upon the driver of a motor vehicle, who is about to make a left turn upon a highway, the legal duty to exercise reasonable care under the circumstances in ascertaining that such movement can be made with safety to himself and others before he actually undertakes it. Hales v. Flowers, 7 N.C. App. 46, 171 S.E.2d 113 (1969).

A driver making a left turn must always use the care which a reasonable man would use under like circumstances. Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966).

The care which is reasonable in making a left turn at an intersection depends, in part, upon the nature and dimensions of the vehicle, or combination of vehicles, to be turned and of the load, if any, projecting from the rear thereof. Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966).

Driver Must Keep Outlook in Direction of Travel. — It is the duty of the driver of a motor vehicle not merely to look, but to keep an outlook in the direction of travel. Clarke v. Holman, 274 N.C. 425, 163 S.E.2d 783 (1968).

III. SIGNALS.

The duty to give a signal does not arise unless the operation of some other vehicle may be affected by such movement. When the surrounding circumstances afford him reasonable grounds to conclude that the left turn might affect the operation of another vehicle, then the duty to give the statutory signal is imposed upon him. Clarke v. Holman, 274 N.C. 425, 163 S.E.2d 783 (1968).

Whenever the operation of another vehicle will not be affected by starting, stopping, or turning, no signal is required by subsection (a) of this section. Clarke v. Holman, 1 N.C. App. 176, 160 S.E.2d 552, aff'd, 274 N.C. 425, 163 S.E.2d 783 (1968).

This section does not require that a motorist give proper signal before making a left turn on the highway unless the surrounding circumstances afford him reasonable grounds for apprehending that such movement may affect the operation of another vehicle, and in exercising such prevision he may, in the absence of notice to the contrary, assume that other motorists will maintain a proper lookout, drive at a lawful speed, and otherwise exercise due care. Cooley v. Baker, 231 N.C. 533, 58 S.E.2d 115 (1950).

Where a motorist makes a left turn across a street, without signaling, to enter a filling station, and makes such turn when a vehicle approaching from the opposite direction is 900 feet away, and is struck by such other vehicle which was traveling at a speed of approximately 70 miles per hour, such motorist does not violate this section, since the motorist had every reason to believe that he could complete his turn with safety to himself and others without affecting in any way the operation of the approaching vehicle. Cooley v. Baker, 231 N.C. 533, 58 S.E.2d 115 (1950).

The provisions of this section do not require the driver of a motor vehicle intending to make a left turn upon a highway to signal his purpose to turn in every case. The duty to give a statutory signal of an intended left turn does not arise in any event unless the operation of some "other vehicle may be affected by such movement." And even then the law does not require infallibility of the motorist. It imposes upon him the duty of giving a statutory signal of his intended left turn only in case the surrounding circumstances afford him reasonable grounds for apprehending that his making the left turn upon the highway might affect the operation of another vehicle. Blanton v. Carolina Dairy, Inc., 238 N.C. 382, 77 S.E.2d 922 (1953).

Person Observing No Vehicles in Either Direction Is under No Obligation to Give Signal. — The plaintiff having first looked in both directions, and having observed no automobile or other vehicle approaching from either direction, was under no obligation, by virtue of this section, to give any signal of his purpose to turn to his left and enter the driveway to his home. He was therefore not negligent as a matter of law in failing to give a signal before he turned to his left and crossed the highway for the purpose of entering the driveway to his home. Stovall v. Ragland, 211 N.C. 536, 190 S.E. 899 (1937).

One is not required to give a signal to a motorist who has not yet appeared on the horizon. Clarke v. Holman, 274 N.C. 425, 163 S.E.2d 783 (1968).

But a driver is held to the duty of seeing what he ought to have seen. Clarke v. Holman, 274 N.C. 425, 163 S.E.2d 783 (1968).

Where cars are meeting at an intersection and one intends to turn across the lane of travel of the other, subsection (b) of § 20-155 and subsection (a) of this section apply, and the driver making the turn is under duty to give a plainly visible signal of his intention to turn, and ascertain that such movement can be made in safety, without regard to which vehicle entered the intersection first. Fleming v. Drye, 253 N.C. 545, 117 S.E.2d 416 (1960); King v. Sloan, 261 N.C. 562, 135 S.E.2d 556 (1964).

Electrical Signal Device. — Evidence that defendant driver gave signal of intention to turn left by an electrical signal device operated by a lever on the steering column, is competent to be considered by the jury on the issue of the contributory negligence of such operator, notwithstanding the absence of evidence that such signal device had been approved by the Department of Motor Vehicles, since, apart from this section, it is for the jury to decide whether the signal was in fact given, whether it indicated a left turn by the operator of the car, and whether the driver of the other car was negligent in failing to observe and heed such signal. Queen City Coach Co. v. Fultz, 246 N.C. 523, 98 S.E.2d 860 (1957).

Giving Both Hand and Mechanical Signals Not Required. — There is nothing in this section or in the decisions that requires under any conditions that a hand signal and a mechanical or electrical signal shall both be given before making a left turn. Rudd v. Stewart, 255 N.C. 90, 120 S.E.2d 601 (1961).

Giving Signal Does Not Relieve Driver of Other Duties. — The requirement in this section that a prescribed hand signal be given of intention to make a left turn in traffic does not constitute full compliance with the mandate also expressed that before turning from a direct line the driver shall first see that such movement can be made in safety, nor does the performance of this mechanical act alone relieve the driver of the common-law duty to exercise due care in other respects. Ervin v. Cannon Mills Co., 233 N.C. 415, 64 S.E.2d 431 (1951); Simmons v. Rogers, 247 N.C. 340, 100 S.E.2d 849 (1957).

It Is Not Necessarily Enough to Look and Give Signal. — In making a left turn, it is not necessarily enough to absolve a driver from negligence that he looked and gave the statutory signal. Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966).

Hence, when the turning vehicle is drawing behind it a 40-foot pole, it is obvious that a left turn at a right angle will involve some swinging of the end of the pole in an arc through part of the intersection. Evidence of such a turn with such a load is sufficient to permit, though not to require, the jury to find that reasonable care for the safety of other users of the highway demands the stationing of some person at the intersection to stop traffic which may otherwise be imperiled by the turn. Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966).

The driver of an automobile may be required to give not only the statutory signals, but also other signals, or to slacken speed or take other steps to avoid a collision, if the surrounding circumstances and conditions require it. The giving of the statutory signals is the least the law requires. Ervin v. Cannon Mills Co., 233 N.C. 415, 64 S.E.2d 431 (1951).

The prescribed hand signal should be maintained for a sufficient length of time to enable the driver of the following vehicle to observe it and to understand therefrom what movement is intended. Ervin v. Cannon Mills Co., 233 N.C. 415, 64 S.E.2d 431 (1951); McNamara v. Outlaw, 262 N.C. 612, 138 S.E.2d 287 (1964).

A signal must be maintained for a sufficient distance and length of time to enable the driver of the following vehicle to observe it and to understand therefrom what movement is intended. Farmers Oil Co. v. Miller, 264 N.C. 101, 141 S.E.2d 41 (1965).

The giving of a signal for a left turn does not give the signaler an absolute right to make the turn immediately, regardless of circumstances, but the signaler must first ascertain that the movement may be made safely. Eason v. Grimsley, 255 N.C. 494, 121 S.E.2d 885 (1961); McNamara v. Outlaw, 262 N.C. 612, 138 S.E.2d 287 (1964).

An allegation that the proper turn signal was given does not support the conclusion that the signaler thereby acquired the right to make an uninterrupted turn, or that the turn made pursuant thereto was lawful. Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962).

Right to Assume that Driver Will Give Signal. — A person has the right to assume, and to act on that assumption, that the driver of a vehicle approaching from the opposite direction will comply with subsection (a) of this section before making a left turn across his path. Petree v. Johnson, 2 N.C. App. 336, 163 S.E.2d 87 (1968).

While ordinarily a motorist may assume and act on the assumption that the driver of a vehicle approaching from the opposite direction will comply with statutory requirements as to signaling before making a left turn across his path, he is not entitled to indulge in this assumption after he sees or by the exercise of due care ought to see that the approaching driver is turning to his left across the highway to enter an intersecting road. Jernigan v. Jernigan, 236 N.C. 430, 72 S.E.2d 912 (1952).

Right to Assume that Signaler Will Delay until Turn May Be Made Safely. — When the circumstances do not allow the signaler a reasonable margin of safety, other motorists affected have the right to assume that he will delay his movement until it may be made in safety. Eason v. Grimsley, 255 N.C. 494, 121 S.E.2d 885 (1961).

And that Approaching Motorist Will Exercise Due Care. — In considering whether he can turn with safety and whether he should give a statutory signal of his purpose, the driver of a motor vehicle, who undertakes to make a left turn in front of an approaching motorist, has the right to take it for granted, in the absence of notice to the contrary, that the oncoming motorist will maintain a proper lookout, drive at

a lawful speed, and otherwise exercise due care to avoid collision with the turning vehicle. McNamara v. Outlaw, 262 N.C. 612, 138 S.E.2d 287 (1964); Johnson v. Douglas, 6 N.C. App. 109, 169 S.E.2d 505 (1969).

Effect of Traffic Signals at Intersection. — Where the evidence disclosed that the street intersection in question had electrically operated traffic signals, with the usual red, yellow, and green lights, the rights of a motorist at such intersection were held to be controlled by the traffic signals and not by this section. White v. Cothran, 260 N.C. 510, 133 S.E.2d 132 (1963).

Where the intersection of streets in a municipality has authorized electric traffic signals, requirements in regard to stopping are controlled by the traffic lights and not by subsection (b) of this section. Jones v. Holt, 268 N.C. 381, 150 S.E.2d 759 (1966).

When a motorist approaches an electrically controlled signal at an intersection of streets or highways, he is under the legal duty to maintain a proper lookout and to keep his motor vehicle under reasonable control in order that he may stop before entering the intersection if the green light changes to yellow or red before he actually enters the intersection. Likewise, another motorist, following immediately behind the first motorist, is not relieved of the legal duty to keep his motor vehicle under reasonable control in order that he might not collide with the motor vehicle in front of him in the event the driver of the first car is required to stop before entering the intersection by reason of the signal light changing from green to yellow or red. Jones v. Holt, 268 N.C. 381, 150 S.E.2d 759 (1966).

In subsection (a) of this section there is no hint of a legislative intent to create a clear dichotomy between those intersections with and those without traffic lights. A pedestrian following the lights and continuing his straight course has the right to rely on the presumption that the driver will obey the law as set forth in this statute. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

IV. NEGLIGENCE AND PROXIMATE CAUSE.

Violation of Section as Negligence Per Se. — The 1965 amendment read in part "that the violation of this section shall not constitute negligence per se." For cases decided prior to the 1965 amendment which held otherwise, see Holland v. Strader, 216 N.C. 436, 5 S.E.2d 311 (1939); Bechtler v. Bracken, 218 N.C. 515, 11 S.E.2d 721 (1940); Conley v. Pearce-Young-Angel Co., 224 N.C. 211, 29 S.E.2d 740 (1944); Banks v. Shepard, 230 N.C. 86, 52 S.E.2d 215 (1949); Grimm v. Watson, 233 N.C. 65, 62 S.E.2d 538 (1950); Bradham v. McLean Trucking Co., 243 N.C. 708, 91 S.E.2d 891 (1956); Queen City Coach Co. v. Fultz, 246 N.C. 523, 98 S.E.2d 860 (1957); Hall v. Carroll, 255 N.C. 326, 121 S.E.2d 547 (1961); Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962); Wiggins v. Ponder, 259 N.C. 277, 130 S.E.2d 402 (1963); Cowan v. Murrows Transf., Inc., 262 N.C. 550, 138 S.E.2d 228 (1964); Farmers Oil Co. v. Miller, 264 N.C. 101, 141 S.E.2d 41 (1965).

Under this section as it stood before the 1965 amendment, a violation of subsection (a) was negligence per se. Lowe v. Futrell, 271 N.C. 550, 157 S.E.2d 92 (1967), in which the court said that it was unnecessary to determine whether the proviso added by the 1965 amendment in subsection (b) was intended to apply to subsection (a).

Violation to Be Considered in Determining Breach of Duty to Exercise Due Care. — Since a violation of this section is no longer to be considered negligence per se, the jury, if they find as a fact this section was violated, must consider the violation along with all other facts and circumstances and decide whether, when so considered, the violator has breached his common-law duty of exercising ordinary care. If a violation of the statute is to be considered negligence per se, the jury would not need to perform this function, since the statute, rather than the common-law duty of ordinary care, would provide the applicable standard. Kinney v. Goley, 4 N.C. App. 325, 167 S.E.2d 97 (1969).

Since a violation of this safety statute is not negligence per se, triers of the facts must consider all relevant facts and attendant circumstances in deciding whether the violator has breached his common-law duty to exercise due care. Sharpe v. Grindstaff, 329 F. Supp. 405 (M.D.N.C. 1970), rev'd on other grounds, 446 F.2d 152 (1971).

Since a violation of this section is no longer to be considered negligence per se, the jury if they find as a fact that the statute was violated, must consider the violation along with all other facts and circumstances and decide whether, when so considered, the violator has breached his common-law duty of exercising ordinary care. Harris v. Freeman, 18 N.C. App. 85, 196 S.E.2d 48 (1973).

Violation Proximately Causing Injury Is Actionable. — The violation of this section, requiring that a driver turning from a direct line shall first see that such movement can be made in safety and, whenever such movement may affect the operation of another vehicle, give proper signal, is negligence, and is actionable if such violation proximately causes injury to another. Cooley v. Baker, 231 N.C. 533, 58 S.E.2d 115 (1950); Ervin v. Cannon Mills Co., 233 N.C. 415, 64 S.E.2d 431 (1951).

Causal Relation Must Be Shown. — The violation of this section and of § 20-138, if conceded, is not sufficient to sustain a prosecution for involuntary manslaughter unless a causal relation is shown between the breach of the statute and the death. State v.

Lowery, 223 N.C. 598, 27 S.E.2d 638 (1943). See Templeton v. Kelley, 216 N.C. 487, 5 S.E.2d 555 (1939).

Allegations of complaint held to show that sole proximate cause of collision was negligent left turn made by first defendant across path of second defendant despite allegations that second defendant was concurrently negligent. Hout v. Harvell, 270 N.C. 274, 154 S.E.2d 41 (1967); Mabe v. Green, 270 N.C. 276, 154 S.E.2d 91 (1967).

Plaintiff's Violation of Section Held Proximate Cause of Collision. — Plaintiff's admitted violation of this section in making a "U" turn to his left without ascertaining that he could do so in safety and without giving the required signal was a proximate cause of the collision justifying a nonsuit against him. Tallent v. Talbert, 249 N.C. 149, 105 S.E.2d 426 (1958).

Failure to Give Hand Signal Held Not Proximate Cause of Collision. — See Cozart v. Hudson, 239 N.C. 279, 78 S.E.2d 881 (1954).

Evidence held not to compel conclusion that sole proximate cause of collision was illegal left turn made by driver of other car. Jernigan v. Jernigan, 236 N.C. 430, 72 S.E.2d 912 (1952).

Proximate Cause Is Question for Jury. — Whether the violation of a safety statute is a proximate cause of injury is ordinarily a question of fact for the determination of the jury. Holland v. Strader, 216 N.C. 436, 5 S.E.2d 311 (1939).

If plaintiff violated this section and was guilty of contributory negligence per se, prior to the 1965 amendment, which provided that violation of the section is not negligence per se, it was for the jury to say whether such negligence proximately caused or contributed to plaintiff's injuries and damage, bearing in mind that reasonable foreseeability is an essential element of proximate cause. White v. Lacey, 245 N.C. 364, 96 S.E.2d 1 (1957).

Contributory Negligence Barring Recovery. — An accident occurred when plaintiff's tractor-trailer, following defendants' tractor-trailer on the highway at night, rammed the rear of defendants' vehicle when it suddenly stopped on the highway. Plaintiff's allegations and evidence were to the effect that defendants' vehicle suddenly stopped without signal by hand or electrical device. Plaintiff's driver testified that he was familiar with the highway and knew he was approaching an intersection where traffic was congested, that he was traveling between 110 and 115 feet behind defendants' vehicle, that he did not see it had stopped until he was within 75 feet of it, and that he immediately put on his brakes but was too close to stop before hitting its rear. It was held that plaintiff's evidence discloses contributory negligence as a matter of law barring recovery. Fawley v. Bobo, 231 N.C. 203, 56 S.E.2d 419 (1949).

Even though the driver of a truck which collided with plaintiff's automobile failed to observe the requirements of this and other sections, where the evidence is equally clear that the collision occurred when plaintiff was attempting to overtake and pass the truck proceeding in the same direction at the intersection of highways, without permission so to do by a traffic or police officer, in violation of provisions of § 20-150(c), contributory negligence on the part of the plaintiff bars recovery. Cole v. Fletcher Lumber Co., 230 N.C. 616, 55 S.E.2d 86 (1949).

Plaintiff truck driver held guilty of contributory negligence in turning left without seeing that movement could be made in safety, and he could not recover damages from colliding with tractor-trailer. Gasperson v. Rice, 240 N.C. 660, 83 S.E.2d 665 (1954).

Intervening Negligence Insulating Primary Negligence. — Plaintiff's evidence tended to show that plaintiff was standing at the rear of a car parked completely off the hard surface on the right, that a car traveling at a speed of 45 to 50 miles per hour slowed down rapidly as it came near the parked car, that the driver of a truck following 250 feet behind the car, immediately when he saw the brake light on the car, applied his brakes without effect and then applied his hand brake and skidded off the highway, striking the rear of the car and the plaintiff. Oncoming traffic prevented the truck driver from turning to the left. The driver of the truck testified that had his brakes been working properly he did not think he would have had any trouble stopping the truck. It was held that even conceding negligence on the part of the driver of the car in violating this section, the intervening negligence of the driver of the truck in driving at excessive speed or in operating the truck with defective brakes, insulated any negligence of the driver of the car as a matter of law, since neither the intervening negligence nor the resulting injury could have been reasonably anticipated by the driver of the car from his act in rapidly decreasing speed. Warner v. Lazarus, 229 N.C. 27, 47 S.E.2d 496 (1948).

V. EVIDENCE.

Evidence of Negligence Sufficient for Jury. — Evidence that defendant driver attempted to turn left into a dirt road without giving a plain and visible signal of his intention to do so, did not keep a proper lookout, and did not heed plaintiff's warning horn, resulting in a collision with plaintiff's vehicle as plaintiff, traveling in the same direction, was attempting to pass, is sufficient to be submitted to the jury on the issue of negligence. Eason v. Grimsley, 255 N.C. 494, 121 S.E.2d 885 (1961).

Evidence Sufficient to Show Negligence under Subsection (a). — Evidence to the effect that defendant, traveling in the opposite

direction, turned left to enter a private driveway and stopped with her vehicle partially blocking plaintiff's lane of travel, causing plaintiff to swerve off the hard surface to avoid a collision, was sufficient to show negligence by defendant under subsection (a) of this section. Black v. Wilkinson, 269 N.C. 689, 153 S.E.2d 333 (1967).

Evidence Insufficient to Show Mechanical or Electrical Signal. — Plaintiff, a passenger in a bus, was injured when a truck following the bus collided with the rear thereof when the bus was stopped on the highway to permit a passenger to alight. Defendant bus company admitted that its driver gave no hand signal, but introduced evidence of a rule of the Utilities Commission as to the required lighting equipment on motor vehicles and evidence that the bus had been inspected and approved by an inspector of the Utilities Commission, and certificate of title issued by the Department (now Division) of Motor Vehicles, together with testimony of the driver that the stoplights were on only when the brakes were on and then only if one stopped the bus suddenly, and that he slowed down gradually before stopping the bus. It was held that the evidence was insufficient to show that a mechanical or electrical signal as required by this section was given, and appellant's motion to nonsuit was properly denied. Banks v. Shepard, 230 N.C. 86, 52 S.E.2d 215 (1949).

Evidence Showing Violation of Section. — See Powell v. Lloyd, 234 N.C. 481, 67 S.E.2d 664 (1951).

§ 20-155. Right-of-way. — (a) When two vehicles approach or enter an intersection from different highways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right.

(b) The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard.

(c) The driver of any vehicle upon a highway within a business or residence district shall yield the right-of-way to a pedestrian crossing such highway within any clearly marked crosswalk, or any regular pedestrian crossing included in the prolongation of the lateral boundary lines of the adjacent sidewalk at the end of a block, except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices.

(d) The driver of any vehicle approaching but not having entered a traffic circle shall yield the right-of-way to a vehicle already within such traffic circle. (1937, c. 407, s. 117; 1949, c. 1016, s. 2; 1955, c. 913, ss. 6, 7; 1967, c. 1053; 1973, c. 1330, s. 20.)

Editor's Note. — For brief comment on the right-of-way as between vehicles on a paved road and those entering from unpaved roads, see 34 N.C.L. Rev. 81 (1955).

Section Applies to Intersections Not Covered by Other Rules. — This section announces the rule with respect to use of intersections not covered by other rules. McEwen Funeral Serv. v. Charlotte City Coach Lines, 248 N.C. 146, 102 S.E.2d 816 (1958).

Where there are no stop signs or traffic control devices at a street intersection, neither street is favored over the other, notwithstanding that one is paved and the other is not, and the right-of-way at such intersection is governed by subsections (a) and (b) of this section. Mallette v. Ideal Laundry & Dry Cleaners, Inc., 245 N.C. 652, 97 S.E.2d 245 (1957); Rhyne v. Bailey, 254 N.C. 467, 119 S.E.2d 385 (1961).

Where by reason of automatic traffic lights, stop or caution signs, or other devices, one street at an intersection is favored over the other, and one street is thereby made permanently or intermittently dominant and the other servient, this section has no application. White v. Phelps, 260 N.C. 445, 132 S.E.2d 902 (1963).

Ordinarily, when traffic lights are installed at an intersection, the relative rights of motorists approaching on intersecting streets are determinable with reference thereto rather than by the provisions of this section. Cogdell v. Taylor, 264 N.C. 424, 142 S.E.2d 36 (1965).

Absent traffic lights, the relative rights of motorists are determinable with reference to this section. Cogdell v. Taylor, 264 N.C. 424, 142 S.E.2d 36 (1965).

No Distinction Between "T" Intersection and One at Which Highways Cross. — With reference to the right-of-way as between two vehicles approaching and entering an intersection, the law of this State makes no distinction between a "T" intersection and one at which the two highways cross each other completely. Dawson v. Jennette, 278 N.C. 438, 180 S.E.2d 121 (1971).

Entering Intersection "at Approximately the Same Time". — Subsection (a) does not apply unless the two vehicles approach or enter

the intersection at approximately the same time. When that condition does not exist, the vehicle first reaching and entering the intersection has the right-of-way over a vehicle subsequently reaching it, irrespective of their directions of travel; and it is the duty of the driver of the latter vehicle to delay his progress so as to allow the first arrival to pass in safety. State v. Hill, 233 N.C. 61, 62 S.E.2d 532 (1950); Brady v. Nehi Beverage Co., 242 N.C. 32, 86 S.E.2d 901 (1955); Downs v. Odom, 250 N.C. 81, 108 S.E.2d 65 (1959).

Two motor vehicles approach or enter an intersection at approximately the same time within the purview of these rules whenever their respective distances from the intersection, their relative speeds, and the other attendant circumstances show that the driver of the vehicle on the left should reasonably apprehend that there is danger of collision unless he delays his progress until the vehicle on the right has passed. State v. Hill, 233 N.C. 61, 62 S.E.2d 532 (1950); Bennett v. Stephenson, 237 N.C. 377, 75 S.E.2d 147 (1953); Brady v. Nehi Beverage Co., 242 N.C. 32, 86 S.E.2d 901 (1955); Taylor v. Brake, 245 N.C. 553, 96 S.E.2d 686 (1957); Moore v. Butler, 10 N.C. App. 120, 178 S.E.2d 35 (1970); Dawson v. Jennette, 278 N.C. 438, 180 S.E.2d 121 (1971).

The test of the applicability of subsection (a) is whether both vehicles approach or reach the intersection at "approximately the same time," and the right-of-way is not determined by a fraction of a second. Hathcock v. Lowder, 16 N.C. App. 255, 192 S.E.2d 124 (1972).

It cannot be held as a matter of law that plaintiff's automobile and defendants' truck approached or entered the intersection "at approximately the same time," when the latter was 125 feet away from the intersection when the former was entering it, and when plaintiff's automobile had crossed within four feet of the opposite curb when defendants' truck collided therewith. Crone v. Fisher, 223 N.C. 635, 27 S.E.2d 642 (1943).

Duty of Driver Approaching from Left. — If the driver of the automobile on the left approaching an intersection sees, or in the exercise of reasonable prudence should see an automobile approaching from his right in such a manner that apparently the two automobiles will reach the intersection at approximately the same time, it is his duty to decrease his speed, bring his automobile under control and if necessary stop, and to yield the right-of-way to the driver of the automobile on his right in order to enable him to proceed and thus avoid a collision. The law imposes this duty on the driver of an automobile approaching an intersecting highway unless the automobile coming from his right on the intersecting highway is a sufficient distance away to warrant the assumption that he can proceed before the other automobile operated at a reasonable speed reaches the crossing. Bennett v. Stephenson, 237 N.C. 377, 75 S.E.2d 147 (1953).

When the driver of a motor vehicle on the left comes to an intersection and finds no one approaching it on the other street within such distance as reasonably to indicate danger of collision, he is under no obligation to stop or wait, but may proceed to use such intersection as a matter of right. Carr v. Stewart, 252 N.C. 118, 113 S.E.2d 18 (1960).

Where two drivers approach an uncontrolled intersection at the same time, it is the duty of the driver on the left to yield the right-of-way to the vehicle on his right. Wilder v. Harris, 266 N.C. 82, 145 S.E.2d 393 (1965).

Speed Not Preventing Application of Rule. — The fact that the defendant's automobile, which was approaching from the plaintiff's right, was being driven at the speed of 35 to 40 miles per hour in a residential district with no other vehicle in view would not prevent the application of the rule as to right-of-way for automobiles entering an intersection at the same time, in the absence of evidence that the speed of defendant's automobile proximately caused the collision. Bennett v. Stephenson, 237 N.C. 377, 75 S.E.2d 147 (1953).

Right to Assume That Driver Approaching from Left Will Yield Right-of-Way. — If two automobiles approach an intersection at approximately the same time, the driver of the automobile on the right, in approaching the intersection, has the right to assume that the driver of the automobile coming from the left will yield the right-of-way and stop or slow down sufficiently to permit the other to pass in safety. Bennett v. Stephenson, 237 N.C. 377, 75 S.E.2d 147 (1953). See Finch v. Ward, 238 N.C. 290, 77 S.E.2d 661 (1953); Neal v. Stevens, 266 N.C. 96, 145 S.E.2d 325 (1965).

A driver with the right-of-way at an intersection is under no duty to anticipate disobedience of law or negligence on the part of others, but in the absence of anything which puts him on notice, or should put him on notice, to the contrary, he is entitled to assume, and to act on the assumption, that others will obey the law, exercise reasonable care and yield to him the right-of-way. Carr v. Lee, 249 N.C. 712, 107 S.E.2d 544 (1959).

Where evidence is uncontradicted that defendant with the right-of-way entered the intersection operating truck at a speed of five or 10 miles per hour, he had the right to assume, and to act on the assumption, in the absence of notice to the contrary, that the operator of the automobile in which plaintiff was riding would recognize his right-of-way and grant him a free passage over the intersection. Brady v. Nehi Beverage Co., 242 N.C. 32, 86 S.E.2d 901 (1955).

A driver having the right-of-way may act upon the assumption in the absence of notice to the

contrary, that the other motorist will recognize his right-of-way and grant him a free passage over the intersection. Carr v. Stewart, 252 N.C. 118, 113 S.E.2d 18 (1960).

When two drivers approach an uncontrolled intersection at the same time, the driver on the right has the right to assume and act on the assumption until given notice to the contrary that the operator of any vehicle approaching the intersection to the left would obey the law and yield the right-of-way. Wilder v. Harris, 266 N.C. 82, 145 S.E.2d 393 (1965).

Nothing else appearing, the driver of a vehicle having the right-of-way at an intersection is entitled to assume and to act, until the last moment, on the assumption that the driver of another vehicle, approaching the intersection, will recognize his right-of-way and will stop or reduce his speed sufficiently to permit him to pass through the intersection in safety. Dawson v. Jennette, 278 N.C. 438, 180 S.E.2d 121 (1971).

Or That Driver Will Not Block Lane by Turning. — A driver intending to go straight through an intersection has the right to assume and act on the assumption that all other travelers will observe the law and not block his lane of travel by a left turn without first ascertaining that such move can be made in safety. Harris v. Parris, 260 N.C. 524, 133 S.E.2d 195 (1963).

A through driver is required to give notice of any intended change in direction through an intersection, and, in the absence of such notice, other travelers are required to assume that he intends to continue through in his proper lane of traffic. Harris v. Parris, 260 N.C. 524, 133 S.E.2d 195 (1963).

"Right-of-Way" Defined. — The expression "right-of-way" has been interpreted to mean the right of a vehicle to proceed uninterruptedly in a lawful manner in the direction in which it is moving in preference to another vehicle approaching from a different direction into its path. Bennett v. Stephenson, 237 N.C. 377, 75 S.E.2d 147 (1953).

Right-of-Way Is Not Absolute. — One who has the right-of-way at an intersection does not have the absolute right-of-way in the sense that he is not bound to use ordinary care in the exercise of his right. When he sees, or by the exercise of due care should see, that an approaching driver cannot or will not observe the traffic laws, he must use such care as an ordinarily prudent person would use under the same or similar circumstances to avoid collision and injury. His duty under such circumstances consists in keeping a reasonable lookout, keeping his vehicle under control, and taking reasonable precautions to avoid injury to persons and property. Carr v. Lee, 249 N.C. 712, 107 S.E.2d 544 (1959).

Even though a driver has the right-of-way at an intersection, it is incumbent upon him, in approaching and traversing the intersection, to drive at a speed no greater than is reasonable under the conditions then existing, to keep his vehicle under control, to keep a reasonably careful lookout and to take such action as a reasonably prudent person would take to avoid collision when the danger of one is discovered or should have been discovered. Dawson v. Jennette, 278 N.C. 438, 180 S.E.2d 121 (1971).

Right of Pedestrian to Proceed Is Superior to That of Turning Motorist. — Under subsection (c) of this section, where a pedestrian and a turning motorist are both proceeding at an intersection under favorable signal lights, the right of the pedestrian to proceed is superior to that of the turning motorist. Duke v. Meisky, 12 N.C. App. 329, 183 S.E.2d 292 (1971).

Failure to Maintain Proper Lookout. — Where a plaintiff's testimony indicates that he did not slow down and yield the right-of-way to a defendant for the reason that plaintiff was not maintaining a proper lookout and did not see the defendant's vehicle, and where plaintiff's testimony further reveals that, while he looked before entering the intersection, he did so at a point where he could not see vehicles approaching the intersection from his right, he was faced with the duty of looking and seeing what he ought to have seen; his admitted conduct prohibits any recovery. Moore v. Butler, 10 N.C. App. 120, 178 S.E.2d 35 (1970).

A motorist who does not keep a lookout is nevertheless charged with having seen what he could have seen had he looked, and his liability to one injured in a collision with his vehicle is determined as it would have been had he looked, observed the prevailing conditions and continued to drive as he did. Dawson v. Jennette, 278 N.C. 438, 180 S.E.2d 121 (1971).

Effect of Disappearance or Removal of Stop Sign. — Where the driver of the vehicle on the highway, which a stop sign had designated as the dominant highway, knew that the stop sign had been so erected but did not know of its disappearance or removal, and the driver of the vehicle on the other highway, which the stop sign had designated as the servient highway, did not know there had ever been such a stop sign erected at the intersection, and he approached the intersection from the right of the other driver, the removal of the stop sign would not take away the right of the driver of the vehicle on the highway, designated by the sign as the dominant highway, to treat it as such and to proceed into the intersection on the assumption that the other vehicle approaching from the right would yield the right-of-way to him. The responsibility of the driver of the vehicle on the highway, designated by the sign as the servient highway, but who did not know it had ever been so designated, must be judged in the light of conditions confronting him, namely, an unmarked intersection, at which the other

vehicle was approaching from his left. Dawson v. Jennette, 278 N.C. 438, 180 S.E.2d 121 (1971).

Effect of Prior Knowledge of Malfunctioning Traffic Signal. — Where a traffic signal was malfunctioning, and each party knew how the traffic signal malfunctioned on his street, the rights and duties of the drivers were determined on the basis of their prior knowledge and not on the objective condition of the intersection, and the defendant was not entitled to a peremptory instruction that the vehicle approaching from the right had the right-of-way under this section. Bledsoe v. Gaddy, 10 N.C. App. 470, 179 S.E.2d 167 (1971).

Effect of Traffic-Control Signals on Right-of-Way of Pedestrians. — The right-of-way given a pedestrian by subsection (c) of this section at an intersection where there is no traffic-control signal is limited at an intersection where there is a traffic-control signal by § 20-173(a) to the pedestrian having the right-of-way only when he is moving with the green light. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

It is not the intention of the legislature to change the rule of right-of-way between vehicles and pedestrians in subsection (c) of this section, but rather to subject the latter to the regulation of traffic signal devices at street intersections. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

The pedestrian crossing with a favorable light is also assisted by the principle that the right to proceed is superior to the right to turn. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

Provisions of subsection (c) of this section requiring motorists to yield the right-of-way to pedestrians within a marked or unmarked crosswalk "except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices" do not subordinate the right-of-way of a pedestrian to that of a turning vehicle at an intersection controlled by traffic signals which are favorable to both. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

Where vehicles involved in a collision were meeting as they approached the intersection, subsection (b) of this section and § 20-154 are applicable. Fowler v. Atlantic Co., 234 N.C. 542, 67 S.E.2d 496 (1951); Fleming v. Drye, 253 N.C. 545, 117 S.E.2d 416 (1960).

Entering Intersection Ahead of Other Car. — If plaintiff's automobile enters the intersection of two streets, at a time when the approaching car of defendant is far enough away to justify a person in believing that, in the exercise of reasonable care and prudence, he may safely pass over the intersection ahead of the oncoming car, the plaintiff has the right-of-way and it is the duty of the defendant to reduce his speed and bring his car under control and yield. Yellow Cab Co. v. Sanders, 223 N.C. 626, 27 S.E.2d 631 (1943).

Where defendant's automobile came to a stop at an intersection 23 feet wide while the automobile decedent was traveling in was more than 125 feet away and a collision occurred when defendant attempted to cross the intersection, it was held that the two vehicles did not approach or enter the intersection at approximately the same time and therefore the automobile of the decedent did not have the right-of-way. State v. Hill, 233 N.C. 61, 62 S.E.2d 532 (1950).

In an action to recover damages resulting from a collision at a street intersection, plaintiff's evidence that she entered the intersection first and that defendants entered the intersection from her left was sufficient to take the case to the jury over defendants' motion to nonsuit. Harrison v. Kapp, 241 N.C. 408, 85 S.E.2d 337 (1955).

Where defendant's truck entered the intersection before the automobile in which plaintiff was riding reached the intersection, and the truck approached the intersection from the automobile's right side of the road, the truck had the right-of-way. Brady v. Nehi Beverage Co., 242 N.C. 32, 86 S.E.2d 901 (1955).

If Vehicle on Left Has Already Entered Intersection. — This section does not apply if the driver on the right, at the time he approaches the intersection and before reaching it, in the exercise of reasonable prudence ascertains that the vehicle on his left has already entered the intersection. Kennedy v. Smith, 226 N.C. 514, 39 S.E.2d 380 (1946); Taylor v. Brake, 245 N.C. 553, 96 S.E.2d 686 (1957).

If the automobile approaching from the left reaches the intersection first and has already entered the intersection, the driver of the automobile on the right is under duty to permit the other automobile to pass in safety. Bennett v. Stephenson, 237 N.C. 377, 75 S.E.2d 147 (1953).

Rule Where Driver Has Brought Automobile to a Complete Stop. — The rule as to right-of-way prescribed by this section applies to moving vehicles approaching an intersection at approximately the same time. Where the driver has already brought his automobile to a complete stop, thereafter the duty would devolve upon him to exercise due care to observe approaching vehicles and to govern his conduct accordingly. One who is required to stop before entering a highway should not proceed, with oncoming vehicles in view, until in the exercise of due care he can determine that he can do so with reasonable assurance of safety. Matheny v. Central Motor Lines, 233 N.C. 673, 65 S.E.2d 361 (1951); Badders v. Lassiter, 240 N.C. 413, 82 S.E.2d 357 (1954).

Private Road or Drive. — The exception in subsection (a) relates to entering from a "private

road or drive." Brady v. Nehi Beverage Co., 242 N.C. 32, 86 S.E.2d 901 (1955).

Subsection (a) Inapplicable to Vehicles Proceeding in Opposite Directions. — Where motorists are proceeding in opposite directions and meeting at an intersection controlled by automatic traffic lights, subsection (a) of this section has no application. Shoe v. Hood, 251 N.C. 719, 112 S.E.2d 543 (1960); Wiggins v. Ponder, 259 N.C. 277, 130 S.E.2d 402 (1963); Rathburn v. Sorrells, 5 N.C. App. 212, 167 S.E.2d 800 (1969).

Where motorists are proceeding in opposite directions and meeting at an intersection, subsection (a) of this section has no application. Fleming v. Drye, 253 N.C. 545, 117 S.E.2d 416 (1960).

Duty of Driver Turning Left. — The driver desiring to turn left at the intersection may move into the intersection when the signal facing him is green, but before turning left is charged with the duty to yield the right-of-way under this section. Hudson v. Petroleum Transit Co., 250 N.C. 435, 108 S.E.2d 900 (1959).

Where cars are meeting at an intersection and one intends to turn across the lane of travel of the other, subsection (b) of this section and subsection (a) of § 20-154 apply, and the driver making the turn is under duty to give a plainly visible signal of his intention to turn, and ascertain that such movement can be made in safety, without regard to which vehicle entered the intersection first. Fleming v. Drye, 253 N.C. 545, 117 S.E.2d 416 (1960); King v. Sloan, 261 N.C. 562, 135 S.E.2d 556 (1964).

It is incumbent upon a motorist, before making a left turn at an intersection, to give a plainly visible signal of his intention to turn and to ascertain that the movement can be made in safety. This, without regard to which vehicle enters the intersection first. Wiggins v. Ponder, 259 N.C. 277, 130 S.E.2d 402 (1963).

Applicability of Subsection (b). — Where, at the time they were struck, defendants had fully complied with § 20-158(a), subsection (b) of this section was then applicable. Todd v. Shipman, 12 N.C. App. 650, 184 S.E.2d 403 (1971).

If Vehicle Turning Has Already Entered Intersection. — Under subsection (b) of this section, the vehicle first reaching an intersection which has no stop sign or traffic signal has the right-of-way over a vehicle subsequently reaching it, whether the vehicle in the intersection is proceeding straight ahead or turning in either direction; and it is the duty of the driver of the vehicle not having entered the intersection to delay his progress and allow the vehicle which first entered the intersection to pass in safety. Carr v. Stewart, 252 N.C. 118, 113 S.E.2d 18 (1960).

If the jury should find that plaintiff was already in the intersection, giving the statutory left-turn signal, at a time when defendant was 150 feet away, it was defendant's duty to have delayed her entrance into the intersection until plaintiff had cleared it entirely. Mayberry v. Allred, 263 N.C. 780, 140 S.E.2d 406 (1965).

Failure to Yield Right-of-Way Held Proximate Cause of Collision. See Freeman v. Preddy, 237 N.C. 734, 76 S.E.2d 159 (1953).

Emergency ambulances are expressly excepted from the requirements of this section. Upchurch v. Hudson Funeral Home, 263 N.C. 560, 140 S.E.2d 17 (1965).

Evidence Supporting Inference That Defendant Negligently Failed to Yield Right-of-Way. — See Donlop v. Snyder, 234 N.C. 627, 68 S.E.2d 316 (1951); Tripp v. Harris, 260 N.C. 200, 132 S.E.2d 322 (1963).

Evidence Raising Issue of Negligence. — Evidence that defendant failed to yield the right-of-way to the plaintiff who was on the right, and that defendant was driving at 50 miles per hour through the intersection, raised the issue of defendant's negligence, and the motion for nonsuit at the close of all the evidence was properly denied. Price v. Gray, 246 N.C. 162, 97 S.E.2d 844 (1957).

Prima Facie Case of Negligence. — Where it may be inferred from plaintiff's evidence that defendant has failed to observe either of the statutory requirements of § 20-154(a) or subsection (b) of this section and injury has been suffered by plaintiff because of such failure, plaintiff has made out a prima facie case of actionable negligence. Wiggins v. Ponder, 259 N.C. 277, 130 S.E.2d 402 (1963).

The pleadings and the evidence were insufficient to support plaintiff's theory that plaintiff had the right-of-way by virtue of subsection (b) of this section. Taylor v. Brake, 245 N.C. 553, 96 S.E.2d 686 (1957).

Instruction. — Under this section where damages are sought for defendant's negligent driving at a street intersection and there is evidence tending to show that the defendant was approaching the intersection at an unlawful rate of speed and did not slow up before the happening of the collision with another car, an instruction correctly charging the rule of the right-of-way if both cars approach the intersection simultaneously and the rule that if one of the cars was already in the intersection it was the duty of the driver of the other car to slow down and permit it to pass will not be held for error. Piner v. Richter, 202 N.C. 573, 163 S.E. 561 (1932).

Court Not Required to Read Applicable Statutes to Jury. — Where the trial court charges the law in regard to the statutory provisions in regard to the right-of-way at an intersection, and applies the law to the evidence in the case, objection on the ground that the court failed to charge on the statutes is without merit, it not being required that the court read

the applicable statutes to the jury. Kennedy v. James, 252 N.C. 434, 113 S.E.2d 889 (1960).

Applied in Wooten v. Smith, 215 N.C. 48, 200 S.E. 921 (1939); Primm v. King, 249 N.C. 228, 106 S.E.2d 223 (1958); Greene v. Meredith, 264 N.C. 178, 141 S.E.2d 287 (1965); Mims v. Dixon, 272 N.C. 256, 158 S.E.2d 91 (1967); White v. Hester, 1 N.C. App. 410, 161 S.E.2d 611 (1968); Douglas v. Booth, 6 N.C. App. 156, 169 S.E.2d 492 (1969).

Quoted in Bobbitt v. Haynes, 231 N.C. 373, 57 S.E.2d 361 (1950); Jordan v. Blackwelder, 250 N.C. 189, 108 S.E.2d 429 (1959); Hathcock v. Lowder, 16 N.C. App. 255, 192 S.E.2d 124 (1972).

Stated in Smith v. Buie, 243 N.C. 209, 90 S.E.2d 514 (1955); Hall v. Kimber, 6 N.C. App. 669, 171 S.E.2d 99 (1969).

Cited in Leary v. Norfolk S. Bus Corp., 220 N.C. 745, 18 S.E.2d 426 (1942); Kelly v. Ashburn, 256 N.C. 338, 123 S.E.2d 775 (1962); Farrow v. Baugham, 266 N.C. 739, 147 S.E.2d 167 (1966); Anderson v. Carter, 272 N.C. 426, 158 S.E.2d 607 (1968).

§ 20-156. Exceptions to the right-of-way rule. — (a) The driver of a vehicle about to enter or cross a highway from an alley, building entrance, private road, or driveway shall yield the right-of-way to all vehicles approaching on the highway to be entered.

(b) The driver of a vehicle upon the highway shall yield the right-of-way to police and fire department vehicles and public and private ambulances, vehicles designed, equipped and used exclusively for the transportation of human tissues and organs for transplantation and to rescue squad emergency service vehicles and vehicles operated by county fire marshals and civil preparedness coordinators when the operators of said vehicles are giving a warning signal by appropriate light and by bell, siren or exhaust whistle audible under normal conditions from a distance not less than 1,000 feet. This provision shall not operate to relieve the driver of a police or fire department vehicle or public or private ambulance or vehicles designed, equipped and used exclusively for the transportation of human tissues and organs for transplantation or rescue squad emergency service vehicle or county fire marshals or civil preparedness coordinators from the duty to drive with due regard for the safety of all persons using the highway, nor shall it protect the driver of any such vehicle or county fire marshal or civil preparedness coordinator from the consequence of any arbitrary exercise of such right-of-way. (1937, c. 407, s. 118; 1971, cc. 78, 106; 1973, c. 1330, s. 21; 1977, c. 52, s. 4; c. 438, s. 3.)

Cross Reference. — See note to § 20-140.

Editor's Note. — The first 1977 amendment substituted "and vehicles operated by county fire marshals and civil preparedness coordinators when the operators of said vehicles are" for "when the latter are operated upon official business and the drivers thereof" in the first sentence of subsection (b) and inserted "or county fire marshals or civil preparedness coordinators" and "or county fire marshal or civil preparedness coordinator" in the second sentence of subsection (b). The amendment also made other minor changes in wording in the first sentence of subsection (b).

The second 1977 amendment inserted "vehicles designed, equipped and used exclusively for the transportation of human tissues and organs for transplantation" in the first sentence of subsection (b) and "or vehicles designed, equipped and used exclusively for the transportation of human tissues and organs for transplantation" in the second sentence of subsection (b).

For note on liability of municipality for accident involving fire truck responding to an emergency call for inhalator, see 30 N.C.L. Rev. 89 (1951).

Power of State Illustrated. — Subsection (a) of this section and § 20-165.1 illustrate the power of the State to regulate the time and manner of entering a public highway. Moses v. State Hwy. Comm'n, 261 N.C. 316, 134 S.E.2d 664, cert. denied, 379 U.S. 930, 85 S. Ct. 327, 13 L. Ed. 2d 342 (1964).

Duty of Driver Entering Highway to Look for Approaching Vehicles. — In order to comply with subsection (a) of this section the driver of a vehicle entering a public highway from a private road or drive is required to look for vehicles approaching on such highway, and this is required to be done at a time when this precaution may be effective. Gantt v. Hobson, 240 N.C. 426, 82 S.E.2d 384 (1954). See also Clark v. Emerson, 245 N.C. 387, 95 S.E.2d 880 (1957).

In order to comply with this section, a driver entering a public highway from a private drive is required to look for vehicles approaching on such highway, to look at a time when the precaution may be effective, to yield the right-of-way to vehicles traveling on the

highway, and to defer entry until the movement may be made in safety. C.C.T. Equip. Co. v. Hertz Corp., 256 N.C. 277, 123 S.E.2d 802 (1962); Davis v. Imes, 13 N.C. App. 521, 186 S.E.2d 641 (1972).

Before entering a public highway from a private driveway, the operator of a motor vehicle is required to exercise due care to see that the intended movement can be made in safety. Smith v. Nunn, 257 N.C. 108, 125 S.E.2d 351 (1962).

Abutting owner's right of access must be exercised with due regard to the safety of others who have an equal right to use the highway. State Hwy. Comm'n v. Raleigh Farmers Mkt., Inc., 263 N.C. 622, 139 S.E.2d 904, aff'd, 264 N.C. 139, 141 S.E.2d 10 (1965).

In order to comply with subsection (a) of this section, the driver of a vehicle about to enter or cross a highway from an alley, building entrance, private road or driveway is only required to look for vehicles approaching on the highway at a time when his lookout may be effective, to see what he should see, and to yield the right-of-way to vehicles on the highway which, in the exercise of reasonable care, he sees or should see are being operated at such a speed or distance as to make his entry onto the highway unsafe, by delaying his entry onto the highway until a reasonable and prudent man would conclude that the entry could be made in safety. Penland v. Greene, 289 N.C. 281, 221 S.E.2d 365 (1976).

Subsection (a) of this section does not require omniscience on the part of a motorist entering a public highway from a private drive. Penland v. Greene, 289 N.C. 281, 221 S.E.2d 365 (1976).

Motorist Facing Stop Sign Must Yield. — Stop signs erected by the State Highway Commission (now Board of Transportation) and local authorities on an intersecting highway or street pursuant to subsection (a) of this section are a method of giving the public notice that traffic on one is favored over the other, and a motorist facing a stop sign must yield. Kelly v. Ashburn, 256 N.C. 338, 123 S.E.2d 775 (1962); Galloway v. Hartman, 271 N.C. 372, 156 S.E.2d 727 (1967).

Failure of a motorist to yield the right-of-way to traffic on a public highway does not compel a finding of contributory negligence as a matter of law when there is evidence that traffic on the highway was faced with a red traffic light and there is no evidence of anything to give notice that a motorist on the highway would not obey the traffic control signal. Galloway v. Hartman, 271 N.C. 372, 156 S.E.2d 727 (1967).

Subsection (a) Applies to Person Riding Animal. — The requirement that a person entering a public highway from a private road or drive must yield the right-of-way to vehicles on the public highway applies to a person riding an animal as well as to a person driving a motor vehicle. Watson v. Stallings, 270 N.C. 187, 154 S.E.2d 308 (1967).

Right to Assume That Driver Entering Highway Will Comply with Section. — The operator of an automobile traveling upon a public highway in this State is under no duty to anticipate that the driver of an automobile entering the public highway from a private road or drive will fail to yield the right-of-way to all vehicles on such public highway, as required by subsection (a) of this section, and in the absence of anything which gives or should give notice to the contrary, he is entitled to assume and to act upon the assumption, even to the last moment, that the driver of the automobile so entering the public highway from a private road or drive will, in obedience to the section, yield the right-of-way. Garner v. Pittman, 237 N.C. 328, 75 S.E.2d 111 (1953).

One operating his motorcycle upon the highway was under no duty to assume that a motorist would fail to yield to him the right-of-way which was rightfully his, and he was entitled to this assumption even to the last moment. Whiteside v. Rooks, 197 F. Supp. 313 (W.D.N.C. 1961).

Right-of-Way on Dirt Ramp Across Highway. — This section is applicable at such times as a dirt ramp across a highway is open for public travel, but it does not apply at such times as the ramp is closed by the flagmen. At the times when the ramp is closed public travelers have no right to use it, but must stop and yield the right-of-way to contractor's machinery. The flagman's signal to stop is at least equivalent to a legally established stop sign or stoplight at an intersection. C.C.T. Equip. Co. v. Hertz Corp., 256 N.C. 277, 123 S.E.2d 802 (1962).

Irrespective of subsection (a), a contractor for the improvement of an airport, who is granted permission to maintain a dirt ramp across a highway, is under a duty, before operating its earth-moving equipment onto and across the ramp, to exercise due care to see that such movement can be made with safety and without injury to users of the highway. C.C. Mangum, Inc. v. Gasperson, 262 N.C. 32, 136 S.E.2d 234 (1964).

When Emergency Vehicle Accorded Right-of-Way. — If the operator of an authorized emergency vehicle bona fide believes an emergency exists which requires expeditious movement and in fact has such belief and meets the statutory test by giving warning, he is accorded the necessary privilege of the right-of-way. Williams v. Sossoman's Funeral Home, 248 N.C. 524, 103 S.E.2d 714 (1958).

No duty rests on the operator of a motor vehicle making normal use of a highway to yield the right-of-way to another vehicle on an emergency mission until an appropriate warning

has been directed to him, and he has reasonable opportunity to yield his prior right. McEwen Funeral Serv. v. Charlotte City Coach Lines, 248 N.C. 146, 102 S.E.2d 816 (1958).

Effect of Traffic Lights on Privileges of Emergency Vehicles. — The General Assembly did not intend the right-of-way privileges accorded emergency ambulances by this section to be extended to apply to intersections controlled by automatic traffic lights. Upchurch v. Hudson Funeral Home, 263 N.C. 560, 140 S.E.2d 17 (1965).

The audible sound which this section requires is such a sound as was in fact heard and comprehended, or which should have been heard and its meaning understood, by a reasonably prudent operator called upon to yield the right-of-way. McEwen Funeral Serv. v. Charlotte City Coach Lines, 248 N.C. 146, 102 S.E.2d 816 (1958); Williams v. Sossoman's Funeral Home, 248 N.C. 524, 103 S.E.2d 714 (1958).

Right of Operator of Emergency Vehicle to Assume That Other Drivers Will Yield. — The operator of an authorized emergency vehicle, while on an emergency call, has the right to proceed upon the assumption that when the required signal by siren is given, other users of the highway will yield the right-of-way. Williams v. Sossoman's Funeral Home, 248 N.C. 524, 103 S.E.2d 714 (1958).

Instructions to Jury. — There is no error prejudicial to defendant in the occasional use of the term "servient highway or street" instead of "private road or drive" in the charge to the jury. Penland v. Greene, 24 N.C. app. 240, 210 S.E.2d 505 (1974), aff'd, 289 N.C. 281, 221 S.E.2d 365 (1976).

While use of the words "dominant" and "servient" may not be precisely correct in referring to the roads in question under subsection (a) of this section in instructions to the jury, where judge instructs upon proper principles of law applicable to each motorist, defendant was not prejudiced thereby. Penland v. Greene, 289 N.C. 281, 221 S.E.2d 365 (1976).

Applied in Nantz v. Nantz, 255 N.C. 357, 121 S.E.2d 561 (1961); State v. Gurley, 257 N.C. 270, 125 S.E.2d 445 (1962); O'Berry v. Perry, 266 N.C. 77, 145 S.E.2d 321 (1965).

Quoted in Bobbitt v. Haynes, 231 N.C. 373, 57 S.E.2d 361 (1950); Brady v. Nehi Beverage Co., 242 N.C. 32, 86 S.E.2d 901 (1955); Payne v. Lowe, 2 N.C. App. 369, 163 S.E.2d 74 (1968).

Cited in Fleming v. Drye, 253 N.C. 545, 117 S.E.2d 416 (1960); Campbell v. O'Sullivan, 4 N.C. App. 581, 167 S.E.2d 450 (1969); White v. Reilly, 15 N.C. App. 331, 190 S.E.2d 303 (1972); Hathcock v. Lowder, 16 N.C. App. 255, 192 S.E.2d 124 (1972).

§ 20-157. Approach of police, fire department or rescue squad vehicles or ambulances; driving over fire hose or blocking fire-fighting equipment; parking, etc., near police, fire department, or rescue squad vehicle or ambulance. — (a) Upon the approach of any police or fire department vehicle or public or private ambulance or rescue squad emergency service vehicle giving warning signal by appropriate light and by audible bell, siren or exhaust whistle, audible under normal conditions from a distance not less than 1000 feet, the driver of every other vehicle shall immediately drive the same to a position as near as possible and parallel to the right-hand edge or curb, clear of any intersection of streets or highways, and shall stop and remain in such position unless otherwise directed by a police or traffic officer until police or fire department vehicle or public or private ambulance or rescue squad emergency service vehicle shall have passed. Provided however, this subsection shall not apply to vehicles traveling in the opposite direction of the vehicles herein enumerated when traveling on a four-lane limited access highway with a median divider dividing the highway for vehicles traveling in opposite directions, and provided further that the violation of this subsection shall not be negligence per se.

(b) It shall be unlawful for the driver of any vehicle other than one on official business to follow any fire apparatus traveling in response to a fire alarm closer than one block or to drive into or park such vehicle within one block where fire apparatus has stopped in answer to a fire alarm.

(c) Outside of the corporate limits of any city or town it shall be unlawful for the driver of any vehicle other than one on official business to follow any fire apparatus traveling in response to a fire alarm closer than 400 feet or to drive into or park such vehicle within a space of 400 feet from where fire apparatus has stopped in answer to a fire alarm.

(d) It shall be unlawful to drive a motor vehicle over a fire hose or any other equipment that is being used at a fire at any time, or to block a fire-fighting apparatus or any other equipment from its source of supply regardless of its distance from the fire.

(e) It shall be unlawful for the driver of a vehicle, other than one on official business, to park and leave standing such vehicle within 100 feet of police or fire department vehicles, public or private ambulances, or rescue squad emergency vehicles which are engaged in the investigation of an accident or engaged in rendering assistance to victims of such accident. (1937, c. 407, s. 119; 1955, cc. 173, 744; 1971, c. 366, ss. 1, 2.)

Local Modification. — Guilford (driving over fire hose or blocking fire-fighting apparatus): 1953, c. 301.

This section does not apply to ambulances. Upchurch v. Hudson Funeral Home, 263 N.C. 560, 140 S.E.2d 17 (1965).

Approach of Police Vehicle Does Not Nullify Provisions of § 20-154. — See note under § 20-154.

Or Authorize Turn Which Cannot Be Made in Safety. — This section, requiring a motorist to pull over to the right-hand curb upon the approach of a police vehicle, does not authorize such motorist to cut sharply to the right into another traffic lane immediately in front of a vehicle to his rear at a time and under circumstances which indicate such movement could not be made in safety. Anderson v. Talman Office Supplies, Inc., 234 N.C. 142, 66 S.E.2d 677 (1951). See Anderson v. Talman Office Supplies, Inc., 236 N.C. 519, 73 S.E.2d 141 (1952).

Warrant Fatally Defective. — A warrant charging violation of subsection (a) of this section, which fails to charge that defendant was driving a motor vehicle at the time he failed to heed a police siren, is fatally defective. State v. Wallace, 251 N.C. 378, 111 S.E.2d 714 (1959).

Applied in State v. McRae, 240 N.C. 334, 82 S.E.2d 67 (1954) (as to subsection (a)); State v. Wells, 259 N.C. 173, 130 S.E.2d 299 (1963); State v. Moses, 272 N.C. 509, 158 S.E.2d 617 (1968).

Cited in State v. Payne, 213 N.C. 719, 197 S.E. 573 (1938); Leary v. Norfolk S. Bus Corp., 220 N.C. 745, 18 S.E.2d 426 (1942); State v. Chavis, 232 N.C. 83, 59 S.E.2d 348 (1950).

§ 20-158. Vehicle control signs and signals. — (a) The Department of Transportation, with reference to State highways, and local authorities, with reference to highways under their jurisdiction, are hereby authorized to control vehicles:

(1) At intersections, by erecting or installing stop signs requiring vehicles to come to a complete stop at the entrance to that portion of the intersection designated as the main traveled or through highway. Stop signs may also be erected at three or more entrances to an intersection.

(2) At appropriate places other than intersections, by erecting or installing stop signs requiring vehicles to come to a complete stop.

(3) At intersections and other appropriate places, by erecting or installing steady-beam stoplights and other traffic control devices, signs, or signals. All steady-beam stoplights emitting alternate red and green lights shall be arranged so that the red light shall appear at the top of the signaling unit and the green light shall appear at the bottom of the signaling unit.

(4) At intersections and other appropriate places, by erecting or installing flashing red or yellow lights.

(b) Control of Vehicles at Intersections. —

(1) When a stop sign has been erected or installed at an intersection, it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto and yield the right-of-way to vehicles operating on the designated main-traveled or through highway. When stop signs have been erected at three or more entrances to an intersection the driver, after stopping in obedience thereto, may proceed with caution.

(2) When a stoplight has been erected or installed at an intersection and is emitting a steady red light, vehicles facing the red light shall come to a complete stop. When the stoplight is emitting a steady yellow light,

vehicles facing the yellow light shall be warned that a red light will be immediately forthcoming and that vehicles may not enter the intersection on such a red light; provided, that except where prohibited by appropriate sign, vehicular traffic facing a steady red light may enter an intersection to make a right turn after coming to a complete stop and yielding the right-of-way to pedestrians and to other traffic using the intersection. When the stoplight is emitting a steady green light, vehicles may proceed through the intersection subject to the rights of pedestrians and other vehicles as may otherwise be provided by law.

(3) When a flashing red light has been erected or installed at an intersection, approaching vehicles facing the red light shall stop and yield the right-of-way to vehicles in or approaching the intersection. The right to proceed shall be subject to the rules applicable to making a stop at a stop sign.

(4) When a flashing yellow light has been erected or installed at an intersection, approaching vehicles facing the yellow flashing light may proceed through the intersection with caution, yielding the right-of-way to vehicles in or approaching the intersection.

(5) When a stop sign, stoplight, flashing light, or other traffic-control device authorized by subsection (a) requires a vehicle to stop at an intersection, the driver shall stop at an appropriately marked stop line, or if none, before entering a marked crosswalk, or if none, before entering the intersection at the point nearest the intersecting street where the driver has a view of approaching traffic on the intersecting street.

(c) Control of Vehicles at Places other than Intersections. —

(1) When a stop sign has been erected or installed at a place other than an intersection, it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto and yield the right-of-way to pedestrians and other vehicles.

(2) When a stoplight has been erected or installed at a place other than an intersection, and is emitting a steady red light, vehicles facing the red light shall come to a complete stop. When the stoplight is emitting a steady yellow light, vehicles facing the light shall be warned that a red light will be immediately forthcoming and that vehicles may not proceed through such a red light. When the stoplight is emitting a steady green light, vehicles may proceed subject to the rights of pedestrians and other vehicles as may otherwise be provided by law.

(3) When a flashing red light has been erected or installed at a place other than an intersection, approaching vehicles facing the light shall stop and yield the right-of-way to pedestrians or other vehicles.

(4) When a flashing yellow light has been erected or installed at a place other than an intersection, approaching vehicles facing the light may proceed with caution, yielding the right-of-way to pedestrians and other vehicles.

(5) When a stoplight, stop sign, or other signaling device authorized by subsection (a) requires a vehicle to stop at a place other than an intersection, the driver shall stop at an appropriately marked stop line, or if none, before entering a marked crosswalk, or if none, before proceeding past the signaling device.

(d) No failure to stop as required by the provisions of this section shall be considered negligence or contributory negligence per se in any action at law for injury to person or property, but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether a party was guilty of negligence or contributory negligence. (1937, c. 407, s. 120; 1941,

c. 83; 1949, c. 583, s. 2; 1955, c. 384, s. 1; c. 913, s. 7; 1957, c. 65, s. 11; 1973, c. 507, s. 5; c. 1191; c. 1330, s. 22; 1975, c. 1; 1977, c. 464, s. 34.)

I. General Consideration.
II. Stop Signs.
III. Right-of-Way.
IV. Negligence and Proximate Cause.

I. GENERAL CONSIDERATION.

Editor's Note. — The 1975 amendment added the proviso at the end of the second sentence of subdivision (b)(2).

The 1977 amendment substituted "Department of Transportation" for "Board of Transportation" in the introductory paragraph of subsection (a).

For comment on the 1941 amendment, see 19 N.C.L. Rev. 455.

State Highways. — Highways which are built and maintained in part out of funds contributed by the federal government and which form links in an interstate system and are designated as U.S. highways, are State highways under the supervision and control of the State Highway Commission (now Board of Transportation) and this section is applicable to these just as it is to other State highways. Yost v. Hall, 233 N.C. 463, 64 S.E.2d 554 (1951).

Undesignated Highways. — Unnamed dirt road and named paved road which intersected were public roads of equal dignity where neither was designated "main traveled or through highway" by State Highway Commission (now Board of Transportation). Brady v. Nehi Beverage Co., 242 N.C. 32, 86 S.E.2d 901 (1955).

Designation of Streets by Municipal Authorities. — Where two streets of a municipality intersect, testimony identifying one as the through street and the other as the cross street, on which there is a stop sign to the right of a driver thereon approaching the intersection, connotes that the streets have been so designated and the sign erected by action of the municipal authorities. Smith v. Buie, 243 N.C. 209, 90 S.E.2d 514 (1955).

This section regulates the conduct of one entering the main highway from a private road. Penland v. Greene, 24 N.C. App. 240, 210 S.E.2d 505 (1974), aff'd, 289 N.C. 281, 221 S.E.2d 365 (1976).

This section applies to a "T" intersection. Dawson v. Jennette, 278 N.C. 438, 180 S.E.2d 121 (1971).

With reference to the right-of-way as between two vehicles approaching and entering an intersection, the law of this State makes no distinction between a "T" intersection and one at which the two highways cross each other completely. Dawson v. Jennette, 278 N.C. 438, 180 S.E.2d 121 (1971).

The legislature took recognition of the fact that all highway intersections are not of equal importance because of the density of traffic on one highway as compared to the flow on an intersecting highway. Hence a rule was prescribed for this situation by this section requiring operators of motor vehicles on a servient highway to stop in accordance with signs commanding them to do so. This was supplemented in 1955 by the provisions of § 20-158.1. McEwen Funeral Serv., Inc. v. Charlotte City Coach Lines, 248 N.C. 146, 102 S.E.2d 816 (1958).

Duty of Motorist before Starting from Position on Subservient Highway. — It is the duty of a motorist before starting from his position on a subservient highway into a dominant highway to exercise due care to see that such movement can be made in safety. Morrisette v. A.G. Boone Co., 235 N.C. 162, 69 S.E.2d 239 (1952).

The driver on the subservient highway is not only required to stop, but, further, is required thereafter to exercise due care to see that he may enter the dominant highway in safety. Satterwhite v. Bocelato, 130 F. Supp. 825 (E.D.N.C. 1955).

A driver of a motor vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be imprudent for him to proceed into the intersection. Matheny v. Central Motor Lines, 233 N.C. 673, 65 S.E.2d 361 (1951).

A motorist traveling on a servient highway on which a stop sign has been erected at an intersection with a dominant highway may not lawfully enter such intersection until he has stopped and observed the traffic on the dominant highway and determined in the exercise of due care that he may enter such intersection with reasonable assurance of safety to himself and others. Primm v. King, 249 N.C. 228, 106 S.E.2d 223 (1958).

This section not only requires the driver on the servient highway or street to stop, but such driver is further required, after stopping, to exercise due care to see that he may enter or cross the dominant highway or street in safety before entering thereon. Jordan v. Blackwelder, 250 N.C. 189, 108 S.E.2d 429 (1959); Wooten v. Russell, 255 N.C. 699, 122 S.E.2d 603 (1961);

Howard v. Melvin, 262 N.C. 569, 138 S.E.2d 238 (1964).

This section requires the driver to remain in a private road until he ascertains, by proper lookout, that he can enter the main highway in safety to himself and to others on the highway. Warren v. Lewis, 273 N.C. 457, 160 S.E.2d 305 (1968).

The driver along the servient highway is not required to anticipate that a driver on the dominant highway will travel at excessive speed or fail to observe the rules of the road applicable to him. Farmer v. Reynolds, 4 N.C. App. 554, 167 S.E.2d 480 (1969).

This section not only requires the driver on a servient highway to stop, but such driver is further required to exercise due care to see that he may enter or cross the dominant highway or street in safety before entering thereon. This interpretation incorporates the requirements obtained in § 20-154, that the motorist must see that such movement can be made in safety. Kanoy v. Hinshaw, 273 N.C. 418, 160 S.E.2d 296 (1968).

A driver along a servient street is required, in compliance with this section, to bring his vehicle to a stop in obedience to a stop sign lawfully erected, and not to proceed into an intersection with the dominant highway until, in the exercise of due care, he can determine that he can do so with reasonable assurance of safety. Todd v. Shipman, 12 N.C. App. 650, 184 S.E.2d 403 (1971).

The right of one starting from a stopped position to undertake to cross an intersection would depend largely upon the distance from the intersection of approaching vehicles and their speed, and unless under the circumstances he would reasonably apprehend no danger of collision from an approaching vehicle it would be his duty to delay his progress until the vehicle has passed. Badders v. Lassiter, 240 N.C. 413, 82 S.E.2d 357 (1954); Raper v. Byrum, 265 N.C. 269, 144 S.E.2d 38 (1965).

Right to Assume That Automobile Will Stop as Required by Statute. — The operator of an automobile, traveling upon a designated main-traveled or through highway and approaching an intersecting highway, is under no duty to anticipate that the operator of an automobile approaching on such intersecting highway will fail to stop as required by the statute, and, in the absence of anything which gives, or should give notice to the contrary, he will be entitled to assume and to act upon the assumption, even to the last moment, that the operator of the automobile on the intersecting highway will act in obedience to the statute, and stop before entering such designated highway. Hawes v. Atlantic Ref. Co., 236 N.C. 643, 74 S.E.2d 17 (1953); Caughron v. Walker, 243 N.C. 153, 90 S.E.2d 305 (1955); Smith v. Buie, 243 N.C. 209, 90 S.E.2d 514 (1955); Jackson v. McCoury, 247 N.C. 502, 101 S.E.2d 377 (1958); King v. Powell, 252 N.C. 506, 114 S.E.2d 265 (1960); Wooten v. Russell, 255 N.C. 699, 122 S.E.2d 603 (1961); Raper v. Byrum, 265 N.C. 269, 144 S.E.2d 38 (1965); Moore v. Hales, 266 N.C. 482, 146 S.E.2d 385 (1966).

While the driver of a car along the dominant highway is entitled to assume that the operator of a car along the intersecting servient highway will stop before entering the intersection, the driver along the dominant highway is nevertheless required to exercise the care of an ordinarily prudent person under similar circumstances to keep a reasonably careful lookout, not to exceed a speed which is reasonable and prudent under the circumstances, and to take such care as a reasonably prudent man would exercise to avoid collision when danger of a collision is discovered, or should have been discovered. Blalock v. Hart, 239 N.C. 475, 80 S.E.2d 373 (1954); Caughron v. Walker, 243 N.C. 153, 90 S.E.2d 305 (1955); Jackson v. McCoury, 247 N.C. 502, 101 S.E.2d 377 (1958).

A motorist proceeding along a favored highway is entitled to assume that traffic on an intersecting secondary highway will yield him the right-of-way, and the effect of his right to rely on this assumption is not lost because warning signs have been misplaced or removed. Kelly v. Ashburn, 256 N.C. 338, 123 S.E.2d 775 (1962).

It is reasonable for the operator of an automobile, traveling upon a designated main-traveled or through highway and approaching an intersecting highway, to assume until the last moment that a motorist on the servient highway who has actually stopped in obedience to the stop sign will yield the right-of-way to him and will not enter the intersection until he has passed through it. Raper v. Byrum, 265 N.C. 269, 144 S.E.2d 38 (1965).

Nothing else appearing, the driver of a vehicle having the right-of-way at an intersection is entitled to assume and to act, until the last moment, on the assumption that the driver of another vehicle, approaching the intersection, will recognize his right-of-way and will stop or reduce his speed sufficiently to permit him to pass through the intersection in safety. Dawson v. Jennette, 278 N.C. 438, 180 S.E.2d 121 (1971).

Ordinary Care Required of Motorists at Intersections. — The duties of motorists, both those on dominant and those on servient highways, when approaching, entering or traversing intersections require that each driver exercise ordinary care under the particular circumstances in which he finds himself and that the failure to do so can constitute actionable negligence where injury results. Murrell v. Jennings, 15 N.C. App. 658, 190 S.E.2d 686 (1972).

Inadvertent Violation of Section. — Where there is an unintentional or inadvertent violation of this section, such violation, standing alone, does not constitute culpable negligence in the law of crimes as distinguished from actionable negligence in the law of torts. The inadvertent or unintentional violation of the statute must be accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or of a heedless indifference to the safety of others. State v. Sealy, 253 N.C. 802, 117 S.E.2d 793 (1961).

Section 20-155 Applicable Where There Is Compliance with Subsection (a) of This Section. — Where at the time they were struck, defendants had fully complied with subsection (a) of this section, § 20-155(b) was then applicable. Todd v. Shipman, 12 N.C. App. 650, 184 S.E.2d 403 (1971).

Jury Instruction Clearly Described Defendant's Duty. — A charge of the court with reference to this section which stated: "The test is whether or not a reasonable and careful and prudent person would have stopped and yielded the right-of-way under the circumstances as they existed," clearly told the jury that defendant's duty was reasonable care under the circumstances. Wright v. Holt, 18 N.C. App. 661, 197 S.E.2d 811 (1973).

Instruction as to negligence held error since it was counter to the provision of this section. Stephens v. Johnson, 215 N.C. 133, 1 S.E.2d 367 (1939).

Applied in Jones v. Bagwell, 207 N.C. 378, 177 S.E. 170 (1934); Powell v. Daniel, 236 N.C. 489, 73 S.E.2d 143 (1952); Edens v. Carolina Freight Carriers Corp., 247 N.C. 391, 100 S.E.2d 878 (1957); State v. Wells, 259 N.C. 173, 130 S.E.2d 299 (1963); Keith v. King, 263 N.C. 118, 139 S.E.2d 21 (1964); Douglas v. Booth, 6 N.C. App. 156, 169 S.E.2d 492 (1969); Gregor v. Willis, 8 N.C. App. 538, 174 S.E.2d 702 (1970); State v. Gainey, 292 N.C. 627, 234 S.E.2d 610 (1977).

Stated in Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 289 N.C. 7, 220 S.E.2d 536 (1975).

Cited in Leary v. Norfolk S. Bus Corp., 220 N.C. 745, 18 S.E.2d 426 (1942); Smith v. United States, 94 F. Supp. 681 (W.D.N.C. 1951); State v. Bournais, 240 N.C. 311, 82 S.E.2d 115 (1954); Currin v. Williams, 248 N.C. 32, 102 S.E.2d 455 (1958); Tucker v. Moorefield, 250 N.C. 340, 108 S.E.2d 637 (1959); Hunt v. Cranford, 253 N.C. 381, 117 S.E.2d 18 (1960); Penland v. Greene, 289 N.C. 281, 221 S.E.2d 365 (1976).

II. STOP SIGNS.

"At the Entrance". — The stop signs referred to in this statute are signs erected "at the entrance" to the main traveled or through highway. A sign 600 feet away from an intersection cannot reasonably be said to be at the entrance thereto. Gilliland v. Ruke, 280 F.2d 544 (4th Cir. 1960).

The purpose of highway stop signs is to enable the driver of a motor vehicle to have opportunity to observe the traffic conditions on the highways and to determine when in the exercise of due care he might enter upon the intersecting highway with reasonable assurance of safety to himself and others. Morrisette v. A.G. Boone Co., 235 N.C. 162, 69 S.E.2d 239 (1952); Edwards v. Vaughn, 238 N.C. 89, 76 S.E.2d 359 (1953); Badders v. Lassiter, 240 N.C. 413, 82 S.E.2d 357 (1954).

The purpose to be served by placing a stop sign some distance from the intersection of a servient and dominant highway is to give the motorist ample time to slow down and stop before entering the zone of danger. And when the driver of a motor vehicle stops at a stop sign on a servient highway and then proceeds into the intersection without keeping a lookout and ascertaining whether he can enter or cross the intersecting highway with reasonable safety, he ignores the intent and purpose of this section. Edwards v. Vaughn, 238 N.C. 89, 76 S.E.2d 359 (1953).

The erection of stop signs on an intersecting highway or street is a method of giving the public notice that traffic on one is favored over the other and that a motorist facing a stop sign must yield. Kelly v. Ashburn, 256 N.C. 338, 123 S.E.2d 775 (1962); Payne v. Lowe, 2 N.C. App. 369, 163 S.E.2d 74 (1968).

Duty to Stop Depends upon Presence of Stop Sign. — The language of this section indicates that the duty to stop depends upon the presence of a stop sign at the time the driver approaches the intersection. He is commanded to stop "in obedience" to the stop sign. If no such sign is in sight and the driver is not aware that there should be one, there is nothing to obey and hence no statutory duty to stop. Gilliland v. Ruke, 280 F.2d 544 (4th Cir. 1960).

Presumption That Signs Were Erected by Lawful Authority. — Stop signs at intersections are in such general use and their function so well known that a motorist, in the absence of notice to the contrary, may presume they were erected by lawful authority. The presumption is one of fact and, like other presumptions of fact, is rebuttable. Kelly v. Ashburn, 256 N.C. 338, 123 S.E.2d 775 (1962).

Where Stop Sign Has Been Removed or Defaced. — A collision at an intersection where a stop sign has been erected and then removed or defaced may result from the negligence of one party, or both, or neither. Kelly v. Ashburn, 256 N.C. 338, 123 S.E.2d 775 (1962).

Where the driver of the vehicle on the highway, which a stop sign had designated as the dominant highway, knew that the stop sign had been so erected but did not know of its

disappearance or removal, and the driver of the vehicle on the other highway, which the stop sign had designated as the servient highway, did not know there had ever been such a stop sign erected at the intersection, and he approached the intersection from the right of the other driver, the removal of the stop sign would not take away the right of the driver of the vehicle on the highway, designated by the sign as the dominant highway, to treat it as such and to proceed into the intersection on the assumption that the other vehicle approaching from the right would yield the right-of-way to him. The responsibility of the driver of the vehicle on the highway, designated by the sign as the servient highway, but who did not know it had ever been so designated, must be judged in the light of conditions confronting him, namely, an unmarked intersection at which the other vehicle was approaching from his left. Dawson v. Jennette, 278 N.C. 438, 180 S.E.2d 121 (1971).

This section does not require that a motorist stop where a stop sign is located. It requires that he, in obedience to the notice provided by the stop sign, bring his car to a full stop before entering the highway and yield the right-of-way to vehicles approaching the intersection on the highway. Clifton v. Turner, 257 N.C. 92, 125 S.E.2d 339 (1962); Howard v. Melvin, 262 N.C. 569, 138 S.E.2d 238 (1964).

Where Stop Signs Located at Points from Which Driver Cannot Get Unobstructed View of Highway. — Though stop signs, due to the surrounding physical conditions, are located at points from which the driver of a motor vehicle cannot get an unobscured vision of the intersecting highway for a sufficient distance to ascertain whether it can be entered or crossed with reasonable safety, this does not relieve a driver on a servient highway from the duty to look and observe traffic conditions on the dominant highway, and to make such observation, before entering or crossing the same, as may be necessary to determine whether or not it would be reasonably safe to enter or cross such highway. Edwards v. Vaughn, 238 N.C. 89, 76 S.E.2d 359 (1953).

III. RIGHT-OF-WAY.

In General. — A vehicle traveling along the through street does not have the right-of-way at the intersection if a vehicle from the cross street is already in the intersection before the vehicle traveling along the through street is near enough the intersection to constitute an immediate hazard. Pearson v. Luther, 212 N.C. 412, 193 S.E. 739 (1937).

Where the driver on the servient street is already in the intersection before the vehicle approaching on the dominant street is near enough to the intersection to constitute an immediate hazard, the driver on the servient street has the right-of-way. Farmer v. Reynolds, 4 N.C. App. 554, 167 S.E.2d 480 (1969); Todd v. Shipman, 12 N.C. App. 650, 184 S.E.2d 403 (1971).

When the driver of an automobile is required to stop at an intersection, he must yield the right-of-way to an automobile approaching on the intersecting highway, and unless the approaching automobile is far enough away to afford reasonable ground for the belief that he can cross in safety he must delay his progress until the other vehicle has passed. Matheny v. Central Motor Lines, 233 N.C. 673, 65 S.E.2d 361 (1951); Badders v. Lassiter, 240 N.C. 413, 82 S.E.2d 357 (1954).

The fact that a motorist on a servient road reaches the intersection a hairsbreadth ahead of one on the dominant highway does not give him the right to proceed. It is his duty to stop and yield the right-of-way unless the motorist on the dominant highway is a sufficient distance from the intersection to warrant the assumption that he can cross in safety before the other vehicle, operated at a reasonable speed, reaches the crossing. Farmer v. Reynolds, 4 N.C. App. 554, 167 S.E.2d 480 (1969).

Duty of Driver Having Right-of-Way. — The driver on a favored highway protected by a statutory stop sign does not have the absolute right-of-way in the sense he is not bound to exercise care toward traffic approaching on an intersecting unfavored highway. It is his duty, notwithstanding his favored position, to observe ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. In the exercise of such duty it is incumbent upon him in approaching and traversing such an intersection (1) to drive at a speed no greater than is reasonable and prudent under the conditions then existing, (2) to keep his motor vehicle under control, (3) to keep a reasonably careful lookout, and (4) to take such action as an ordinarily prudent person would take in avoiding collision with persons or vehicles upon the highway when, in the exercise of due care, danger of such collision is discovered or should have been discovered. Primm v. King, 249 N.C. 228, 106 S.E.2d 223 (1958); King v. Powell, 252 N.C. 506, 114 S.E.2d 265 (1960); Stockwell v. Brown, 254 N.C. 662, 119 S.E.2d 795 (1961); Raper v. Byrum, 265 N.C. 269, 144 S.E.2d 38 (1965); Murrell v. Jennings, 15 N.C. App. 658, 190 S.E.2d 686 (1972).

The driver on a favored highway protected by a statutory stop sign under this section does not have the absolute right-of-way in the sense he is not bound to exercise care toward traffic approaching on an intersecting unfavored highway. It is his duty, notwithstanding his favored position, to observe ordinary care. Williamson v. Randall, 248 N.C. 20, 102 S.E.2d 381 (1958).

The driver of plaintiff's truck on the dominant highway protected by a statutory stop sign did not have the absolute right-of-way, in the sense he was not bound to exercise the care toward defendant's pickup truck approaching on the intersecting servient road. Scott v. Darden, 259 N.C. 167, 130 S.E.2d 42 (1963).

Even though a driver has the right-of-way at an intersection, it is incumbent upon him, in approaching and traversing the intersection, to drive at a speed no greater than is reasonable under the conditions then existing, to keep his vehicle under control, to keep a reasonably careful lookout and to take such action as a reasonably prudent person would take to avoid collision when the danger of one is discovered or should have been discovered. Dawson v. Jennette, 278 N.C. 438, 180 S.E.2d 121 (1971).

IV. NEGLIGENCE AND PROXIMATE CAUSE.

Failure to Stop at Intersection Not Negligence Per Se. — The failure of a motorist traveling upon a servient highway to stop in obedience to a sign before entering an intersection with a dominant highway is not negligence per se and is insufficient alone to make out a prima facie case of negligence, but is only evidence of negligence to be considered along with other facts and circumstances adduced by the evidence, and an instruction that failure to stop in obedience to the sign is negligence, must be held for reversible error. Hill v. Lopez, 228 N.C. 433, 45 S.E.2d 539 (1947). See Nichols v. Goldston, 228 N.C. 514, 46 S.E.2d 320 (1948); Lee v. Robertson Chem. Corp., 229 N.C. 447, 50 S.E.2d 181 (1948); Bobbitt v. Haynes, 231 N.C. 373, 57 S.E.2d 361 (1950); Bailey v. Michael, 231 N.C. 404, 57 S.E.2d 372 (1950); Johnson v. Bell, 234 N.C. 522, 67 S.E.2d 658 (1951). And see Satterwhite v. Bocelato, 130 F. Supp. 825 (E.D.N.C. 1955), wherein the evidence justified a finding of negligence.

A violation of this section is not negligence per se. State v. Williams, 3 N.C. App. 463, 165 S.E.2d 52 (1969).

Failure to come to a complete stop before entering a through street intersection is not negligence per se, but only evidence of negligence to be considered with other facts in the case, such holding being a necessary corollary to the provision of this section, that failure to stop before entering a through street intersection should not be considered contributory negligence per se, but only evidence to be considered with the other facts in the case upon the issue of contributory negligence. Sebastian v. Horton Motor Lines, 213 N.C. 770, 197 S.E. 539 (1938); Reeves v. Staley, 220 N.C. 573, 18 S.E.2d 239 (1942).

This rule is unaffected by a municipal ordinance making such failure to stop unlawful, since this section prevails over the ordinance. Swinson v. Nance, 219 N.C. 772, 15 S.E.2d 284 (1941).

The failure of a driver along a servient highway to stop before entering an intersection with a dominant highway is not contributory negligence per se, but is to be considered with other facts in evidence in determining the issue. Hawes v. Atlantic Ref. Co., 236 N.C. 643, 74 S.E.2d 17 (1953); Primm v. King, 249 N.C. 228, 106 S.E.2d 223 (1958); State v. Sealy, 253 N.C. 802, 117 S.E.2d 793 (1961).

Failure to stop at a stop sign and yield the right-of-way is not negligence per se, but it is evidence of negligence that may be considered with other facts in the case in determining whether a party thereto was guilty of negligence or contributory negligence. Johnson v. Bass, 256 N.C. 716, 125 S.E.2d 19 (1962).

But Is Evidence of Negligence Sufficient to Support Verdict. — While a failure to stop and yield the right-of-way to traffic on the dominant highway is not negligence per se, it is evidence of negligence, and, when the proximate cause of injury, is sufficient to support a verdict for plaintiff. Wooten v. Russell, 255 N.C. 699, 122 S.E.2d 603 (1961).

Negligence of Car Approaching on Through Highway. — The driver of an automobile upon a through highway did not have the right to assume absolutely that a driver approaching the intersection along a servient highway would obey the stop sign before entering or crossing the through highway, Public Laws 1927, c. 148, s. 21, but was required to keep a proper lookout and to keep his car at a reasonable speed under the circumstances in order to avoid injury to life or limb, and the driver of the car along the through highway forfeited his right to rely upon the assumption that the other driver would stop before entering or crossing the intersection when he approached and attempted to traverse it himself at an unlawful or excessive speed, and even when his speed was lawful he remained under duty to exercise due care to ascertain if the driver of the other car was going to violate the statutory requirement in order to avoid the consequences of such negligence, it being necessary to construe the pertinent statutes in pari materia and this result being consonant with such construction. Groome v. Davis, 215 N.C. 510, 2 S.E.2d 771 (1939).

Proximate Cause Must Be Shown beyond a Mere Chance. — Where a conviction of involuntary manslaughter is sought for the failure to observe a positive duty imposed by statute with reference to the driving of automobiles upon the State highways, the question of proximate cause must be shown beyond a mere chance or casualty. State v. Satterfield, 198 N.C. 682, 153 S.E. 155 (1930).

The manifest object of this section is to protect the public by requiring the driver of an automobile upon the public highways of the

State to stop and ascertain the circumstances and conditions at highway intersections, particularly with reference to traffic, with a view of determining whether in the exercise of due care he may go upon the intersecting highway with reasonable safety to himself and others, and where the defendant in a prosecution for manslaughter fails to stop, but has knowledge of the conditions and has an unobstructed view of the highway for a long distance, and there is no evidence tending to show that he had violated any other statute or that he was negligent in any other respect, the evidence alone that he had violated the statute in the respect stated is insufficient to take the case to the jury, there being no evidence that the violation of the statute was a proximate cause of the death or in causal relation thereto, and defendant's motion as of nonsuit, made in apt time, should have been granted. State v. Satterfield, 198 N.C. 682, 153 S.E. 155 (1930).

It is not enough for the plaintiff to show that defendant was negligent in driving at an excessive speed, in failing to reduce his speed as he approached and entered the intersection, or in failing to maintain a reasonable and proper lookout. The burden is also upon the plaintiff to prove that such negligence by the defendant was one of the proximate causes of the collision and of his intestate's death. Raper v. Byrum, 265 N.C. 269, 144 S.E.2d 38 (1965).

Evidence of Negligence and Proximate Cause. — Where plaintiff's intestate brought his automobile to a stop at a point where he had an unobstructed view of the defendants' automobile approaching on the dominant highway, and he resumed his progress into the intersection at a very slow rate of speed when the defendants' automobile was so near to the intersection and moving at such a speed that in the exercise of reasonable prudence he should have seen that he could not cross in safety, his entry into the intersection in this manner and under these conditions was negligence and was one of the proximate causes of the collision and of his death, if not the sole proximate cause thereof. Raper v. Byrum, 265 N.C. 269, 144 S.E.2d 38 (1965).

§ 20-158.1. Erection of "yield right-of-way" signs. — The Department of Transportation, with reference to State highways, and cities and towns with reference to highways and streets under their jurisdiction, are authorized to designate main-traveled or through highways and streets by erecting at the entrance thereto from intersecting highways or streets, signs notifying drivers of vehicles to yield the right-of-way to drivers of vehicles approaching the intersection on the main-traveled or through highway. Notwithstanding any other provisions of this Chapter, except G.S. 20-156, whenever any such yield right-of-way signs have been so erected, it shall be unlawful for the driver of any vehicle to enter or cross such main-traveled or through highway or street unless he shall first slow down and yield right-of-way to any vehicle in movement on the main-traveled or through highway or street which is approaching so as to arrive at the intersection at approximately the same time as the vehicle entering the main-traveled or through highway or street. No failure to so yield the right-of-way shall be considered negligence or contributory negligence per se in any action at law for injury to person or property, but the facts relating to such failure to yield the right-of-way may be considered with the other facts in the case in determining whether either party in such action was guilty of negligence or contributory negligence. (1955, c. 295; 1957, c. 65, s. 11; 1973, c. 507, s. 5; c. 1330, s. 23; 1977, c. 464, s. 34.)

Editor's Note. — The 1977 amendment substituted "Department of Transportation" for "Board of Transportation" in the first sentence.

Section Supplements § 20-158. — See McEwen Funeral Serv., Inc. v. Charlotte City Coach Lines, 248 N.C. 146, 102 S.E.2d 816 (1958).

Emergency ambulances are expressly excepted from the requirements of this section. Upchurch v. Hudson Funeral Home, 263 N.C. 560, 140 S.E.2d 17 (1965).

Duty of Driver along Servient Highway. — The driver along the servient highway is not required to anticipate that a driver on the dominant highway will travel at excessive speed or fail to observe the rules of the road applicable to him. Farmer v. Reynolds, 4 N.C. App. 554, 167 S.E.2d 480 (1969).

The fact that a motorist on a servient road reaches the intersection a hairsbreadth ahead of one on the dominant highway does not give him the right to proceed. It is his duty to stop and yield the right-of-way unless the motorist on the dominant highway is a sufficient distance from the intersection to warrant the assumption that he can cross in safety before the other vehicle, operated at a reasonable speed, reaches the crossing. Farmer v. Reynolds, 4 N.C. App. 554, 167 S.E.2d 480 (1969).

Where the driver on the servient street is already in the intersection before the vehicle approaching on the dominant street is near enough the intersection to constitute an immediate hazard, the driver on the servient street has the right-of-way. Farmer v. Reynolds, 4 N.C. App. 554, 167 S.E.2d 480 (1969).

Quoted in Johnson v. Bass, 256 N.C. 716, 125 S.E.2d 19 (1962).

Cited in Hathcock v. Lowder, 16 N.C. App. 255, 192 S.E.2d 124 (1972).

§ 20-159: Repealed by Session Laws 1973, c. 1330, s. 39.

§ 20-160. Driving through safety zone or on sidewalks prohibited. — (a) The driver of a vehicle shall not at any time drive through or over a safety zone.

(b) No person shall drive any motor vehicle upon a sidewalk or sidewalk area except upon a permanent or temporary driveway. (1937, c. 407, s. 122; 1973, c. 1330, s. 24.)

Cross Reference. — As to definition of safety zone, see § 20-4.01, subdivision (39).

§ 20-161. Stopping on highway prohibited; warning signals; removal of vehicles from public highway. — (a) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or main-traveled portion of any highway or highway bridge outside municipal corporate limits unless the vehicle is disabled to such an extent that it is impossible to avoid stopping and temporarily leaving the vehicle upon the paved or main-traveled portion of the highway or highway bridge.

(b) No person shall park or leave standing any vehicle upon the shoulder of a public highway outside municipal corporate limits unless the vehicle can be clearly seen by approaching drivers from a distance of 200 feet in both directions and does not obstruct the normal movement of traffic.

(c) The operator of any truck, trailer or semitrailer which is disabled upon any portion of the highway shall display warning signals not less than 200 feet in the front and rear of the vehicle. During daylight hours, such warning signals shall consist of red flags. During hours of darkness, such warning signals shall consist of red flares or reflectors of a type approved by the Commissioner of Motor Vehicles. Such warning signals shall be displayed as long as the vehicle is disabled.

(d) The owner of any vehicle parked or left standing in violation of law shall be deemed to have appointed any investigating law-enforcement officer his agent:

(1) For the purpose of removing the vehicle to the shoulder of the highway or to some other suitable place; and

(2) For the purpose of arranging for the transportation and safe storage of any vehicle which is interfering with the regular flow of traffic or which otherwise constitutes a hazard, in which case the officer shall be deemed a legal possessor of the vehicle within the meaning of G.S. 44A-2(d).

(e) When any vehicle is parked or left standing upon the right-of-way of a public highway for a period of 48 hours or more, the owner shall be deemed to have appointed any investigating law-enforcement officer his agent for the purpose of arranging for the transportation and safe storage of such vehicle and such investigating law-enforcement officer shall be deemed a legal possessor of the motor vehicle within the meaning of that term as it appears in G.S. 44A-2(d). (1937, c. 407, s. 123; 1951, c. 1165, s. 1; 1971, c. 294, s. 1; 1973, c. 1330, s. 25.)

I. General Consideration.
II. Disabled Vehicles.
III. Negligence and Proximate Cause.

I. GENERAL CONSIDERATION.

The word "park" means the permitting of a vehicle to remain standing on a public highway or street, while not in use. State v. Carter, 205 N.C. 761, 172 S.E. 415 (1934).

To "park" means something more than a mere temporary or momentary stoppage on the road for a necessary purpose. Stallings v. Buchan Transp. Co., 210 N.C. 201, 185 S.E. 643 (1936); Morris v. Jenrette Transp. Co., 235 N.C. 568, 70 S.E.2d 845 (1952); Meece v. Dickson, 252 N.C. 300, 113 S.E.2d 578 (1960); Saunders v. Warren, 264 N.C. 200, 141 S.E.2d 308 (1965).

Thus, where the driver of a truck with a trailer stopped on the highway at night on the right-hand side, with lights burning, because two automobiles in front of him were interlocked in a wreck, and at the time of the collision the truck and trailer had been standing still only a fraction of a minute, and it remained parked for about five minutes thereafter, it was held that at the time of the collision the truck was not parked on the highway within the meaning of this section, and the length of time it remained still after the collision is immaterial to plaintiff's right to recover since it was not the intention of those who drafted the statute to make it a violation of law for a driver of a heavy truck and trailer to stop on his right-hand side of the highway before driving around or by two cars interlocked in a collision on the highway, and around which a number of people were working. Stallings v. Buchan Transp. Co., 210 N.C. 201, 185 S.E. 643 (1936).

Starting and stopping on a highway in accordance with the exigencies of the occasion is an incident to the right of travel, and the word "park" and the words "leave standing" as used in this section are modified by the words "whether attended or unattended" so that they are synonymous, and neither term includes a mere temporary stop for a necessary purpose when there is no intent to break the continuity of the travel. Peoples v. Fulk, 220 N.C. 635, 18 S.E.2d 147 (1942); Morris v. Jenrette Transp. Co., 235 N.C. 568, 70 S.E.2d 845 (1952); Royal v. McClure, 244 N.C. 186, 92 S.E.2d 762 (1956); Meece v. Dickson, 252 N.C. 300, 113 S.E.2d 578 (1960); Wilson v. Miller, 20 N.C. App. 156, 201 S.E.2d 55 (1973).

The stopping of a bus on the hard surface of a highway outside of a business or residential district for the purpose of taking on a passenger is not parking or leaving the vehicle standing within the meaning of the terms as used in this section. Peoples v. Fulk, 220 N.C. 635, 18 S.E.2d 147 (1942); Morgan v. Carolina Coach Co., 225 N.C. 668, 36 S.E.2d 263 (1945), even though the shoulders of the highway at the scene are of sufficient width to permit the bus to be stopped thereon. Leary v. Norfolk S. Bus Corp., 220 N.C. 745, 18 S.E.2d 426 (1942). See also Conley v. Pearce-Young-Angel Co., 224 N.C. 211, 29 S.E.2d 740 (1944); Banks v. Shepard, 230 N.C. 86, 52 S.E.2d 215 (1949).

The uncontradicted statement of defendant, offered in evidence by plaintiff through its witness, and explained by the testimony of defendant, refuted the theory of "a parking" of defendant's tractor-trailer at the place of the collision in question, within the meaning of subsection (a) of this section. Harris Express, Inc. v. Jones, 236 N.C. 542, 73 S.E.2d 301 (1952).

"Park" and "leave standing," as used in subsection (a), are synonymous, and neither term includes a mere temporary or momentary stoppage on the highway for a necessary purpose when there is no intent to break the continuity of the travel. Faison v. T & S Trucking Co., 266 N.C. 383, 146 S.E.2d 450 (1966).

This section has no reference to a mere temporary stop for a necessary purpose when there is no intent to break the continuity of the "travel." Royal v. McClure, 244 N.C. 186, 92 S.E.2d 762 (1956).

A mere temporary or momentary stoppage on the highway when there is no intent to break the continuity of the travel is not "parking" or "leave standing" as used in this section. Wilson v. Lee, 1 N.C. App. 119, 160 S.E.2d 107 (1968).

Deputy sheriff did not violate this section when he temporarily stopped his car on the right side of the highway in order to speak to an intoxicated pedestrian. Skinner v. Evans, 243 N.C. 760, 92 S.E.2d 209 (1956).

The stopping of a police car on a highway solely to enable police officers to determine whether the driver of another car had a driver's license does not constitute a parking of the police car in violation of subsection (a). Kinsey v. Town of Kenly, 263 N.C. 376, 139 S.E.2d 686 (1965).

But Temporary Stop Must Be for Necessary Purpose. — A temporary stopping must be for a necessary purpose, and under such conditions that it is impossible to avoid leaving such vehicle in such position, that is, occupying traveled portion of the highway. Melton v. Crotts, 257 N.C. 121, 125 S.E.2d 396 (1962).

Parking in a Residential or Business District. — The parking or leaving standing of any vehicle in a business or residential district is not a violation of this section. Hammett v. Miller, 227 N.C. 10, 40 S.E.2d 480 (1946).

This section is inapplicable to a motor vehicle parked in a residential district in a city or town on a street which constitutes no part of the

highway system. Smith v. Goldsboro Iron & Metal Co., 257 N.C. 143, 125 S.E.2d 377 (1962); Pardon v. Williams, 265 N.C. 539, 144 S.E.2d 607 (1965).

Exemption for Police Vehicles. — Erection of some type of roadblock, whether stationary or running, may be the only practical method of stopping a determined and reckless lawbreaker. Under such circumstances exemption for police vehicles from this section (in case of a stationary roadblock) or from § 20-151 (in case of a running roadblock), may be reasonably implied. Collins v. Christenberry, 6 N.C. App. 504, 170 S.E.2d 515 (1969).

One stopping an automobile on the highway should use ordinary care to prevent a collision with other vehicles operating thereon. Saunders v. Warren, 267 N.C. 735, 149 S.E.2d 19 (1966).

The operator of a standing or parked vehicle which constitutes a source of danger to other users of the highway is generally bound to exercise ordinary or reasonable care to give adequate warning or notice to approaching traffic of the presence of the standing vehicle, and such duty exists irrespective of the reason for stopping the vehicle on the highway. So the driver of the stopped vehicle must take such precautions as would reasonably be calculated to prevent injury, whether by the use of lights, flags, guards, or other practical means, and failing to give such warning may constitute negligence. Saunders v. Warren, 267 N.C. 735, 149 S.E.2d 19 (1966).

A motorist stopping on a pronounced curve should anticipate that a following motorist will have an obstructed view of the highway ahead. Saunders v. Warren, 267 N.C. 735, 149 S.E.2d 19 (1966).

This section requires that no part of a parked vehicle be left protruding into the traveled portion of the highway when there is ample room and it is practicable to park the entire vehicle off the traveled portion of the highway. Sharpe v. Hanline, 265 N.C. 502, 144 S.E.2d 574 (1965).

The parking of a car on the hard surface of a highway at night without a taillight in violation of statute is sufficient to sustain the jury's affirmative answer upon the issue of actionable negligence, and the question of contributory negligence in failing to see the parked car under the circumstances in time to have avoided the collision is also properly submitted to the jury. Lambert v. Caronna, 206 N.C. 616, 175 S.E. 303 (1934); Sharpe v. Hanline, 265 N.C. 502, 144 S.E.2d 574 (1965).

The fact that the taillight of defendant's truck after a collision was still burning did not excuse him from leaving it on the paved portion of a highway. Freshman v. Stallings, 128 F. Supp. 179 (E.D.N.C. 1955).

Applied in Parkway Bus Co. v. Coble Dairy Prods. Co., 229 N.C. 352, 49 S.E.2d 623 (1948); Parrish v. Bryant, 237 N.C. 256, 74 S.E.2d 726 (1953); Chandler v. Forsyth Royal Crown Bottling Co., 257 N.C. 245, 125 S.E.2d 584 (1962); Carolina Coach Co. v. Cox, 337 F.2d 101 (4th Cir. 1964); Coleman v. Burris, 265 N.C. 404, 144 S.E.2d 241 (1965); Williams v. Hall, 1 N.C. App. 508, 162 S.E.2d 84 (1968); Staples v. Carter, 5 N.C. App. 264, 168 S.E.2d 240 (1969); Grimes v. Gibert, 6 N.C. App. 304, 170 S.E.2d 65 (1969).

Quoted in Lienthall v. Glass, 2 N.C. App. 65, 162 S.E.2d 596 (1968).

Stated in Puryear v. Cooper, 2 N.C. App. 517, 163 S.E.2d 299 (1968).

Cited in Riggs v. Gulf Oil Corp., 228 N.C. 774, 47 S.E.2d 254 (1948); Thomas v. Thurston Motor Lines, 230 N.C. 122, 52 S.E.2d 377 (1949); Keener v. Beal, 246 N.C. 247, 98 S.E.2d 19 (1957); McDonald v. Patton, 240 F.2d 424 (4th Cir. 1957); Correll v. Gaskins, 263 N.C. 212, 139 S.E.2d 202 (1964); Choate Motor Co. v. Gray, 5 N.C. App. 643, 169 S.E.2d 77 (1969); Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970); Williamson v. Basinger, 30 N.C. App. 50, 226 S.E.2d 213 (1976).

II. DISABLED VEHICLES.

Exception as to Disabled Vehicles Where Impossible to Avoid Leaving on Highway. — Defendant's claim of protection by virtue of the provision of this section excepting disabled vehicles from the prohibition in subsection (a) where it is "impossible" to avoid leaving the vehicle on the paved or main traveled part of the highway must be tested by the facts of each case. Melton v. Crotts, 257 N.C. 121, 125 S.E.2d 396 (1962).

The word "impossible" in former subsection (c) [now in subsection (a)] must be construed as meaning that the car must be disabled to the extent that it is not reasonably practical to move the car so as to leave room for the free passage of other cars. Melton v. Crotts, 257 N.C. 121, 125 S.E.2d 396 (1962).

"Impossible" is to be construed in a reasonable, practical sense. Melton v. Crotts, 257 N.C. 121, 125 S.E.2d 396 (1962).

The parking of a disabled vehicle as far as possible on the right shoulder, leaving more than 15 feet upon the main traveled portion of the highway for the free passage of traffic, at a place where the drivers of other cars have a clear view of the parked automobile for a distance of more than 200 feet in both directions, is not a violation of this section. Rowe v. Murphy, 250 N.C. 627, 109 S.E.2d 474 (1959).

If plaintiff had established a violation of subsection (a), forbidding parking on the paved or main traveled portion of a highway, and defendant relied on former subsection (c), excepting disabled vehicles from the application of subsection (a), defendant must carry the burden of justifying his act in stopping at a proper place and for a permissible period of time.

Melton v. Crotts, 257 N.C. 121, 125 S.E.2d 396 (1962).

Where there is evidence tending to show that the defendant had parked his truck upon the hard surface of a highway in violation of this section, resulting in injury to the plaintiff, and the defendant claims that under the facts it came within the exception as to disabled vehicles, under the statute and the facts disclosed by the record the matter should have been submitted to the jury under proper instructions, and the granting of defendant's motion as of nonsuit was error. Smithwick v. Colonial Pine Co., 200 N.C. 519, 157 S.E. 612 (1931).

Whether a puncture or blowout is such disablement of a motor vehicle as to justify the driver in stopping partially on the paved portion of the highway is ordinarily a question for the jury unless the facts are admitted. Melton v. Crotts, 257 N.C. 121, 125 S.E.2d 396 (1962).

Where the defendant's only evidence in excuse of parking on the paved portion of the highway was that he had a flat tire, such evidence was insufficient to bring defendant within the exception. Lambert v. Caronna, 206 N.C. 616, 175 S.E. 303 (1934).

Disabled Automobile Need Not Display Warning Signals. — The requirement of this section with respect to placing "red flares or lanterns [now reflectors]" on the highway applies to trucks, trailers or semitrailers disabled on the highway, and not to automobiles. Rowe v. Murphy, 250 N.C. 627, 109 S.E.2d 474 (1959).

Subsection (a) of this section does not apply to the driver of a disabled passenger vehicle. Exum v. Boyles, 272 N.C. 567, 158 S.E.2d 845 (1968).

But Obligation to Light Vehicle at Night Is Not Affected. — This section does not conflict with nor reduce the obligation imposed on the operator of a vehicle stopped or parked on the highway at night to light his vehicle as required by §§ 20-129 and 20-134. To the extent that Meece v. Dickson, 252 N.C. 300, 113 S.E.2d 578 (1960), may be construed as conflicting, it is overruled. Melton v. Crotts, 257 N.C. 121, 125 S.E.2d 396 (1962).

Whether defendants violated this section has no bearing upon their obligations in respect of lighting equipment and lights imposed by §§ 20-129 and 20-134. Faison v. T & S Trucking Co., 266 N.C. 383, 146 S.E.2d 450 (1966).

Parking a truck on a paved highway at night, without flares or other warning, is negligence. Allen v. Dr. Pepper Bottling Co., 223 N.C. 118, 25 S.E.2d 388 (1943).

Section Not Violated Where Disabled Truck Parked on Shoulder of Highway. — See State v. McDonald, 211 N.C. 672, 191 S.E. 733 (1937).

Failure to Move Disabled Truck to Shoulder of Highway. — Where one of the truck's tires was flat and the motor was out of commission, but with the manpower present the truck could have been removed onto the shoulder, failure to do so constituted negligence. Freshman v. Stallings, 128 F. Supp. 179 (E.D.N.C. 1955).

Driver of disabled truck has reasonable time to display warning signals. The law will not hold him to be negligent in failing to do that which he has not had time to do. Thus where the plaintiff's car approached before the driver of the defendant's tractor-trailer had time, after it stopped, to get out of the cab, the tractor-trailer was not parked or left standing upon the paved portion of the highway in violation of subsection (a). Morris v. Jenrette Transp. Co., 235 N.C. 568, 70 S.E.2d 845 (1952).

Right to Assume that Driver of Disabled Truck Will Display Warning Signals. — A motorist has the right to assume that the driver of any truck becoming disabled on the highway after sundown will display red flares or lanterns (now reflectors) as required by this section. Chaffin v. Brame, 233 N.C. 377, 64 S.E.2d 276 (1951); United States v. First-Citizens Bank & Trust Co., 208 F.2d 280 (4th Cir.), aff'g Rosenblatt v. United States, 112 F. Supp. 114 (E.D.N.C.), aff'd, 208 F.2d 280 (1953); Towe v. Stokes, 117 F. Supp. 880 (M.D.N.C.), aff'd, 214 F.2d 563 (1954).

"Truck" Does Not Include Three-Quarter Ton Truck. — The part of this section requiring the driver of a truck, trailer or semitrailer to display red flares or lanterns (now reflectors) when disabled upon the highway is not applicable to a three-quarter ton truck. Freshman v. Stallings, 128 F. Supp. 179 (E.D.N.C. 1955).

"Truck" Includes United States Mobile Post-Office Vehicle. — The word "truck" as used in this section includes a mobile highway post-office vehicle. Cronenberg v. United States, 123 F. Supp. 693 (E.D.N.C. 1954).

Leaving a disabled marine corps wrecker standing on the highway in the nighttime without lights and warning signals required by § 20-134 and this section constituted negligence. United States v. First-Citizens Bank & Trust Co., 208 F.2d 280 (4th Cir.), aff'g Rosenblatt v. United States, 112 F. Supp. 114 (E.D.N.C. 1953).

III. NEGLIGENCE AND PROXIMATE CAUSE.

Violation of this section is negligence per se. Hughes v. Vestal, 264 N.C. 500, 142 S.E.2d 361 (1965); Wilson v. Miller, 20 N.C. App. 156, 201 S.E.2d 55 (1973).

The requirement of setting out proper warning flares is absolute and a violation of it is negligence per se. Barrier v. Thomas & Howard Co., 205 N.C. 425, 171 S.E. 626 (1933); Caulder v. Gresham, 224 N.C. 402, 30 S.E.2d 312 (1944). The statute requires that red flares or lanterns (now reflectors) be displayed "not less than 200 feet in the front and rear of the vehicle." The flares were placed only 45 feet

from the vehicle. Cronenberg v. United States, 123 F. Supp. 693 (E.D.N.C. 1954).

A failure to meet the requirements of this section, relating to the display of warning signals when a truck, etc., is disabled on the highway, convicts of negligence which is actionable if such failure was one of the proximate causes of the collision. Taylor v. United States, 156 F. Supp. 763 (E.D.N.C. 1957).

Stopping to Receive or Discharge Passenger Does Not Necessarily Constitute Negligence. — The mere fact that a driver stops his vehicle on the traveled portion of a highway for the purpose of receiving or discharging a passenger, nothing else appearing, does not constitute negligence. Strickland v. Powell, 10 N.C. App. 225, 178 S.E.2d 136 (1970).

To Be Actionable Negligence Must Be Proximate Cause of Injury. — Negligence in parking an automobile on a public highway in violation of this section, to be actionable, must be a proximate cause of the injury in suit, and where the plaintiff fails to show by his evidence that such violation was a proximate cause of his injury, a judgment as of nonsuit is properly allowed. Burke v. Carolina Coach Co., 198 N.C. 8, 150 S.E. 636 (1929).

Negligent Parking Need Not Be Anticipated. — Where defendant leaves his truck unattended, partly on a paved or improved portion of a State highway, between sunset and sunup, without displaying flares or lanterns (now reflectors) not less than 200 feet to the front and rear of the vehicle, it is an act of negligence, and the driver of the car in which plaintiff was riding, traveling at about 30 to 35 miles per hour on the right side of the road under conditions which made it impossible for him to see more than a few feet ahead, although apparently guilty of negligence, is not under the duty of anticipating defendant's negligent parking, so that the concurrent negligence of the two made the resulting collision inevitable and an exception to the denial of a motion of nonsuit cannot be sustained. Caulder v. Gresham, 224 N.C. 402, 30 S.E.2d 312 (1944).

Evidence Disclosing Contributory Negligence. — Conceding defendant was negligent in parking the car on the hard surface in violation of this section, the evidence discloses contributory negligence of plaintiff as a matter of law in attempting to pass the parked car without first ascertaining that he could pass the car in safety. McNair v. Kilmer & Co., 210 N.C. 65, 185 S.E. 481 (1936).

Guest's contributory negligence barred recovery from driver for negligence in parking vehicle in violation of this section. Basnight v. Wilson, 245 N.C. 548, 96 S.E.2d 699 (1957).

Evidence Not Showing Contributory Negligence. — Where evidence tended to show that defendant's mud-spattered truck was parked on a dark, foggy morning, with all four wheels on the pavement without lights, flares, or any other mode of signal, and had been so parked for some time, and that plaintiff was compelled to dim his lights when about 20 feet south of defendant's truck, in response to the dimmed lights of an oncoming car, the lights of this car partly blinding plaintiff, who collided with the rear of defendant's truck, motion for nonsuit on the ground of contributory negligence was properly refused. Cummins v. Southern Fruit Co., 225 N.C. 625, 36 S.E.2d 11 (1945).

Nonsuit on Ground of Contributory Negligence Not Warranted. — Evidence disclosing that plaintiff's automobile was parked on a bridge 40 feet wide, leaving a space of 30 feet for the passage of traffic, that the driver of defendants' bus was blinded by the lights of an approaching car and hit the rear of plaintiff's car, and that the bridge constituted part of a city street and the parking of cars on the bridge was customary, was held not to warrant nonsuit on the ground of contributory negligence, since even though the parking of the car on the bridge was negligence per se, whether such negligence under the circumstances was a proximate cause of the injury is a question for the jury. Boles v. Hegler, 232 N.C. 327, 59 S.E.2d 796 (1950).

Evidence of Negligence Sufficient to Go to Jury. — Evidence that a disabled truck was left standing on the hard surface of a highway at night without warning flares or lanterns (now reflectors) as required by this section, and that a car, approaching from the rear, collided with the back of the truck, resulting in injuries to the driver and passengers in the car, is held sufficient to be submitted to the jury on the issue of negligence in each of the actions instituted by the driver and occupants of the car against the driver and owner of the truck. Wilson v. Central Motor Lines, 230 N.C. 551, 54 S.E.2d 53 (1949).

Evidence Making Out Prima Facie Case of Actionable Negligence. — Evidence that defendants left a wrecker standing on the highway in such manner that the wrecker, and the cable attached, blocked the entire highway, that the existing circumstances affected visibility of the cable, that no meaningful warning was given that the highway was completely obstructed, and that traffic, to avoid collision, would have to come to a complete stop, makes out a prima facie case of actionable negligence on the part of defendants. Montford v. Gilbhaar, 265 N.C. 389, 144 S.E.2d 31 (1965).

As to negligence of one defendant insulating negligence of other, see McLaney v. Anchor Motor Freight, Inc., 236 N.C. 714, 74 S.E.2d 36 (1953).

Proximate Cause Is Jury Question. — Whether a violation of this section is the proximate cause of injury in a particular case is ordinarily a question for the jury. Hughes v. Vestal, 264 N.C. 500, 142 S.E.2d 361 (1965);

Wilson v. Miller, 20 N.C. App. 156, 201 S.E.2d 55 (1973).

Negligence Held Proximate Cause of Collision. — Negligence of the government's servants in failing to provide proper and statutory warning when a mobile highway post-office vehicle became disabled on the highway was held one of the proximate causes of collision and resulting death and injuries. Cronenberg v. United States, 123 F. Supp. 693 (E.D.N.C. 1954).

Evidence Insufficient to Show Violation as Proximate Cause. — See Saunders v. Warren, 264 N.C. 200, 141 S.E.2d 308 (1965).

§ 20-161.1. Regulation of night parking on highways. — No person parking or leaving standing a vehicle at night on a highway or on a side road entering into a highway shall permit the bright lights of said vehicle to continue burning when such lights face oncoming traffic. (1953, c. 1052.)

Hazard against Which Section Directed. — This section is directed against the hazard of bright lights on standing vehicles facing oncoming traffic at night. Lienthall v. Glass, 2 N.C. App. 65, 162 S.E.2d 596 (1968).

Guest's contributory negligence barred recovery from driver for negligence in parking vehicle in violation of this section. Basnight v. Wilson, 245 N.C. 548, 96 S.E.2d 699 (1957).

Applied in Staples v. Carter, 5 N.C. App. 264, 168 S.E.2d 240 (1969); Tharpe v. Brewer, 7 N.C. App. 432, 172 S.E.2d 919 (1970).

§ 20-162. Parking in front of fire hydrant, fire station or private driveway. — No person shall park a vehicle or permit it to stand, whether attended or unattended, upon a highway in front of a private driveway or within 15 feet in either direction of a fire hydrant or the entrance to a fire station, nor within 25 feet from the intersection of curb lines or if none, then within 15 feet of the intersection of property lines at an intersection of highways; provided, that local authorities may by ordinance decrease the distance within which a vehicle may park in either direction of a fire hydrant. (1937, c. 407, s. 124; 1939, c. 111.)

Violation of Section a Misdemeanor. — The violation of this section by parking within 25 feet from the intersection of curb lines at an intersection of highways within a municipality is a misdemeanor, notwithstanding that the prima facie rule of evidence created by § 20-162.1 is invoked. State v. Rumfelt, 241 N.C. 375, 85 S.E.2d 398 (1955).

Rule of Evidence in § 20-162.1 Applies. — The prima facie rule of evidence created by § 20-162.1 is applicable to prosecutions for violation of this section. State v. Rumfelt, 241 N.C. 375, 85 S.E.2d 398 (1955).

Cited in Basnight v. Wilson, 245 N.C. 548, 96 S.E.2d 699 (1957).

§ 20-162.1. Prima facie rule of evidence for enforcement of parking regulations. — Whenever evidence shall be presented in any court of the fact that any automobile, truck, or other vehicle was found upon any street, alley or other public place contrary to and in violation of the provisions of any statute or of any municipal ordinance limiting the time during which any such vehicle may be parked or prohibiting or otherwise regulating the parking of any such vehicle, it shall be prima facie evidence in any court in the State of North Carolina that such vehicle was parked and left upon such street, alley or public way or place by the person, firm or corporation in whose name such vehicle is then registered and licensed according to the records of the department or agency of the State of North Carolina, by whatever name designated, which is empowered to register such vehicles and to issue licenses for their operation upon the streets and highways of this State; provided, that no evidence tendered or presented under the authorization contained in this section shall be admissible or competent in any respect in any court or tribunal, except in cases concerned solely with violation of statutes or ordinances limiting, prohibiting or otherwise regulating the parking of automobiles or other vehicles upon public streets, highways, or other public places.

Any person convicted pursuant to this section shall be subject to a penalty of one dollar ($1.00). (1953, c. 879, ss. 1, 1½.)

Editor's Note. — The act inserting this section exempted Madison and Sampson counties. Session Laws 1953, c. 978, made the section applicable to Sampson County.

For brief comment on this section, see 31 N.C.L. Rev. 410 (1953).

Purpose of Section. — In State v. Scoggin, 236 N.C. 19, 72 S.E.2d 54 (1952), the Supreme Court said: "We should not, in the absence of a legislative rule of evidence to the contrary, consider mere ownership of a motor vehicle, parked in violation of a city ordinance, and no more, sufficient to sustain a criminal conviction." It seems apparent that as a result of this decision and the language quoted above therefrom, the General Assembly at its 1953 Session enacted the statute which is now this section. State v. Rumfelt, 241 N.C. 375, 85 S.E.2d 398 (1955).

Creates No Criminal Offense but Prescribes Rule of Evidence. — This section creates no criminal offense, but prescribes that when the prima facie rule of evidence therein set forth is relied upon by the State in a criminal prosecution, the punishment shall be a penalty of $1.00. State v. Rumfelt, 241 N.C. 375, 85 S.E.2d 398 (1955).

The word "penalty" is used in this section in the broad sense of punishment and not in the sense of a penalty recoverable in a civil action. State v. Rumfelt, 241 N.C. 375, 85 S.E.2d 398 (1955).

Section Applicable to Violation of § 20-162. — See note to § 20-162.

§§ 20-162.2, 20-162.3: Transferred to §§ 20-219.2, 20-219.3 by Session Laws 1973, c. 1330, s. 36.

§ 20-163. Unattended motor vehicles. — No person driving or in charge of a motor vehicle shall permit it to stand unattended on a public highway or public vehicular area without first stopping the engine, effectively setting the brake thereon and, when standing upon any grade, turning the front wheels to the curb or side of the highway. (1937, c. 407, s. 125; 1973, c. 1330, s. 26.)

Violation of this section is negligence per se, but it must be a proximate cause of the injury to be actionable. Arnett v. Yeago, 247 N.C. 356, 100 S.E.2d 855 (1957); Watts v. Watts, 252 N.C. 352, 113 S.E.2d 720 (1960).

The violation of this section and other safety statutes is negligence per se, unless the statute expressly provides otherwise. McCall v. Dixie Cartage & Warehousing, Inc., 272 N.C. 190, 158 S.E.2d 72 (1967).

When a vehicle is parked, this section requires a setting of the brakes, and a violation of this statute is negligence. Bundy v. Belue, 253 N.C. 31, 116 S.E.2d 200 (1960).

Violation Inferred from Runaway Automobile. — The fact that an automobile ran down the street for a considerable distance immediately after it was parked, permits the inference that plaintiff's intestate did not turn its front wheels to the curb of the street, as required by § 20-124 and this section. Watts v. Watts, 252 N.C. 352, 113 S.E.2d 720 (1960).

§ 20-164: Repealed by Session Laws 1973, c. 1330, s. 39.

§ 20-165. Coasting prohibited. — The driver of any motor vehicle when traveling upon a downgrade shall not coast with the gears or transmission of such vehicle in neutral, or with the clutch disengaged. (1937, c. 407, s. 127; 1973, c. 1330, s. 27.)

Violation Negligence Per Se. — The violation of this section is negligence per se, and, if injury to the violator proximately result therefrom, it would bar his right to recover therefor. Dillon v. City of Winston-Salem, 221 N.C. 512, 20 S.E.2d 845 (1942).

§ 20-165.1. One-way traffic. — In all cases where the Department of Transportation has heretofore, or may hereafter lawfully designate any highway or other separate roadway, under its jurisdiction for one-way traffic and shall erect appropriate signs giving notice thereof, it shall be unlawful for

any person to willfully drive or operate any vehicle on said highway or roadway except in the direction so indicated by said signs. (1957, c. 1177; 1973, c. 507, s. 5; c. 1330, s. 28; 1977, c. 464, s. 34.)

Editor's Note. — The 1977 amendment substituted "Department of Transportation" for "Board of Transportation."

Power of State Illustrated. — This section and § 20-156(a) illustrate the power of the State to regulate the time and manner of entering a public highway. Moses v. State Hwy. Comm'n, 261 N.C. 316, 134 S.E.2d 664, cert. denied, 379 U.S. 930, 85 S. Ct. 327, 13 L. Ed. 2d 342 (1964).

Cited in State Hwy. Comm'n v. Raleigh Farmers Mkt., Inc., 263 N.C. 622, 139 S.E.2d 904 (1965).

§ 20-166. Duty to stop in event of accident or collision; furnishing information or assistance to injured person, etc.; persons assisting exempt from civil liability. — (a) The driver of any vehicle involved in an accident or collision resulting in injury or death to any person shall immediately stop such vehicle at the scene of such accident or collision, and any person violating this provision shall upon conviction be punished as provided in G.S. 20-182.

(b) The driver of any vehicle involved in an accident or collision resulting in damage to property and in which there is not involved injury or death of any person shall immediately stop his vehicle at the scene of the accident or collision and shall give his name, address, operator's or chauffeur's license number and the registration number of his vehicle to the driver or occupants of any other vehicle involved in the accident or collision or to any person whose property is damaged in the accident or collision; provided that if the damaged property is a parked and unattended vehicle and the name and location of the owner is not known to or readily ascertainable by the driver of the responsible vehicle, the said driver shall furnish the information required by this subsection to the nearest available peace officer, or, in the alternative, and provided he thereafter within 48 hours fully complies with G.S. 20-166.1(c), shall immediately place a paper-writing containing said information in a conspicuous place upon or in the damaged vehicle and, provided that if the damaged property is a guardrail, utility pole, or other fixed object owned by the Department of Transportation, a public utility, or other public service corporation to which report cannot readily be made at the scene, it shall be sufficient if the responsible driver shall furnish the information required to the nearest peace officer or make written report thereof containing said information by U.S. certified mail, return receipt requested, to the N.C. Division of Motor Vehicles within five days following said collision. Any person violating the provisions of this subsection shall be guilty of a misdemeanor and fined or imprisoned for a period of not more than two years, or both, in the discretion of the court.

(c) The driver of any vehicle involved in any accident or collision resulting in injury or death to any person shall also give his name, address, operator's or chauffeur's license number and the registration number of his vehicle to the person struck or the driver or occupants of any vehicle collided with, and shall render to any person injured in such accident or collision reasonable assistance, including the carrying of such person to a physician or surgeon for medical or surgical treatment if it is apparent that such treatment is necessary or is requested by the injured person, and it shall be unlawful for any person to violate this provision, and such violator shall be punishable as provided in G.S. 20-182.

(d) Any person who renders first aid or emergency assistance at the scene of a motor vehicle accident on any street or highway to any person injured as a result of such accident, shall not be liable in civil damages for any acts or omissions relating to such services rendered, unless such acts or omissions amount to wanton conduct or intentional wrongdoing. (1937, c. 407, s. 128; 1939, c. 10, ss. 1, 1½; 1943, c. 439; 1951, cc. 309, 794, 823; 1953, cc. 394, 793; c. 1340,

s. 1; 1955, c. 913, s. 8; 1965, c. 176; 1967, c. 445; 1971, c. 958, s. 1; 1973, c. 507, s. 5; 1975, c. 716, s. 5; 1977, c. 464, s. 34.)

I. General Consideration.
II. Warrants.
III. Evidence.

I. GENERAL CONSIDERATION.

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsection (b).

The 1977 amendment substituted "Department of Transporation" for "Board of Transporation" in subsection (b).

As to the effect of the 1939 amendment, see 17 N.C.L. Rev. 349. For brief comment on the 1953 amendments, see 31 N.C.L. Rev. 419 (1953). For note on North Carolina's "Good Samaritan" statute, see 44 N.C.L. Rev. 508 (1966). For note on duty of tort-feasor and of innocent participant to render aid to accident victim, see 6 Wake Forest Intra. L. Rev. 537 (1970).

Purpose. — The purpose of the requirement that a motorist stop and identify himself is to facilitate investigation. State v. Smith, 264 N.C. 575, 142 S.E.2d 149 (1965).

The misdemeanor described in subsection (b) is not a lesser included offense of the crime described in subsection (c) of this section; therefore, in a prosecution for a violation of subsection (c), a trial court does not err in failing to instruct the jury on the offense defined in subsection (b). State v. Chavis, 9 N.C. App. 430, 176 S.E.2d 388 (1970).

Knowledge of Accident Is Essential Element of Offense. — Knowledge of the driver that his vehicle had been involved in an accident resulting in injury to a person is an essential element of the offense of "hit-and-run driving." State v. Ray, 229 N.C. 40, 47 S.E.2d 494 (1948).

Knowledge by a motorist that he had struck a pedestrian is an essential element of the offense of failing to stop and give such pedestrian aid. State v. Glover, 270 N.C. 319, 154 S.E.2d 305 (1967).

Personal injury or death is a necessary element of the offense envisioned by this section. State v. Crutchfield, 5 N.C. App. 586, 169 S.E.2d 43 (1969).

Driver Must Stop at Scene of Accident. — This section requires the driver of a vehicle involved in an accident to stop at the scene, and in the event the accident involves the injury of any person, it requires him to give his name, address, operator's license and the registration number of his vehicle, and to render reasonable assistance to the injured person. State v. Brown, 226 N.C. 681, 40 S.E.2d 34 (1946).

This section requires the driver of a vehicle, involved in an accident or collision resulting in injury or death to any person, to stop, render reasonable assistance and give certain specified information to the occupant or driver of the vehicle collided with. Branch v. Dempsey, 265 N.C. 733, 145 S.E.2d 395 (1965).

Where defendant admitted that he knew he had hit a man and did not stop or return to the scene, his own testimony disclosed a violation of this section, and his good faith in stopping 200 yards away from the accident and obtaining aid for the injured man before proceeding on his way to his home was immaterial on the issue of guilt or innocence and the exclusion of testimony to this effect was without error. State v. Brown, 226 N.C. 681, 40 S.E.2d 34 (1946).

Proof of charge for failure to stop automobile at scene of accident held wholly lacking. State v. Wall, 243 N.C. 238, 90 S.E.2d 383 (1955).

The driver violates this section if he does not immediately stop at the scene. State v. Norris, 26 N.C. App. 259, 215 S.E.2d 875, appeal dismissed, 288 N.C. 249, 217 S.E.2d 673 (1975), cert. denied, 423 U.S. 1073, 96 S. Ct. 856, 47 L. Ed. 2d 83 (1976).

Failure to stop is the gist of the offense. State v. Smith, 264 N.C. 575, 142 S.E.2d 149 (1965).

Section does not restrict offense to public highway. State v. Smith, 264 N.C. 575, 142 S.E.2d 149 (1965).

Failure to Stop or Flight from Scene as Evidence of Conscious Wrong. — A defendant's failure to stop as required by this section, or immediate flight from scene of the injury, affords sufficient evidence of conscious wrong, or dereliction on his part, to warrant the jury in so concluding. Edwards v. Cross, 233 N.C. 354, 64 S.E.2d 6 (1951).

Failure to Give Name, Address, etc. — Defendant cannot be convicted of charge that he failed to give his name, address, etc., as required by subsection (c) where the evidence showed that all others involved in the accident were either killed or so seriously injured that there was no one to whom defendant could give a report. State v. Wall, 243 N.C. 238, 90 S.E.2d 383 (1955).

Evidence by the State was to the effect that the injured party was unconscious after the accident and, certainly, no useful purpose could have been served by undertaking to give the unconscious man the information required by this section. The law does not require a party to do a vain and useless thing. State v. Coggin, 263 N.C. 457, 139 S.E.2d 701 (1965).

The proviso in subsection (b) merely withdraws the case of a parked or unattended vehicle whose owner's identity is not readily ascertainable from the general language of the statute. It does not describe a separate offense,

and therefore it need not be negatived in the warrant. State v. Norris, 26 N.C. App. 259, 215 S.E.2d 875, appeal dismissed, 288 N.C. 249, 217 S.E.2d 673 (1975), cert. denied, 423 U.S. 1073, 96 S. Ct. 856, 47 L. Ed. 2d 83 (1976).

Person Instantly Killed. — A defendant may not be convicted of failing to give assistance to a person injured in a collision when the evidence discloses that such person was instantly killed in the collision. State v. Wall, 243 N.C. 238, 90 S.E.2d 383 (1955).

Absence of Fault No Defense. — Absence of fault on the part of the driver is not a defense to the charge of failure to stop. State v. Smith, 264 N.C. 575, 142 S.E.2d 149 (1965).

Guest Passenger Not Ipso Facto Guilty as Aider and Abettor. — If the owner and driver of an automobile fails to stop and give his name, address and license number, after an accident resulting in injury to a person, in violation of this section, an occupant of the car, merely because he is a guest passenger in the car driven by the owner, is not guilty as an aider and abettor. State v. Dutch, 246 N.C. 438, 98 S.E.2d 475 (1957).

Whether Injury Sustained Is Matter for Jury. — Whether a person received personal injuries in an accident within the meaning of this section is a matter for determination by the jury. State v. Chavis, 9 N.C. App. 430, 176 S.E.2d 388 (1970).

Section does not require statement by driver as to how he was driving or what caused the collision. Branch v. Dempsey, 265 N.C. 733, 145 S.E.2d 395 (1965).

Former Jeopardy. — In a prosecution for hit-and-run driving the trial court properly refused to submit an issue of former acquittal based upon a prior prosecution for involuntary manslaughter arising out of the same collision, since the offenses are different, both in law and in fact, and therefore the plea of former jeopardy is inapposite as a matter of law. State v. Williams, 229 N.C. 415, 50 S.E.2d 4 (1948).

Instruction. — In a prosecution for "hit-and-run driving" an instruction that defendant was charged with the violation of one of the motor vehicle statutes designed for the protection of life and property, cannot be held for error, the statement not being related to any fact in issue or any evidence introduced in the case, and containing no inference as to the guilt or innocence of defendant, it further appearing that the court correctly charged upon the presumption of innocence and the burden of proof. State v. King, 219 N.C. 667, 14 S.E.2d 803 (1941).

The defendant was entitled to have the trial judge instruct the jury that the burden was on the State to establish beyond a reasonable doubt that the defendant knowingly or intentionally failed to render reasonable assistance to his injured passenger, including the carrying of him to a physician or surgeon for medical or surgical treatment if it was apparent that such treatment was necessary. State v. Coggin, 263 N.C. 457, 139 S.E.2d 701 (1965).

Applied in State v. Smith, 238 N.C. 82, 76 S.E.2d 363 (1953); State v. Nall, 239 N.C. 60, 79 S.E.2d 354 (1953); State v. Hollingsworth, 263 N.C. 158, 139 S.E.2d 235 (1964); State v. Harrelson, 265 N.C. 589, 144 S.E.2d 650 (1965); State v. Mohrmann, 265 N.C. 594, 144 S.E.2d 645 (1965); State v. Moses, 272 N.C. 509, 158 S.E.2d 617 (1968); State v. Markham, 5 N.C. App. 391, 168 S.E.2d 49 (1969); State v. Alston, 6 N.C. App. 200, 169 S.E.2d 520 (1969); State v. Moore, 19 N.C. App. 742, 200 S.E.2d 200 (1973); State v. Rimmer, 25 N.C. App. 637, 214 S.E.2d 225 (1975).

Cited in State v. Newton, 207 N.C. 323, 177 S.E. 184 (1934); State v. Midgett, 214 N.C. 107, 198 S.E. 613 (1938); Leary v. Norfolk S. Bus Corp., 220 N.C. 745, 18 S.E.2d 426 (1942); State v. Collins, 247 N.C. 248, 100 S.E.2d 492 (1957); Punch v. Landis, 258 N.C. 114, 128 S.E.2d 224 (1962).

II. WARRANTS.

Warrant Charging Violation of Subsection (c). — A warrant which charges that the defendant, while driving a motor vehicle, was involved in an accident and left the scene without complying with the requirements of subsection (c) of this section fails to charge the commission of any criminal offense. State v. Morris, 235 N.C. 393, 70 S.E.2d 23 (1952).

Failure of Warrant to Set Out Description or Name of Owner of Property Damaged. — In a prosecution under this section, charging defendant with failing to stop his automobile after an accident resulting in property damage, the fact that the warrant failed to set out any description of the property damaged other than the word "automobile" and failed to state the name of the owner is not fatal. State v. Crutchfield, 5 N.C. App. 586, 169 S.E.2d 43 (1969).

Warrant was insufficient to charge the offense of leaving the scene of an accident, where it did not charge defendant with operating the motor vehicle involved in the accident and did not charge that he failed to give his name and address and driver's license number before leaving the scene of the accident. State v. Wiley, 20 N.C. App. 732, 203 S.E.2d 95 (1974).

Failure of indictment to designate street or highway on which collision occurred is not fatal. State v. Smith, 264 N.C. 575, 142 S.E.2d 149 (1965).

Warrant May Cure Defective Indictment in Case Transferred for Jury Trial. — Where a prosecution for violating this section, a misdemeanor in the exclusive jurisdiction of a municipal-county court, is transferred to the superior court upon defendant's demand for a jury trial, the jurisdiction of the superior court

is limited to the charge in the warrant; therefore, the warrant constitutes an essential part of the record, so that any failure of the indictment to identify the property damaged and the owner thereof is cured when the warrant supplies this information, thus affording defendant protection against another prosecution for the same offense. State v. Smith, 264 N.C. 575, 142 S.E.2d 149 (1965).

III. EVIDENCE.

What State Must Prove to Secure Conviction. — In order to convict the defendant on a count which charged a violation of subsection (a) of this section, it was necessary for the State to prove that on the occasion in question, the defendant was the operator of a named automobile which the State contended drove down a given street; that this vehicle was involved in an accident or collision with the alleged victim; and that knowing he had struck the victim, the defendant failed to stop his vehicle immediately at the scene. State v. Overman, 257 N.C. 464, 125 S.E.2d 920 (1962).

To secure a conviction on a count which charged a violation of subsection (c), the State was required to prove that the defendant was the operator of a vehicle which had been involved in an accident or collision which resulted in injury to the alleged victim; that defendant failed to give his name, address, operator's license number, and the registration number of his vehicle to the alleged victim; that it was apparent that medical treatment was necessary to the alleged victim but that defendant failed to render him reasonable assistance, including carrying him to a physician or surgeon for medical treatment. State v. Overman, 257 N.C. 464, 125 S.E.2d 920 (1962).

The burden is on the State to satisfy beyond a reasonable doubt that a defendant violated every element of a crime charged under subsection (c) of this section. State v. Chavis, 9 N.C. App. 430, 176 S.E.2d 388 (1970).

If the State satisfied the jury beyond a reasonable doubt that defendant was the driver of an automobile involved in an accident resulting in injuries to the six named persons in the indictment, and did unlawfully, willfully, and feloniously fail to stop such automobile at the scene of the accident, it would be sufficient to justify the conviction of the defendant on the first count in the indictment; it would not be necessary for the State to prove that all of the six named persons were killed, as alleged in the indictment. State v. Wilson, 264 N.C. 373, 141 S.E.2d 801 (1965).

Evidence Sufficient for Jury. — Where all the evidence tended to show that the car of the prosecuting witness was struck by a car which was traveling at the time of the accident with its left wheels over the centerline of the highway, that an occupant in the car of the prosecuting witness was injured, and that the car which collided with her car failed to stop after the collision, in violation of this section, and the State's circumstantial evidence, including marks on the highway leading uninterruptedly from the point of collision to a car parked at defendant's place of business, which defendant admitted to be his, the condition of defendant's car, a hub cap and other automobile parts found at the scene of the collision which were missing from defendant's car, and other circumstances tending to show efforts on the part of defendant to conceal the identity of his car as the one involved in the collision, together with testimony by defendant that no one else had driven his car on the evening in question, it was held sufficient to have been submitted to the jury on the question of defendant's guilt, and his motions for judgment as of nonsuit were held properly refused. State v. King, 219 N.C. 667, 14 S.E.2d 803 (1941).

Evidence held sufficient to take case to jury as to whether defendant failed to render reasonable assistance to injured persons as required by this section. State v. Wall, 243 N.C. 238, 90 S.E.2d 383 (1955).

Evidence held sufficient to support charge of failing to stop an automobile after an accident resulting in death of a person. State v. Massey, 271 N.C. 555, 157 S.E.2d 150 (1967).

§ 20-166.1. Reports and investigations required in event of collision. — (a) The driver of a vehicle involved in a collision resulting in injury to or death of any person or total property damage to an apparent extent of two hundred dollars ($200.00) or more shall immediately, by the quickest means of communication, give notice of the collision to the local police department if the collision occurs within a municipality, or to the office of the sheriff or other qualified rural police of the county wherein the collision occurred.

(b) The driver of any vehicle involved in a collision resulting in injury to or death of any person or total property damage to an apparent extent of two hundred dollars ($200.00) or more shall furnish proof of financial responsibility on forms prescribed by the Division.

(c) Notwithstanding any other provisions of this section, the driver of any motor vehicle which collides with another motor vehicle left parked or

unattended on any street or highway of this State shall within 48 hours report the collision to the owner of such parked or unattended motor vehicle. Such report shall include the time, date and place of the collision, the driver's name, address, operator's or chauffeur's license number and the registration number of the vehicle being operated by the driver at the time of the collision, and such report may be oral or in writing. Such written report must be transmitted to the current address of the owner of the parked or unattended vehicle by United States certified mail, return receipt requested, and a copy of such report shall be transmitted to the North Carolina Division of Motor Vehicles.

No report, oral or written, made pursuant to this Article shall be competent in any civil action except to establish identity of the person operating the moving vehicle at the time of the collision referred to therein.

Any person who violates this subsection is guilty of a misdemeanor and shall be punishable by fine or imprisonment, or both, in the discretion of the court.

(d) The Division may require the driver of a vehicle involved in a collision which is required to be reported by this section to file a supplemental report when the original report is insufficient in the opinion of the Division.

(e) It shall be the duty of the State Highway Patrol or the sheriff's office or other qualified rural police to investigate all collisions required to be reported by this section when the collisions occur outside the corporate limits of a city or town; and it shall be the duty of the police department of each city or town to investigate all collisions required to be reported by this section when the collisions occur within the corporate limits of the city or town. Every law-enforcement officer who investigates a collision as required by this subsection, whether the investigation is made at the scene of the collision or by subsequent investigations and interviews, shall, within 24 hours after completing the investigation, forward a written report of the collision to the Division if the collision occurred outside the corporate limits of a city or town, or to the police department of the city or town if the collision occurred within the corporate limits of such city or town. Police departments should forward such reports to the Division within 10 days of the date of the collision. Provided, when a collision occurring outside the corporate limits of a city or town is investigated by a duly qualified law-enforcement officer other than a member of the State Highway Patrol, as permitted by this section, such other officer shall forward a written report of the collision to the office of the sheriff or rural police of the county wherein the collision occurred and the office of the sheriff or rural police shall forward such reports to the Division within 10 days of the date of the collision. The reports by law-enforcement officers shall be in addition to, and not in place of, the reports required of drivers by this section.

When any person involved in an automobile collision shall die as a result of said collision within a period of 12 months following said collision, and such death shall not have been reported in the original report, it shall be the duty of investigating enforcement officers to file a supplemental report setting forth the death of such person.

(f) Every person holding the office of medical examiner in this State shall report to the Division the death of any person as a result of a collision involving a motor vehicle and the circumstances of the collision within five days following such death. Every hospital shall notify the medical examiner of the county in which the collision occurred of the death within the hospital of any person who dies as a result of injuries apparently sustained in a collision involving a motor vehicle.

(g) With respect to a collision between a common carrier and another vehicle, which collision is required to be reported by this section, the common carrier shall make a written report of the collision to the Division within 10 days from the date of the collision, and the report shall be in addition to the report required of the driver. When the original report submitted by a common carrier is

insufficient in the opinion of the Division, the Division may require it to file a supplemental report.

(h) The Division shall prepare and shall upon request supply to police, [medical examiners], sheriffs, and other suitable agencies, or individuals, forms for collision reports calling for sufficiently detailed information to disclose with reference to a highway collision the cause, conditions then existing, and the persons and vehicles involved. All collision reports required by this section shall be made on forms supplied or approved by the Division.

(i) All collision reports, including supplemental reports, above mentioned, except those made by State, city or county police, shall be without prejudice and shall be for the use of the Division and shall not be used in any manner as evidence, or for any other purpose in any trial, civil or criminal, arising out of such collision except that the Division shall furnish upon demand of any court a properly executed certificate stating that a particular collision report has or has not been filed with the Division solely to prove a compliance with this section.

The reports made by State, city or county police and medical examiners, but no other reports required under this section, shall be subject to the inspection of members of the general public at all reasonable times, and the Division shall furnish a certified copy of any such report to any member of the general public who shall request the same, upon receipt of a fee of two dollars fifty cents ($2.50) [for a] certified copy, or the Division is authorized to furnish without charge to departments of the governments of the United States, states, counties, and cities certified copies of such collision reports for official use.

Nothing herein provided shall prohibit the Division from furnishing to interested parties only the name or names of insurers and insured and policy number shown upon any reports required under this section.

(j) The Division shall receive collision reports required to be made by this section and may tabulate and analyze such reports and publish annually, or at more frequent intervals, statistical information based thereon as to the number, cause and location of highway collisions.

Based upon its findings after analysis, the Division may conduct further necessary detailed research to determine more fully the cause and control of highway collisions. It may further conduct experimental field tests within areas of the State from time to time to prove the practicability of various ideas advanced in traffic control and collision prevention. (1953, c. 1340, s. 2; 1955, c. 913, s. 9; 1963, c. 1249; 1965, c. 577; 1971, c. 55; c. 763, s. 1; c. 958, ss. 2, 3; 1973, c. 1133, ss. 1, 2; c. 1330, s. 29; 1975, c. 307; c. 716, s. 5.)

Cross Reference. — See note to § 20-166.

Editor's Note. — The first 1975 amendment eliminated provisions as to uncertified copies of reports in the second paragraph of subsection (i), increased the fee for certified copies in the first sentence of that paragraph from $1.00 to $2.50, and deleted the former last sentence of that paragraph, relating to disposition of funds received under the provisions of subsection (i). The amendment also eliminated the brackets around "medical examiners" near the beginning of the first sentence of the second paragraph of subsection (i), which had been used in the Replacement Volume because of a technical error in the 1973 amendatory act.

The second 1975 amendment substituted "Division" for "Department," throughout the section.

For brief comment on this section, see 31 N.C.L. Rev. 419 (1953).

For comment on release of medical records by North Carolina hospitals, see 7 N.C. Cent. L.J. 299 (1976).

Section Imposes Duties on Driver, Not Owner. — The duties imposed by this section are duties which the law imposes upon the driver, not upon the owner. Branch v. Dempsey, 265 N.C. 733, 145 S.E.2d 395 (1965).

Requirements of Section. — This section requires the driver of any vehicle involved in a collision, resulting in injury or death of any person, to give notice of the collision to police officers and within 24 hours to make a written report to the Department (now Division) of Motor Vehicles upon a form supplied by it. Branch v. Dempsey, 265 N.C. 733, 145 S.E.2d 395 (1965).

No Statement Required. — This section contains no provision requiring a driver involved in a collision which must be reported to make any

statement to the officer. Branch v. Dempsey, 265 N.C. 733, 145 S.E.2d 395 (1965).

Duty Imposed by Subsection (e). — Subsection (e) of this section makes it the duty of the State Highway Patrol to investigate all collisions required to be reported to it by this section, and requires the investigating officer to make his report in writing to the Motor Vehicle Department (now Division), which report is open to inspection by the public. Branch v. Dempsey, 265 N.C. 733, 145 S.E.2d 395 (1965).

Applied in Lane v. Iowa Mut. Ins. Co., 258 N.C. 318, 128 S.E.2d 398 (1962); Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

Stated in Robinson v. United States Cas. Co., 260 N.C. 284, 132 S.E.2d 629 (1963); Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971).

Cited in Carter v. Scheidt, 261 N.C. 702, 136 S.E.2d 105 (1964).

§ 20-167. Vehicles transporting explosives. — Any person operating any vehicle transporting any explosive as a cargo or part of a cargo upon a highway shall at all times comply with the provisions of this section.

(1) Said vehicle shall be marked or placarded on each side and the rear with the word "Explosives" in letters not less than eight inches high, or there shall be displayed on the rear of such vehicle a red flag not less than 24 inches square marked with the word "Danger" in white letters six inches high.

(2) Every said vehicle shall be equipped with not less than two fire extinguishers, filled and ready for immediate use, and placed at a convenient point on the vehicle so used.

(3) The Commissioner is hereby authorized and directed to promulgate such additional regulations governing the transportation of explosives and other dangerous articles by vehicles upon the highways as he shall deem advisable for the protection of the public. (1937, c. 407, s. 129.)

Cross Reference. — As to vehicles transporting motor fuels, see § 119-41 et seq.

Cited in Latham v. Elizabeth City Orange Crush Bottling Co., 213 N.C. 158, 195 S.E. 372 (1938).

§ 20-167.1. Transportation of spent nuclear fuel. — (a) No person, firm or corporation shall transport upon the highways of this State any spent nuclear fuel unless such person, firm, or corporation notifies the State Highway Patrol in advance of transporting the spent nuclear fuel.

(b) The provisions of this section shall apply whether or not the fuel is for delivery in North Carolina and whether or not the shipment originated in North Carolina.

(c) The Radiation Protection Commission is authorized to adopt, promulgate, amend, and repeal rules and regulations necessary to implement the provisions of this section.

(d) Any person, firm or corporation violating any provision of this section shall be punished by a fine of not less than five hundred dollars ($500.00), and each unauthorized shipment shall constitute a separate offense. (1977, c. 839, s. 1.)

§ 20-168. Drivers of State, county, and city vehicles subject to the provisions of this Article. — (a) Subject to the exceptions in subsection (b), the provisions of this Article applicable to the drivers of vehicles upon the highways shall apply to the drivers of all vehicles owned or operated by the State or any political subdivision thereof.

(b) While actually engaged in maintenance or construction work on the highways, but not while traveling to or from such work, drivers of vehicles owned or operated by the State or any political subdivision thereof are exempt from all provisions of this Article except:

(1) G.S. 20-138. Persons under the influence of intoxicating liquor.
(2) G.S. 20-139. Persons under the influence of drugs.
(3) G.S. 20-139.1. Result of a chemical analysis admissible in evidence; presumption.
(4) G.S. 20-140. Reckless driving.
(5) G.S. 20-140.4 [G.S. 20-141.4]. Death by vehicle.
(6) G.S. 20-141. Speed restrictions. (1937, c. 407, s. 130; 1973, c. 1330, s. 30.)

Cited in Babbs v. Eury, 206 N.C. 679, 175 S.E. 100 (1934).

§ 20-169. Powers of local authorities. — Local authorities, except as expressly authorized by G.S. 20-141 and G.S. 20-158, shall have no power or authority to alter any speed limitations declared in this Article or to enact or enforce any rules or regulations contrary to the provisions of this Article, except that local authorities shall have power to provide by ordinances for the regulation of traffic by means of traffic or semaphores or other signaling devices on any portion of the highway where traffic is heavy or continuous and may prohibit other than one-way traffic upon certain highways, and may regulate the use of the highways by processions or assemblages and except that local authorities shall have the power to regulate the speed of vehicles on highways in public parks, but signs shall be erected giving notices of such special limits and regulations. Signaling devices of a stop-light nature erected pursuant to this section and which emit alternate red and green lights shall be so arranged and placed that the red light shall appear at the top and the green light shall appear at the bottom of the signaling unit. Provided, that all traffic signs, signals, markings, islands, and all other traffic-control devices installed or erected on streets or highways on the State highway system within the corporate limits of a municipality shall be subject to the approval of the Board of Transportation and be installed or erected in substantial conformance with the specifications set forth in the Manual on Uniform Traffic Control Devices for Streets and Highways, or any subsequent revisions of the same, published by the United States Department of Commerce, Bureau of Public Roads and dated June, 1961. Provided further that the Board of Transportation is authorized and directed to assume the cost of installing and erecting such traffic-control devices provided the same are installed and erected with the approval of the Board of Transportation and in conformity with this section, and the Board of Transportation is authorized and directed to assume the costs of altering existing traffic-control devices on the State highway system to conform to the said specifications set out above. (1937, c. 407, s. 131; 1949, c. 947, s. 2; 1955, c. 384, s. 2; 1963, c. 559; 1973, c. 507, s. 5.)

Local Modification. — City of Greensboro: 1953, c. 1075.

For application of former statute prohibiting ordinance in conflict, see State v. Freshwater, 183 N.C. 762, 111 S.E. 161 (1922).

Automatic Traffic-Control Signals. — In consequence of this section, a town acted within the limits of its authority as a municipal corporation in installing its automatic traffic-control signals and enacting an ordinance to compel their observance. Cox v. Hennis Freight Lines, 236 N.C. 72, 72 S.E.2d 25 (1952).

This section authorizes municipal corporations to install automatic traffic-control signals and compel their observance by ordinance. Upchurch v. Hudson Funeral Home, 263 N.C. 560, 140 S.E.2d 17 (1965).

Ambulances May Be Required to Observe Lights. — The provisions of this section are sufficiently broad to authorize the adoption of an ordinance requiring ambulances to observe traffic lights. Upchurch v. Hudson Funeral Home, 263 N.C. 560, 140 S.E.2d 17 (1965).

Violation of Ordinance Negligence Per Se. — The violation of a valid ordinance adopted pursuant to this section requiring a motorist to stop in obedience to a red traffic-control signal is negligence per se. Currin v. Williams, 248 N.C. 32, 102 S.E.2d 455 (1958).

Legal Rights Depend on Ordinance. — When automatic traffic-control signals are installed pursuant to municipal ordinance authorized by this section, the respective rights of motorists depend upon the provisions of the particular ordinance authorizing such installation. Cogdell v. Taylor, 264 N.C. 424, 142 S.E.2d 36 (1965).

Allegation and Proof of Ordinance. — Before legal rights may be predicated on an ordinance regulating traffic by means of automatic signal-control devices, such an ordinance must be alleged and established by proper evidence. Smith v. Buie, 243 N.C. 209, 90 S.E.2d 514 (1955).

Cited in Stewart v. Yellow Cab Co., 225 N.C. 654, 36 S.E.2d 256 (1945); Rogers v. Rogers, 2 N.C. App. 668, 163 S.E.2d 645 (1968).

§ 20-170. This Article not to interfere with rights of owners of real property with reference thereto. — Nothing in this Article shall be construed to prevent the owner of real property used by the public for purposes of vehicular travel by permission of the owner, and not as matter of right from prohibiting such use nor from requiring other or different or additional conditions than those specified in this Article or otherwise regulating such use as may seem best to such owner. (1937, c. 407, s. 132.)

§ 20-171. Traffic laws apply to persons riding animals or driving animal-drawn vehicles. — Every person riding an animal or driving any animal drawing a vehicle upon a highway shall be subject to the provisions of this Article applicable to the driver of a vehicle, except those provisions of the Article which by their nature can have no application. (1939, c. 275.)

The requirement that a person entering a public highway from a private road or drive must yield the right-of-way to vehicles on the public highway applies to a person riding an animal as well as to a person driving a motor vehicle. Watson v. Stallings, 270 N.C. 187, 154 S.E.2d 308 (1967).

Part 10A. Operation of Bicycles.

§ 20-171.1. Definitions. — As used in this Part, except where the context clearly requires otherwise, the words and expressions defined in this section shall be held to have the meanings here given to them:

Bicycle. — A nonmotorized vehicle with two or three wheels tandem, a steering handle, one or two saddle seats, and pedals by which the vehicle is propelled. (1977, c. 1123, s. 1.)

§ 20-171.2. Bicycle racing. — (a) Bicycle racing on the highways is prohibited except as authorized in this section.

(b) Bicycle racing on a highway shall not be unlawful when a racing event has been approved by State or local authorities on any highway under their respective jurisdictions. Approval of bicycle highway racing events shall be granted only under conditions which assure reasonable safety for all race participants, spectators and other highway users, and which prevent unreasonable interference with traffic flow which would seriously inconvenience other highway users.

(c) By agreement with the approving authority, participants in an approved bicycle highway racing event may be exempted from compliance with any traffic laws otherwise applicable thereto, provided that traffic control is adequate to assure the safety of all highway users. (1977, c. 1123, s. 1.)

Part 11. Pedestrians' Rights and Duties.

§ 20-172. Pedestrians subject to traffic-control signals. — (a) The Board of Transportation, with reference to State highways, and local authorities, with reference to highways under their jurisdiction, are hereby authorized to erect

or install, at intersections or other appropriate places, special pedestrian control signals exhibiting the words "WALK" or "DON'T WALK" as a part of a system of traffic-control signals or devices.

(b) Whenever special pedestrian-control signals are in place, such signals shall indicate as follows:

(1) WALK. — Pedestrians facing such signal may proceed across the highway in the direction of the signal and shall be given the right-of-way by the drivers of all vehicles.

(2) DON'T WALK. — No pedestrian shall start to cross the highway in the direction of such signal, but any pedestrian who has partially completed his crossing on the "WALK" signal shall proceed to a sidewalk or safety island while the "DON'T WALK" signal is showing.

(c) Where a system of traffic-control signals or devices does not include special pedestrian-control signals, pedestrians shall be subject to the vehicular traffic-control signals or devices as they apply to pedestrian traffic.

(d) At places without traffic-control signals or devices, pedestrians shall be accorded the privileges and shall be subject to the restrictions stated in Part 11 of this Article. (1937, c. 407, s. 133; 1973, c. 507, s. 5; c. 1330, s. 31.)

A pedestrian at a crosswalk acquires no additional rights against a red traffic light. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

Rights of Pedestrians Proceeding in Accord with Lights Not Impaired. — The legislature did not intend that the provisions subjecting pedestrians to traffic lights would impair their rights as pedestrians proceeding in accord with such lights. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

Party Having Green Light Has Superior Right. — Although one party may be a motorist and the other a pedestrian whoever has the green light has the superior right to traverse the intersection and to assume that the other will recognize it and conduct himself accordingly. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

Duty to Charge Sections in Civil Actions. — It is the duty of the court to charge the duty of drivers to pedestrians, imposed by this and the following sections, in an action for damages for their violation and this error is not cured by a general charge as to the use of necessary prudence, and is reversible even in the absence of a prayer for more specific instructions. Bowen v. Schnibben, 184 N.C. 248, 114 S.E. 170 (1922).

Quoted in Spencer v. McDowell Motor Co., 236 N.C. 239, 72 S.E.2d 598 (1952).

Cited in Metcalf v. Foister, 232 N.C. 355, 61 S.E.2d 77 (1950).

§ 20-173. Pedestrians' right-of-way at crosswalks. — (a) Where traffic-control signals are not in place or in operation the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at or near an intersection, except as otherwise provided in Part 11 of this Article.

(b) Whenever any vehicle is stopped at a marked crosswalk or at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway, the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle.

(c) The driver of a vehicle emerging from or entering an alley, building entrance, private road, or driveway shall yield the right-of-way to any pedestrian, or person riding a bicycle, approaching on any sidewalk or walkway extending across such alley, building entrance, road, or driveway. (1937, c. 407, s. 134; 1973, c. 1330, s. 32.)

Relative Rights of Pedestrians and Motorists in Absence of Signals. — In the absence of signals controlling traffic, the relative rights of pedestrians and motorists are prescribed by this section and § 20-174. Griffin v. Pancoast, 257 N.C. 52, 125 S.E.2d 310 (1962).

Duty of Motorist to Yield Right-of-Way. — It is the duty of a motorist to yield the right-of-way to a pedestrian in an unmarked crosswalk at an intersection. Bowen v. Gardner, 3 N.C. App. 529, 165 S.E.2d 545, rev'd on other grounds, 275 N.C. 363, 168 S.E.2d 47 (1969).

Duty of Pedestrian to Yield Right-of-Way. — If the pedestrian elects to cross a street or a highway at a place which is not a marked crosswalk and not an unmarked crosswalk at an intersection, subsection (a) of this section and § 20-174(a) require that he yield the right-of-way to vehicles. Anderson v. Carter, 272 N.C. 426, 158 S.E.2d 607 (1968).

A right-of-way is not absolute, and even a pedestrian with the right-of-way must exercise ordinary care for her own safety. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

But where the pedestrian has the right-of-way, he is not required to anticipate negligence on the part of others. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

To a pedestrian the right-of-way means that he has the right to continue in his direction of travel without anticipating negligence on the part of motorists. Unless the circumstances are sufficient to give him notice to the contrary, he may act upon the assumption, even to the last moment, that motorists will recognize such a preferential right. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

A pedestrian who has the right-of-way at a crosswalk may not be held to be contributorily negligent as a matter of law for failure to see an approaching vehicle or for failure to use ordinary care for his or her own safety. The pedestrian is not required to anticipate negligence on the part of others. McCoy v. Dowdy, 16 N.C. App. 242, 192 S.E.2d 81 (1972).

And May Assume That Motorist Will Yield Right-of-Way. — A pedestrian is entitled to assume and to act upon the assumption, even to the last moment, that an approaching motorist would yield the right-of-way in the absence of anything which gives or should have given notice to the contrary. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

If a person is crossing in an unmarked crosswalk at an intersection, he is not required to anticipate negligence on the part of others. In the absence of anything which gave or should have given notice to the contrary, he is entitled to assume and to act upon the assumption, even to the last moment, that others will observe and obey the statute which required them to yield the right-of-way. Bowen v. Gardner, 275 N.C. 363, 168 S.E.2d 47 (1969).

Both pedestrian and motorist have the right to assume the other will obey the rules of the road and accord the right-of-way to the one having that privilege. Griffin v. Pancoast, 257 N.C. 52, 125 S.E.2d 310 (1962).

Effect of Traffic-Control Signal. — Subsection (a) of this section does not indicate a legislative intent to establish two mutually exclusive sets of rules to be applied according to the mere presence or absence of a traffic light. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

The right-of-way given a pedestrian by § 20-155(c) at an intersection where there is no traffic-control signal is limited at an intersection where there is a traffic-control signal by subsection (a) of this section to the pedestrian having the right-of-way only when he is moving with the green light. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

The injustice of holding that the legislature intended in all events to impair the pedestrian's right-of-way where the intersection may be in some ways a controlled one is clear. If he had no right-of-way, the pedestrian faced with heavy turning traffic would not even be able to cross the street even though he had the green light. He would be "invited into a place of danger" every time he obeyed the green light only to find himself dodging or being hit by turning traffic. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

The term "unmarked crosswalk at an intersection," as used in subsection (a) of this section and § 20-174(a), means that area within an intersection which also lies within the lateral boundaries of a sidewalk projected across the intersection. Anderson v. Carter, 272 N.C. 426, 158 S.E.2d 607 (1968); Bowen v. Gardner, 3 N.C. App. 529, 165 S.E.2d 545 (1969); Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969); Downs v. Watson, 8 N.C. App. 13, 173 S.E.2d 556 (1970).

This section extends right-of-way to a pedestrian within "an unmarked crosswalk at an intersection." The focus is not on the lines but on the proximity to an intersection which is a place a motorist should expect pedestrians will have to cross and should yield to them. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

Pedestrian's Right-of-Way Not Affected by Failure to Mark Crosswalk. — If a pedestrian was crossing at an intersection, as defined in § 20-38(12) [now § 20-4.01(16)], he had the right-of-way, and that right was not affected by the failure to mark a place at the intersection for pedestrians to use in crossing. Griffin v. Pancoast, 257 N.C. 52, 125 S.E.2d 310 (1962).

Where gutter repair work and barricades prevented exit from the street within the crosswalk lines, it would be unreasonable and unjust for the Court of Appeals to say plaintiff forfeited her intersection crossing right-of-way by stepping a few feet outside the painted lines to skirt a barricade. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

Subsection (a) and § 20-174(a) do not prohibit pedestrians from crossing streets or highways at places other than marked crosswalks or unmarked crosswalks at intersections. Anderson v. Carter, 272 N.C. 426, 158 S.E.2d 607 (1968).

Failure of Pedestrian to See Approaching Motorist. — Where the pedestrian had the

right-of-way afforded her by an intersection crosswalk it was erroneous to find contributory negligence as a matter of law simply because she failed to see the defendant motorist approaching the intersection. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

Whether a pedestrian simply by failing to see the vehicle, failed to exercise due care is a jury question. The jury must determine whether the vehicle's speed, proximity, or manner of operation would have put the pedestrian, had she seen it, on notice that the motorist did not intend to yield the right-of-way. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

Applied in Keaton v. Blue Bird Taxi Co., 241 N.C. 589, 86 S.E.2d 93 (1955); Falls v. Williams, 261 N.C. 413, 134 S.E.2d 670 (1964); Blake v. Mallard, 262 N.C. 62, 136 S.E.2d 214 (1964); Nix v. Earley, 263 N.C. 795, 140 S.E.2d 402 (1965); Carter v. Murray, 7 N.C. App. 171, 171 S.E.2d 810 (1970).

Cited in Leary v. Norfolk S. Bus Corp., 220 N.C. 745, 18 S.E.2d 426 (1942); Spencer v. McDowell Motor Co., 236 N.C. 239, 72 S.E.2d 598 (1952); Reeves v. Campbell, 264 N.C. 224, 141 S.E.2d 296 (1965).

§ 20-174. Crossing at other than crosswalks; walking along highway. — (a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.

(b) Any pedestrian crossing a roadway at a point where a pedestrian tunnel or overhead pedestrian crossing has been provided shall yield the right-of-way to all vehicles upon the roadway.

(c) Between adjacent intersections at which traffic-control signals are in operation pedestrians shall not cross at any place except in a marked crosswalk.

(d) Where sidewalks are provided, it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway. Where sidewalks are not provided, any pedestrian walking along and upon a highway shall, when practicable, walk only on the extreme left of the roadway or its shoulder facing traffic which may approach from the opposite direction. Such pedestrian shall yield the right-of-way to approaching traffic.

(e) Notwithstanding the provisions of this section, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway. (1937, c. 407, s. 135; 1973, c. 1330, s. 33.)

Cross Reference. — See note to § 20-173.

Editor's Note. — For article on proof of negligence in North Carolina, see 48 N.C.L. Rev. 731 (1970).

The pedestrian's right-of-way is limited by this section. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

A person walking along a public highway pushing a handcart is a pedestrian within the purview of subsection (d) of this section, and is not a driver of a vehicle within the meaning of §§ 20-146 and 20-149. Lewis v. Watson, 229 N.C. 20, 47 S.E.2d 484 (1948).

The term "unmarked crosswalk at an intersection," as used in § 20-173(a) and subsection (a) of this section means that area within an intersection which also lies within the lateral boundaries of a sidewalk projected across the intersection. Anderson v. Carter, 272 N.C. 426, 158 S.E.2d 607 (1968); Bowen v. Gardner, 3 N.C. App. 529, 165 S.E.2d 545 (1969); Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969); Downs v. Watson, 8 N.C. App. 13, 173 S.E.2d 556 (1970).

Pedestrian Need Not Yield Right-of-Way at Unmarked Intersections. — An instruction placing the duty upon a pedestrian to yield the right-of-way to vehicles in traversing a highway at an unmarked intersection of highways must be held for error. Gaskins v. Kelly, 228 N.C. 697, 47 S.E.2d 34 (1948).

A pedestrian crossing an intersection as defined by § 20-38(12) [now § 20-4.01(16)], even though there is no marked crosswalk at that point, has the right-of-way over a motorist traversing the intersection. Jenkins v. Thomas, 260 N.C. 768, 133 S.E.2d 694 (1963).

Subsection (a) and § 20-173(a) do not prohibit pedestrians from crossing streets or highways at places other than marked crosswalks or unmarked crosswalks at intersections. Anderson v. Carter, 272 N.C. 426, 158 S.E.2d 607 (1968).

But It Is Duty of Pedestrian So Crossing to Yield Right-of-Way. — It is the duty of pedestrian, in crossing highway at a point other than within a marked crosswalk or within an unmarked crosswalk at an intersection, to yield

right-of-way to truck approaching upon the roadway. Tysinger v. Coble Dairy Prods., 225 N.C. 717, 36 S.E.2d 246 (1945). Grisanti v. United States, 284 F. Supp. 308 (E.D.N.C. 1968).

A pedestrian crossing the highway at a place which is not within a marked crosswalk or within an unmarked crosswalk at an intersection, is under duty to yield the right-of-way to vehicles along the highway, subject to the duty of a motorist to exercise due care to avoid colliding with any pedestrian and to give warning by sounding horn whenever necessary. Garmon v. Thomas, 241 N.C. 412, 85 S.E.2d 589 (1955).

If a pedestrian was not injured at an intersection but was struck when he stepped into a street at some point between one intersection and the next, the motorist would have the right-of-way. This right-of-way would, of course, be subject to the provisions of subsection (e). Griffin v. Pancoast, 257 N.C. 52, 125 S.E.2d 310 (1962).

Where intestate was crossing the street diagonally within the block, at a point which was neither at an intersection nor within a marked crosswalk, and the evidence disclosed no traffic control signals at the adjacent intersections, under the provisions of subsection (a) it was intestate's duty to "yield the right-of-way to all vehicles upon the roadway." Wanner v. Alsup, 265 N.C. 308, 144 S.E.2d 18 (1965).

If the pedestrian elects to cross a street or a highway at a place which is not a marked crosswalk and not an unmarked crosswalk at an intersection, § 20-173(a) and subsection (a) of this section require that he yield the right-of-way to vehicles. Anderson v. Carter, 272 N.C. 426, 158 S.E.2d 607 (1968).

A pedestrian who crosses the street at a point where he does not have the right-of-way must constantly watch for oncoming traffic before he steps into the street and while he is crossing. Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975).

And to Keep Timely Lookout. — It is the duty of pedestrians to look before starting across a highway and, in the exercise of reasonable care for their own safety, to keep a timely lookout for approaching motor traffic on the highway to see what should have been seen and could have been seen if they had looked before starting across the highway. Rosser v. Smith, 260 N.C. 647, 133 S.E.2d 499 (1963).

Crossing between Adjacent Intersections at Which Traffic Control Signals Are in Operation. — It is unlawful for a pedestrian to cross a street between intersections at which traffic lights are maintained unless there is a marked crosswalk between the intersections at which he may cross and on which he has the right-of-way over vehicles, and his failure to observe the statutory requirement is evidence of negligence, but not negligence per se. Templeton v. Kelley, 216 N.C. 487, 5 S.E.2d 555 (1939). See also Templeton v. Kelley, 215 N.C. 577, 2 S.E.2d 696 (1939); Bass v. Roberson, 261 N.C. 125, 134 S.E.2d 157 (1964).

It is unlawful for a pedestrian to cross between intersections at which traffic control signals are in operation except in a marked crosswalk, but where a pedestrian violates this provision a motorist is nonetheless required to exercise due care to avoid colliding with him. State v. Call, 236 N.C. 333, 72 S.E.2d 752 (1952).

Walking on Right-Hand Side of Highway. — It is unlawful to walk on the right-hand shoulder of a highway along the traveled portion thereof. Simpson v. Wood, 260 N.C. 157, 132 S.E.2d 369 (1963).

A pedestrian walking on the right-hand side of the highway, along the traveled portion thereof, does not have to be on the hard surface or the traveled portion thereof to be in violation of this section. Simpson v. Wood, 260 N.C. 157, 132 S.E.2d 369 (1963).

Evidence that plaintiff was walking about two feet from the pavement on the right-hand side of the highway was sufficient to establish a violation of this section, which was evidence of negligence to be considered along with the other facts and circumstances involved in determining whether or not the plaintiff was guilty of contributory negligence. Simpson v. Wood, 260 N.C. 157, 132 S.E.2d 369 (1963).

Where the evidence failed to sustain plaintiff's allegation that his intestate was walking along the edge of the highway on his left side at the place provided by law and was struck by a board projecting from defendants' truck, defendants' motion to nonsuit was properly allowed for failure of plaintiff to establish negligence proximately causing the fatal injury. Pack v. Auman, 220 N.C. 704, 18 S.E.2d 247 (1942).

Duty of Motorist Generally. — A motorist must operate his vehicle at a reasonable rate of speed, keep a lookout for persons on or near the highway, decrease his speed when any special hazard exists with respect to pedestrians, and, if circumstances warrant, he must give warning of his approach by sounding his horn. Morris v. Minix, 4 N.C. App. 634, 167 S.E.2d 494 (1969).

Motorist May Assume Pedestrian Will Obey Law. — Where a pedestrian elects not to cross an intersection at a point where he has the right-of-way, but at a point where the motorist has the right-of-way, the motorist has the right to assume, until put on notice to the contrary, that the pedestrian will obey the law and yield the right-of-way. Jenkins v. Thomas, 260 N.C. 768, 133 S.E.2d 694 (1963).

Subsection (e) States the Common Law. — Both the common law and subsection (e) of this section provide that notwithstanding the provisions of subsection (d) "every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway." Lewis v. Watson, 229 N.C. 20, 47 S.E.2d 484 (1948).

Independent of statute, it is the duty of the motorist at common law to exercise due care to avoid colliding with a pedestrian. Gamble v. Sears, 252 N.C. 706, 114 S.E.2d 677 (1960).

Subsection (e) of this section states the common-law rule of negligence. Gathings v. Sehorn, 255 N.C. 503, 121 S.E.2d 873 (1961).

Motorist Must Use Due Care to Avoid Striking Pedestrian Who Fails to Yield Right-of-Way. — Even though a pedestrian failed to yield the right-of-way as required by this section, it was the duty of the driver of an approaching vehicle, both at common law and under the express provisions of subsection (e), to "exercise due care to avoid colliding with" the pedestrian. Simpson v. Curry, 237 N.C. 260, 74 S.E.2d 649 (1953); Landini v. Steelman, 243 N.C. 146, 90 S.E.2d 377 (1955); Gamble v. Sears, 252 N.C. 706, 114 S.E.2d 677 (1960).

It is the duty of a motor vehicle operator both at common law and under the express provisions of this section to "exercise due care to avoid colliding" with pedestrians on the highway. Rosser v. Smith, 260 N.C. 647, 133 S.E.2d 499 (1963); Wanner v. Alsup, 265 N.C. 308, 144 S.E.2d 18 (1965).

Or Pedestrian on Wrong Side of Highway. — The evidence disclosed that intestate was pushing his handcart on the right-hand side of the highway in violation of subsection (d) of this section, and was struck from the rear by a vehicle traveling in the same direction. Plaintiff's evidence was to the effect that the operator of the vehicle was traveling at excessive speed and failed to keep a proper lookout. It was held that the fact that intestate was traveling on the wrong side of the road did not render him guilty of contributory negligence as a matter of law upon the evidence, since the operator of a vehicle is under the duty notwithstanding the provisions of subsection (d) to exercise due care to avoid colliding with any pedestrian upon the highway. Lewis v. Watson, 229 N.C. 20, 47 S.E.2d 484 (1948). For a discussion of this case, see 27 N.C.L. Rev. 274.

A driver must make certain that pedestrians in front of him are aware of his approach. Wanner v. Alsup, 265 N.C. 308, 144 S.E.2d 18 (1965).

Duty Where Pedestrian Oblivious to Danger. — Where a pedestrian elects not to cross an intersection at a point where he has the right-of-way, but at a point where the motorist has the right-of-way, the mere fact that the pedestrian is oblivious to danger does not impose a duty on the motorist to yield the right-of-way; that duty arises when, and only when, the motorist sees, or in the exercise of reasonable care should see, that the pedestrian is not aware of the approaching danger and for that reason will continue to expose himself to peril. Jenkins v. Thomas, 260 N.C. 768, 133 S.E.2d 694 (1963).

Duty to Give Warning to Pedestrians. — An instruction that the violation of statutes regulating the operation of motor vehicles and the conduct of pedestrians on the highway would constitute negligence per se and would be actionable if the proximate cause of injury, is held without error when it appears that the instruction was applied solely to § 20-146 and this section, prescribing that vehicles should be operated on the right-hand side of the highway and that warning should be given pedestrians. Williams v. Woodward, 218 N.C. 305, 10 S.E.2d 913 (1940).

While ordinarily a motorist is not required to anticipate that a pedestrian will leave a place of safety and get in a line of travel, when the circumstances are such that it should appear to the motorist that a pedestrian is oblivious of his approach, or when he may reasonably anticipate the pedestrian will come into his way, it is his duty to give warning by sounding his horn. Williams, v. Henderson, 230 N.C. 707, 55 S.E.2d 462 (1949).

A workman crossing a highway in an area marked by signs reading "Men Working" is in a lawful place where he has a right to be, and when apparently oblivious of danger, he is entitled to a signal of approach as much as, if not more than, an ordinary pedestrian in the highway. Kellogg v. Thomas, 244 N.C. 722, 94 S.E.2d 903 (1956).

While a driver of a motor vehicle is not required to anticipate that a pedestrian seen in a place of safety will leave it and get in the danger zone until some demonstration or movement on his part reasonably indicates that fact, he must give warning to one on the highway or in close proximity to it, and not on a sidewalk, who is apparently oblivious of the approach of the car, or to one whom the driver in the exercise of ordinary care may reasonably anticipate will come into his way. Wanner v. Alsup, 265 N.C. 308, 144 S.E.2d 18 (1965).

It is a driver's duty to sound his horn in order that a pedestrian unaware of his approach may have timely warning. Wanner v. Alsup, 265 N.C. 308, 144 S.E.2d 18 (1965).

If it appears that the pedestrian is oblivious for the moment of the nearness of the car and of the speed at which it is approaching, ordinary care requires the driver to blow his horn, slow down, and, if necessary, stop to avoid inflicting injury. Wanner v. Alsup, 265 N.C. 308, 144 S.E.2d 18 (1965).

Duty of Motorist to Child. — This section imposes upon a driver the legal duty to exercise proper precaution to avoid injury to a child if by the exercise of reasonable care he can and should observe the child upon the street. Washington v. Davis, 249 N.C. 65, 105 S.E.2d 202 (1958).

In a prosecution of a motorist for manslaughter in the deaths of two small boys

who were struck by defendant's car as defendant was attempting to pass another vehicle traveling in the same direction, evidence that the children were walking on the hard surface when they were struck and that the preceding car speeded up as defendant attempted to pass it, requires the court to instruct the jury upon the conduct of the children in walking on the hard surface and the conduct of the other driver in increasing his speed as bearing upon the question of whether defendant's negligence was a proximate cause of the deaths. State v. Harrington, 260 N.C. 663, 133 S.E.2d 452 (1963).

The presence of children on or near the traveled portion of a highway whom a driver sees, or should see, places him under the duty to use due care to control the speed and movement of his vehicle and to keep a vigilant lookout to avoid injury. Anderson v. Smith, 29 N.C. App. 72, 223 S.E.2d 402 (1976).

The presence of children on or near a highway is a warning signal to a motorist, who must bear in mind that they have less capacity to shun danger than adults and are prone to act on impulse. Anderson v. Smith, 29 N.C. App. 72, 223 S.E.2d 402 (1976).

Violation of Section Not Negligence Per Se. — The violation by a pedestrian of subsections (a), (b) and (e) of this section is not negligence per se, but is evidence to be considered along with other evidence upon the question of a pedestrian's negligence. Moore v. Bezalla, 241 N.C. 190, 84 S.E.2d 817 (1954); Simpson v. Curry, 237 N.C. 260, 74 S.E.2d 649 (1953).

Violations of this section do not constitute negligence per se. Clark v. Bodycombe, 289 N.C. 246, 221 S.E.2d 506 (1976).

Crossing a street without a right-of-way is not negligence per se. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

The failure of a pedestrian to yield the right-of-way as required by subsection (a) is not contributory negligence per se, but is evidence to be considered with other evidence in the case upon the issue. Citizens Nat'l Bank v. Phillips, 236 N.C. 470, 73 S.E.2d 323 (1952); Simpson v. Curry, 237 N.C. 260, 74 S.E.2d 649 (1953); Goodson v. Williams, 237 N.C. 291, 74 S.E.2d 762 (1953); Landini v. Steelman, 243 N.C. 146, 90 S.E.2d 377 (1955); Gamble v. Sears, 252 N.C. 706, 114 S.E.2d 677 (1960).

It is to be left to the jury to consider a violation of this section as evidence of negligence along with the other evidence in determining whether or not a pedestrian contributed to his own injury and was, therefore, guilty of contributory negligence. Simpson v. Wood, 260 N.C. 157, 132 S.E.2d 369 (1963).

The failure of a pedestrian crossing a roadway at a point other than a crosswalk to yield the right-of-way to a motor vehicle is not contributory negligence per se; it is only evidence of negligence. Holloway v. Holloway, 262 N.C. 258, 136 S.E.2d 559 (1964); Blake v. Mallard, 262 N.C. 62, 136 S.E.2d 214 (1964); Price v. Miller, 271 N.C. 690, 157 S.E.2d 347 (1967).

However, the court will nonsuit a plaintiff-pedestrian on the ground of contributory negligence when all the evidence so clearly establishes his failure to yield the right-of-way as one of the proximate causes of his injuries that no other reasonable conclusion is possible. Blake v. Mallard, 262 N.C. 62, 136 S.E.2d 214 (1964); Price v. Miller, 271 N.C. 690, 157 S.E.2d 347 (1967).

The mere fact that a pedestrian attempts to cross a street at a point other than a crosswalk is not sufficient, standing alone, to support a finding of contributory negligence as a matter of law. Wanner v. Alsup, 265 N.C. 308, 144 S.E.2d 18 (1965).

Evidence tending to show that intestate failed to yield the right-of-way as required by subsection (a) may not be treated as amounting to contributory negligence as a matter of law, particularly so in view of testimony to the effect that intestate at the time he was struck had reached a point about 10 feet from the west curb of the street. Failure so to yield the right-of-way is not contributory negligence per se, but rather it is evidence of negligence to be considered with other evidence in the case in determining whether the actor is chargeable with negligence which proximately caused or contributed to his injury. Wanner v. Alsup, 265 N.C. 308, 144 S.E.2d 18 (1965).

A failure to yield the right-of-way required under this section is not contributory negligence per se, but rather it is evidence of negligence to be considered with other evidence in the case in determining whether the actor is chargeable with negligence which proximately caused or contributed to his injury. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969); Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975).

The evidence tending to show that intestate failed to yield the right-of-way as required by subsection (a) of this section may not be treated as amounting to contributory negligence as a matter of law. Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

A pedestrian's failure to yield the right-of-way is not contributory negligence per se, but rather it is evidence of negligence to be considered with other evidence in the case in determining whether the pedestrian is chargeable with negligence which proximately caused, or contributed to, his injury. Pompey v. Hyder, 9 N.C. App. 30, 175 S.E.2d 319 (1970).

Although the failure of a pedestrian crossing a roadway at a point other than a crosswalk to yield the right-of-way to a motor vehicle is not contributory negligence per se but is only evidence of negligence, the court will nonsuit a plaintiff-pedestrian on the ground of

contributory negligence when all the evidence so clearly establishes his failure to yield the right-of-way as one of the proximate causes of his injuries that no other reasonable conclusion is possible. Foster v. Shearin, 28 N.C. App. 51, 220 S.E.2d 179 (1975).

A pedestrian who crosses the street at a point where he does not have the right-of-way must constantly watch for on-coming traffic before he steps into the street and while he is crossing. If he sees a vehicle approaching him, he must move out of its path. A pedestrian who fails to take these precautions cannot be said to exercise reasonable care for his own safety. Brooks v. Boucher, 22 N.C. App. 676, 207 S.E.2d 282, cert. denied, 286 N.C. 211, 209 S.E.2d 319 (1974).

Upon consideration of a motion for a directed verdict, where it appears that plaintiff was proceeding along a dirt pathway beyond the curb on the north side of a street when she was confronted with an automobile blocking a driveway which traversed the path, plaintiff left the dirt path and walked along a gutter between the driveway and the portion of the street upon which vehicles ordinarily traveled, plaintiff was never more than 12 inches from the north curb of the street, and just before she reached the curb on the western side of the driveway she was struck by defendant's automobile, the evidence permits diverse inferences as to whether plaintiff acted in a reasonable manner and whether her acts proximately caused her injuries, and thus, the issue of contributory negligence should have been submitted to the jury. Clark v. Bodycombe, 289 N.C. 246, 221 S.E.2d 506 (1976).

The issue of contributory negligence was properly submitted to the jury in an action by a pedestrian for personal injuries sustained when he was struck by defendant's car, where evidence showed that plaintiff was crossing the roadway at an unmarked crossing in the path of an oncoming car which had the right-of-way. Maness v. Ingram, 29 N.C. App. 26, 222 S.E.2d 737 (1976).

It is to be left to the jury to consider a violation of subsection (d) of this section as evidence of negligence along with other evidence in determining whether or not the plaintiff contributed to his own injury and was, therefore, guilty of contributory negligence. Clark v. Bodycombe, 289 N.C. 246, 221 S.E.2d 506 (1976).

Failure to yield the right-of-way as required under subsection (a) is not negligence per se, but it does constitute evidence of negligence. Brooks v. Boucher, 22 N.C. App. 676, 207 S.E.2d 282, cert. denied, 286 N.C. 211, 209 S.E.2d 319 (1974).

Pedestrian Held Guilty of Contributory Negligence. — Plaintiff was guilty of contributory negligence as a matter of law in failing to yield the right-of-way to defendant's vehicle, which he should have seen in time to have avoided the injury if he had exercised reasonable care for his own safety and kept a timely lookout. Garmon v. Thomas, 241 N.C. 412, 85 S.E.2d 589 (1955).

Evidence established contributory negligence in that it disclosed that deceased was walking on the traveled portion of the highway otherwise than on his extreme left-hand side thereof, as required by this section. Miller v. Lewis & Holmes Motor Freight Corp., 218 N.C. 464, 11 S.E.2d 300 (1940).

Examples of Negligence of Pedestrians. — See Wagoner v. Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

Necessity for Instruction. — The evidence disclosed that intestate was pushing a handcart on the right side of the highway, and that he was struck from the rear by defendant's vehicle traveling in the same direction. Plaintiff contended that the handcart was a vehicle and that §§ 20-146 and 20-149 applied. Defendant contended that intestate was a pedestrian and was required by subsection (d) of this section to push the handcart along the extreme left-hand side of the highway. It was held that an instruction failing to define intestate's status and explain the law arising upon the evidence failed to meet the requirements of § 1-180. Lewis v. Watson, 229 N.C. 20, 47 S.E.2d 484 (1948).

When Failure to Charge Section Not Prejudicial. — Where the jury found that defendant was negligent, failure to charge specifically on this section would not be prejudicial to plaintiff. Gathings v. Sehorn, 255 N.C. 503, 121 S.E.2d 873 (1961).

Instructions as to Walking on Traveled Portion of Highway. — Where the evidence is conflicting as to whether plaintiff-pedestrian was walking on her left-hand or her right-hand side of the highway, the court should charge the jury on the various aspects of the evidence to the effect that if she was walking on her left-hand side of the highway it was her duty to yield the right-of-way to vehicles upon the roadway, and that if she was walking on her right-hand side it was in violation of the statute, subsections (a) and (d) of this section, and an instruction that the duty of a pedestrian to yield the right-of-way applies only to traffic approaching from the front when he is walking on his left side of the highway, must be held for error. Spencer v. McDowell Motor Co., 236 N.C. 239, 72 S.E.2d 598 (1952).

Instruction as to Crossing between Intersections Held Error. — Where all the evidence tended to show that the injured pedestrian had crossed the street in the middle of a block between intersections at which traffic-control signals were in operation, and there was no evidence that there was a marked crosswalk at the place, an instruction to the effect that the pedestrian had a right to cross in the middle of the block and that motorists were

under duty to do what was necessary for her protection, constituted prejudicial error. State v. Call, 236 N.C. 333, 72 S.E.2d 752 (1952).

Evidence Sufficient to Show Noncompliance with Subsection (e). — See Register v. Gibbs, 233 N.C. 456, 64 S.E.2d 280 (1951).

Evidence Disclosing Contributory Negligence of Pedestrian. — See Barbee v. Perry, 246 N.C. 538, 98 S.E.2d 794 (1957).

Evidence Warranting Nonsuit. — Evidence disclosing that plaintiff-pedestrian, instead of crossing at an intersection where he had the right-of-way, elected to cross some 100 feet south of the intersection, and that he was struck by defendant motorist who was traveling, with his lights on, some 25 miles per hour in a 35 mile per hour zone, was held to warrant nonsuit in the absence of evidence not only that plaintiff was oblivious to the danger but that defendant saw, or in the exercise of reasonable care should have seen, that plaintiff was not aware of the approaching danger. Jenkins v. Thomas, 260 N.C. 768, 133 S.E.2d 694 (1963).

Applied in Sparks v. Willis, 228 N.C. 25, 44 S.E.2d 343 (1947) (as to subsection (e)); Combs v. United States, 122 F. Supp. 280 (E.D.N.C. 1954) (as to subsection (e)); Holland v. Malpass, 255 N.C. 395, 121 S.E.2d 576 (1961) (as to subsection (a)); Nix v. Earley, 263 N.C. 795, 140 S.E.2d 402 (1965); Jones v. Smith, 3 N.C. App. 396, 165 S.E.2d 56 (1969); Swain v. Williamson, 4 N.C. App. 622, 167 S.E.2d 491 (1969); Anderson v. Mann, 9 N.C. App. 397, 176 S.E.2d 365 (1970); Clark v. Bodycombe, 27 N.C. App. 146, 218 S.E.2d 216 (1975); Brooks v. Smith, 27 N.C. App. 223, 218 S.E.2d 489 (1975).

Cited in Metcalf v. Foister, 232 N.C. 355, 61 S.E.2d 77 (1950); Keaton v. Blue Bird Taxi Co. of Asheville, Inc., 241 N.C. 589, 86 S.E.2d 93 (1955); Jenks v. Morrison, 258 N.C. 96, 127 S.E.2d 895 (1962); Webb v. Felton, 266 N.C. 707, 147 S.E.2d 219 (1966); Bowen v. Gardner, 275 N.C. 363, 168 S.E.2d 47 (1969); Duke v. Meisky, 12 N.C. App. 329, 183 S.E.2d 292 (1971).

§ 20-174.1. Standing, sitting or lying upon highways or streets prohibited.

— (a) No person shall willfully stand, sit, or lie upon the highway or street in such a manner as to impede the regular flow of traffic.

(b) Any person convicted of violating this section shall be punished by a fine not exceeding five hundred dollars ($500.00) or by imprisonment not exceeding six months, or both, in the discretion of the court. (1965, c. 137; 1969, c. 1012.)

Editor's Note. — For article dealing with the legal problems in southern desegregation, see 43 N.C.L. Rev. 689 (1965).

The legislative intent is to prohibit and punish those who willfully place themselves upon the streets and highways of the State in such manner as to impede the regular flow of traffic. State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Frinks, 22 N.C. App. 584, 207 S.E.2d 380 (1974).

The legislature intended to make it unlawful for any person to impede the regular flow of traffic upon the streets and highways of the State by willfully placing his body thereon in either a standing, lying or sitting position. State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970).

Conduct Constituting Violation of Section. — A person may stand and walk, stand and strut, stand and run, or stand still. All these acts are condemned by this section when done willfully in such manner as to impede the regular flow of traffic upon a public street or highway. State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Frinks, 22 N.C. App. 584, 207 S.E.2d 380 (1974).

Conduct of the defendants in walking slowly back and forth across a public highway in such a manner as to cause traffic to be blocked in both directions is within the purview of this section, making it unlawful for any person to willfully stand upon a highway and impede the regular flow of traffic; and the trial court correctly charged that "if the defendants were on the highway and standing, whether they were standing still or walking is of no consequence," since standing is an integral and necessary part of the act of walking. State v. Spencer, 7 N.C. App. 282, 172 S.E.2d 280, aff'd, 276 N.C. 535, 173 S.E.2d 765 (1970).

Instructions. — Trial court's charge to the jury when it read the warrant, which charged defendants with "feloniously" sitting, in defining the violation of this section was not prejudicial when the charge was considered in its entirety. State v. Frinks, 22 N.C. App. 584, 207 S.E.2d 380 (1974).

The punishment ceiling imposed by § 20-176(b) does not apply to this section. State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970).

Applied in In re Burrus, 4 N.C. App. 523, 167 S.E.2d 454 (1969); In re Shelton, 5 N.C. App. 487, 168 S.E.2d 695 (1969); In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969).

Cited in State v. Gibbs, 8 N.C. App. 339, 174 S.E.2d 119 (1970); State v. Evans, 8 N.C. App. 469, 174 S.E.2d 680 (1970); McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971); State v. Godwin, 13 N.C. App. 700, 187 S.E.2d 400 (1972); State v. Murrell, 18 N.C. App. 327, 196 S.E.2d 606 (1973).

§ 20-175. Pedestrians soliciting rides, employment, business or funds upon highways or streets. — (a) No person shall stand in any portion of the State highways, except upon the shoulders thereof, for the purpose of soliciting a ride from the driver of any motor vehicle.

(b) No person shall stand or loiter in the main traveled portion, including the shoulders and median, of any State highway or street, excluding sidewalks, or stop any motor vehicle for the purpose of soliciting employment, business or contributions from the driver or occupant of any motor vehicle that impedes the normal movement of traffic on the public highways or streets: Provided that the provisions of this subsection shall not apply to licensees, employees or contractors of the Department of Transportation or of any municipality engaged in construction or maintenance or in making traffic or engineering surveys.

(c) Repealed by Session Laws 1973, c. 1330, s. 39. (1937, c. 407, s. 136; 1965, c. 673, 1973, c. 507, s. 5; c. 1330, s. 39; 1977, c. 464, s. 34.)

Editor's Note. The 1977 amendment substituted "Department of Transportation" for "Board of Transportation" in subsection (b).

Acts Not Constituting Violation of Section. — Standing or loitering on the main traveled portion of the highway, soliciting employment, business or contributions from driver or occupant of motor vehicle does not constitute a violation of this section if the acts do not result in impeding the normal movement of traffic. Opinion of Attorney General to Mr. Carl V. Venters, 41 N.C.A.G. 528 (1971).

Part 11A. Blind Pedestrians — White Canes or Guide Dogs.

§ 20-175.1. Public use of white canes by other than blind persons prohibited. — It shall be unlawful for any person, except one who is wholly or partially blind, to carry or use on any street or highway, or in any other public place, a cane or walking stick which is white in color or white tipped with red. (1949, c. 324, s. 1.)

§ 20-175.2. Right-of-way at crossings, intersections and traffic-control signal points; white cane or guide dog to serve as signal for the blind. — At any street, road or highway crossing or intersection, where the movement of traffic is not regulated by a traffic officer or by traffic-control signals, any blind or partially blind pedestrian shall be entitled to the right-of-way at such crossing or intersection, if such blind or partially blind pedestrian shall extend before him at arm's length a cane white in color or white tipped with red, or if such person is accompanied by a guide dog. Upon receiving such a signal, all vehicles at or approaching such intersection or crossing shall come to a full stop, leaving a clear lane through which such pedestrian may pass, and such vehicle shall remain stationary until such blind or partially blind pedestrian has completed the passage of such crossing or intersection. At any street, road or highway crossing or intersection, where the movement of traffic is regulated by traffic-control signals, blind or partially blind pedestrians shall be entitled to the right-of-way if such person having such cane or accompanied by a guide dog shall be partly across such crossing or intersection at the time the traffic-control signals change, and all vehicles shall stop and remain stationary until such pedestrian has completed passage across the intersection or crossing. (1949, c. 324, s. 2.)

§ 20-175.3. Rights and privileges of blind persons without white cane or guide dog. — Nothing contained in this Part shall be construed to deprive any blind or partially blind person not carrying a cane white in color or white tipped with red, or being accompanied by a guide dog, of any of the rights and privileges conferred by law upon pedestrians crossing streets and highways, nor shall the failure of such blind or partially blind person to carry a cane white in color or white tipped with red, or to be accompanied by a guide dog, upon the streets,

roads, highways or sidewalks of this State, be held to constitute or be evidence of contributory negligence by virtue of this Part. (1949, c. 324, s. 3.)

§ 20-175.4: Repealed by Session Laws 1973, c. 1330, s. 39.

Part 12. Sentencing; Penalties.

§ 20-176. Penalty for misdemeanor. — (a) It shall be unlawful and constitute a misdemeanor for any person to violate any of the provisions of this Article unless such violation is by this Article or other law of this State declared to be a felony.

(b) Unless another penalty is in this Article or by the laws of this State provided, every person convicted of a misdemeanor for the violation of any provision of this Article shall be punished by a fine of not more than one hundred dollars ($100.00) or by imprisonment in the county or municipal jail for not more than 60 days, or by both such fine and imprisonment. (1937, c. 407, s. 137; 1951, c. 1013, s. 7; 1957, c. 1255; 1967, c. 674, s. 3; 1969, c. 378, s. 3; 1973, c. 1330, s. 34; 1975, c. 644.)

Editor's Note. — The 1975 amendment deleted in subsection (b) a proviso which set a lesser punishment for certain violations.

Some of the cases cited below were decided under corresponding provisions of the former law.

Strict Construction of Penal Provisions. — Inasmuch as this Article contains provisions of a highly penal nature, and, although it is within the police power, the courts will not, by construction, extend its penal provisions unless the case comes within the letter of the law, and within its meaning and palpable design. Security Fin. Co. v. Hendry, 189 N.C. 549, 127 S.E. 629 (1925); Carolina Disct. Corp. v. Landis Motor Co., 190 N.C. 157, 129 S.E. 414 (1925).

Violations of Motor Vehicle Law as Evidence of Guilt of Murder, Manslaughter or Assault and Battery. — In addition to being liable to punishment under these statutes, it is possible for a person to be so negligent in the violation in disregarding the rights of others as to be guilty of other crimes at the same time. For example, although it is a misdemeanor to violate the statute regulating the law of the road as to speed under the Motor Vehicle Law, one may also be guilty of murder, manslaughter or assault and battery if he is so reckless in the violation that he runs down and kills or injures another, if the elements essential to constitute such crimes are present in the violation. State v. McIver, 175 N.C. 761, 94 S.E. 682 (1917); State v. Gash, 177 N.C. 595, 99 S.E. 337 (1919). And evidence of violation of this Chapter is admissible upon such trials. State v. Sudderth, 184 N.C. 753, 114 S.E. 828 (1922).

This section does not apply to the various sections where punishment is specified as fine or imprisonment or both in the discretion of the court with no maximum limitation being specified. State v. Spencer, 7 N.C. App. 282, 172 S.E.2d 280, aff'd, 276 N.C. 535, 173 S.E.2d 765 (1970).

The maximum punishment for a violation of § 20-63 or 20-111 would be that prescribed by subsection (b) of this section, namely, a fine of not more than $100.00 or imprisonment in the county or municipal jail for not more than 60 days, or both such fine and imprisonment. State v. Tolley, 271 N.C. 459, 156 S.E.2d 858 (1967).

Driving Without Lights. — Subsection (b) prescribes punishment for driving a motor vehicle without lights during the period from a half hour after sunset to a half hour before sunrise in violation of § 20-129. State v. Eason, 242 N.C. 59, 86 S.E.2d 774 (1955).

Operating a motor vehicle on a public highway at night and without lights is a violation of § 20-129. Such violation is a misdemeanor under this section, and is negligence per se. Williamson v. Varner, 252 N.C. 446, 114 S.E.2d 92 (1960).

Every person convicted of speeding in violation of § 20-141, where the speed is not in excess of 80 miles per hour, shall be punished by a fine of not more than $100.00 or by imprisonment in the county or municipal jail for not more than 60 days, or by both such fine and imprisonment. State v. Tolley, 271 N.C. 459, 156 S.E.2d 858 (1967).

The violation of § 20-162 by parking within 25 feet from the intersection of curb lines at an intersection of highways within a municipality is a misdemeanor, notwithstanding that the prima facie rule of evidence created by § 20-162.1 is invoked. State v. Rumfelt, 241 N.C. 375, 85 S.E.2d 398 (1955).

The punishment ceiling imposed by subsection (b) does not apply to § 20-174.1. State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970).

Applied in State v. Daughtry, 236 N.C. 316, 72 S.E.2d 658 (1952); State v. Massey, 265 N.C. 579,

144 S.E.2d 649 (1965); State v. Craig, 21 N.C. App. 51, 203 S.E.2d 401 (1974).

Quoted in State v. Wooten, 228 N.C. 628, 46 S.E.2d 868 (1948); State v. Zimmerman, 7 N.C. App. 522, 173 S.E.2d 35 (1970).

Cited in State v. Mickle, 194 N.C. 808, 140 S.E. 150 (1927); Lancaster v. B. & H. Coach Line, 198 N.C. 107, 150 S.E. 716 (1929); Hinson v. Dawson, 241 N.C. 714, 86 S.E.2d 585 (1955); State v. Baucom, 244 N.C. 61, 92 S.E.2d 426 (1956); McEwen Funeral Serv., Inc. v. Charlotte City Coach Lines, 248 N.C. 146, 102 S.E.2d 816 (1958); State v. Speights, 280 N.C. 137, 185 S.E.2d 152 (1971); State v. Murrell, 18 N.C. App. 327, 196 S.E.2d 606 (1973).

§ 20-177. Penalty for felony. — Any person who shall be convicted of a violation of any of the provisions of this Article herein or by the laws of this State declared to constitute a felony shall, unless a different penalty is prescribed herein or by the laws of this State, be punished by imprisonment in the State prison for a term not less than one year nor more than five years, or by a fine of not less than five hundred dollars ($500.00) nor more than five thousand dollars ($5,000), or by both fine and imprisonment. (1937, c. 407, s. 138.)

§ 20-178. Penalty for bad check. — When any person, firm, or corporation shall tender to the Division any uncertified check for payment of any tax, fee or other obligation due by him under the provisions of this Article, and the bank upon which such check shall be drawn shall refuse to pay it on account of insufficient funds of the drawer on deposit in such bank, and such check shall be returned to the Division, an additional tax shall be imposed by the Division upon such person, firm or corporation, which additional tax shall be equal to ten percent (10%) of the tax or fee in payment of which such check was tendered: Provided, that in no case shall the additional tax be less than one dollar ($1.00); provided, further, that no additional tax shall be imposed if, at the time such check was presented for payment, the drawer had on deposit in any bank of this State funds sufficient to pay such check and by inadvertence failed to draw the check upon such bank, or upon the proper account therein. The additional tax imposed by this section shall not be waived or diminished by the Division. (1937, c. 407, s. 139; 1953, c. 1144; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

§ 20-179. Penalty for driving or operating vehicle while under the influence of intoxicating liquor, narcotic drugs, or other impairing drugs; limited driving permits for first offenders. — (a) Every person who is convicted of violating G.S. 20-138, 20-139(a), or 20-139(b) shall be punished as follows:

(1) For the first offense, a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), by imprisonment for not less than 30 days nor more than six months, or by both such fine and imprisonment, in the discretion of the court.

(2) For a second conviction of any offense under G.S. 20-138, 20-139(a), or 20-139(b), by a fine of not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00), by imprisonment for not less than two months nor more than six months, or by both such fine and imprisonment, in the discretion of the court.

(3) For a third or subsequent conviction of any offense under G.S. 20-138, 20-139(a), or 20-139(b), by a fine of not less than five hundred dollars ($500.00), by imprisonment for not more than two years, or by both such fine and imprisonment, in the discretion of the court.

(b) (1) Upon a first conviction only, the trial judge may when feasible allow a limited driving privilege or license to the person convicted for proper purposes reasonably connected with the health, education and welfare of the person convicted and his family. For purposes of determining

whether conviction is a first conviction, no prior offense occurring more than 10 years before the date of the current offense shall be considered. The judge may impose upon such limited driving privilege any restrictions as in his discretion are deemed advisable including, but not limited to, conditions of days, hours, types of vehicles, routes, geographical boundaries and specific purposes for which limited driving privilege is allowed. Any such limited driving privilege allowed and restrictions imposed thereon shall be specifically recorded in a written judgment which shall be as near as practical to that hereinafter set forth and shall be signed by the trial judge and shall be affixed with the seal of the court and shall be made a part of the records of the said court. A copy of said judgment shall be transmitted to the Division of Motor Vehicles along with any operator's or chauffeur's license in the possession of the person convicted and a notice of the conviction. Such permit issued hereunder shall be valid for such length of time as shall be set forth in the judgment of the trial judge. Such permit shall constitute a valid license to operate motor vehicles upon the streets and highways of this or any other state in accordance with the restrictions noted thereon and shall be subject to all provisions of law relating to operator's or chauffeur's license not by their nature rendered inapplicable.

(2) The judgment issued by the trial judge as herein permitted shall as near as practical be in form and contents as follows:

STATE OF NORTH CAROLINA COUNTY OF	IN THE GENERAL COURT OF JUSTICE RESTRICTED DRIVING PRIVILEGES

This cause coming on to be heard and being heard before the Honorable . . . . . ., Judge presiding, and it appearing to the Court that the defendant, ..., has been convicted of the offense of (describe offense under G.S. 20-138, 20-139(a) or 20-139(b) or as appropriate), and it further appearing to the court that the defendant should be issued a restrictive driving license and is entitled to the issuance of a restrictive driving privilege under and by the authority of G.S. 20-179(b);

Now, therefore, it is ordered, adjudged and decreed that the defendant be allowed to operate a motor vehicle under the following conditions and under no other circumstances.

Name: . . . . . .

Race: . . . . . Sex: . . . . . .

Height: . . . . . Weight: . . . . . .

Color of Hair: . . . . . Color of Eyes: . . . . . .

Birth Date: . . . . . .

Driver's License Number: . . . . . .

Signature of Licensee: . . . . . .

Conditions of Restriction: . . . . . .

Type of Vehicle: . . . . . .

Geographic Restrictions: . . . . . .

Hours of Restriction: . . . . . .

Other Restrictions: . . . . . .

This limited license shall be effective from . . . . . to . . . . . subject to further orders as the court in its discretion may deem necessary and proper.

This the . . . . . day of . . . . . ., 19. . . .

. . . . . .

(Judge Presiding)

(3) Upon conviction of such offense outside the jurisdiction of this State the person so convicted may apply to the presiding or resident judge of the superior court or district court judge of the district in which he resides for limited driving privileges herein before defined. Upon such application the judge shall have the authority to issue such limited driving privileges in the same manner as if he were the trial judge.

(4) Any violation of the restrictive driving privileges as set forth in the judgment of the trial judge allowing such privileges shall constitute the offense of driving while license has been revoked as set forth in G.S. 20-28. Whenever a person is charged with operating a motor vehicle in violation of the restrictions, the limited driving privilege shall be suspended pending the final disposition of the charge.

(5) This section is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina. (1937, c. 407, s. 140; 1947, c. 1067, s. 18; 1967, c. 510; 1969, c. 50; c. 1283, ss. 1-5; 1971, c. 619, s. 16; c. 1133, s. 1; 1975, c. 716, s. 5; 1977, c. 125.)

Cross References. — As to alleging and proving prior convictions, see §§ 15A-924, 15A-928. As to mandatory revocation of license for driving under the influence of liquor or drugs, see § 20-17, subdivision (2). As to operation of vehicles under the influence of intoxicating liquor, see § 20-138 and the note thereto. As to operation of vehicles under the influence of drugs, see § 20-139 and the note thereto.

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subdivision (b)(1).

The 1977 amendment inserted "presiding or" and "or district court judge" in the first sentence of subdivision (b)(3).

Opinions of Attorney General. — Representative G. Hunter Warlick, Hickory, 40 N.C.A.G. 412 (1969); Commissioner Joe W. Garrett, Department of Motor Vehicles, 40 N.C.A.G. 415 (1969); Mr. John B. Whitley, District Prosecutor, Twenty-sixth Judicial District, 40 N.C.A.G. 409 (1969); Mr. Robert C. Powell, Attorney at Law, 40 N.C.A.G. 401 (1969); Honorable Walter W. Cohoon, Resident Judge, First Judicial District, 40 N.C.A.G. 410 (1969); Mr. W.E. Crosswhite, Solicitor, Statesville Recorder's Court, 40 N.C.A.G. 422 (1969); Honorable John S. Gardner, District Court Judge, Sixteenth Judicial District, 40 N.C.A.G. 420 (1969).

Section Relates Only to Punishment. — This section, with respect to second, third, and subsequent offenses, relates only to punishment. State v. White, 246 N.C. 587, 99 S.E.2d 772 (1957).

Allegation of Prior Conviction Required. — To make a person subject to the infliction of the heavier punishment to be imposed by the court for a second offense of driving while under the influence of intoxicating liquor or narcotic drugs, pursuant to this section, it is necessary that a prior conviction be alleged in the indictment or warrant for the second offense. Harrell v. Scheidt, 243 N.C. 735, 92 S.E.2d 182 (1956).

For a defendant to be subjected under this section to the infliction of the heavier punishment for a second offense of driving while under the influence of intoxicating liquor, it is necessary that a prior conviction, and the time and place thereof, be alleged in the warrant and proved by the State. State v. Owenby, 10 N.C. App. 170, 177 S.E.2d 749 (1970); State v. Williams, 21 N.C. App. 70, 203 S.E.2d 399 (1974).

Effect of Allegation in Warrant on Appeal to Superior Court. — Where the violation charged in the original warrant in the recorder's court alleged such violation as being a second offense, and the jurisdiction of the superior court was derivative, the superior court had no power to impose a penalty greater than that provided for a second offense, although the indictment in the superior court charged the violation as a third offense. State v. White, 246 N.C. 587, 99 S.E.2d 772 (1957).

Amendment of Warrant. — The trial court has discretionary power to permit the amendment of a warrant charging defendant with operating a motor vehicle upon a public highway while under the influence of intoxicating liquor, so as to charge that the offense was a third offense, since the amendment does not change the nature of the offense but relates solely to punishment. State v. Broome, 269 N.C. 661, 153 S.E.2d 384 (1967).

Evidence and Procedure in Prosecution for Subsequent Offense. — No more evidence is required to convict a defendant for "drunk driving" pursuant to the provisions of this section for a second, third, or subsequent offense than is required for a conviction for a first offense, the only difference being that the State in such cases is required to allege and

prove the second, third, or subsequent offenses before it is entitled to subject the accused to the higher penalty. Furthermore, in such cases, the defendant is entitled to know whether or not the State is seeking to exact a higher penalty because of a previous conviction or convictions. State v. White, 246 N.C. 587, 99 S.E.2d 772 (1957).

Admissibility of Evidence of Prior Conviction. — Evidence that a defendant has been previously convicted of drunken driving is admissible in a prosecution charging defendant with a second offense of drunken driving, even though the defendant neither testified as a witness nor offered evidence of good character. State v. Owenby, 10 N.C. App. 170, 177 S.E.2d 749 (1970).

Out-of-State Convictions. — If it is the clear intent of the legislature to count out-of-state convictions in permanently depriving one of his license under § 20-19(e), it is logical to conclude that the legislature intended them to count for purposes of granting limited driving privileges under subdivision (b)(1) of this section. In re Sparks, 25 N.C. App. 65, 212 S.E.2d 220 (1975).

It is reasonable to assume that the legislative amendment in 1971 adding "or as appropriate" to the offenses to be listed in the form judgment of subdivision (b)(2) was referring to out-of-state convictions. In re Sparks, 25 N.C. App. 65, 212 S.E.2d 220 (1975).

In view of the legislative recognition of out-of-state convictions in other subdivisions of subsection (b), and the fundamental rule of construction that sections and acts in pari materia, and all parts thereof, should be construed together on out-of-state conviction within 10 years of the present offense abrogates the discretion of a judge to grant a limited permit. In re Sparks, 25 N.C. App. 65, 212 S.E.2d 220 (1975).

Subdivision (b)(1) is a license reinstatement provision, and insofar as the court has already held that the clear legislative intent under a penal provision was to count prior out-of-state convictions, it becomes very difficult to discount them under a grace type provision. In re Sparks, 25 N.C. App. 65, 212 S.E.2d 220 (1975).

Judgment upon Ex Parte Request. — Judge's execution judgments allowing limited driving privileges under this section upon a mere ex parte request without making any effort or conducting any inquiry to ascertain whether the facts recited in the judgments were true and whether he was lawfully entitled to enter the judgments and without giving the State an opportunity to be heard when in truth the judgments were supported neither in fact nor in law and were beyond the judge's jurisdiction to enter constituted a gross abuse of important provisions of the motor vehicle statutes and amounted to conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Under § 20-24(c), a bond forfeiture is equivalent to a conviction. In re Sparks, 25 N.C. App. 65, 212 S.E.2d 220 (1975).

A plea of nolo contendere in a prior case is not the equivalent of a plea of guilty as a basis for the pronouncement of judgment under this section. State v. Stone, 245 N.C. 42, 95 S.E.2d 77 (1956); State v. Michaels, 11 N.C. App. 110, 180 S.E.2d 442 (1971).

Where an indictment for driving a motor vehicle while under the influence of intoxicating liquor charges that defendant had theretofore been twice convicted for like offenses, but the proof discloses that defendant had entered a plea of nolo contendere in one of the prior instances, the court should not submit such instance to the jury, and the court's action in admitting evidence thereof must be held prejudicial. State v. Stone, 245 N.C. 42, 95 S.E.2d 77 (1956).

If the State fails in its proof as to one or more of the alleged prior convictions, this fact does not defeat the entire prosecution and require a verdict of not guilty. Rather, the court before submitting the case will eliminate the allegations in the warrant or indictment of which there is no competent evidence; and the jury, in returning their verdict, will eliminate the allegations which are not established by the evidence beyond a reasonable doubt. In short, the verdict should spell out, first, whether the jury find the defendant guilty of the violation of § 20-138 charged in the warrant or indictment, and if so, whether they further find that he was convicted of one or more of the alleged prior violations thereof. State v. Stone, 245 N.C. 42, 95 S.E.2d 77 (1956).

Question of Former Conviction Should Be Submitted to Jury. — Where there is allegation and evidence that defendant had been adjudged guilty of violating § 20-138 on a prior occasion, but this feature was in no way submitted to or passed on by the jury, a verdict of guilty cannot be regarded as a conviction of a second offense within the meaning of this section. Whether there was a former conviction or not was for the jury, not for the court. State v. Cole, 241 N.C. 576, 86 S.E.2d 203 (1955).

Whether there was in fact a prior conviction under this section is a question for the jury and not the court. State v. Owenby, 10 N.C. App. 170, 177 S.E.2d 749 (1970).

Verdict Insufficient to Support Judgment. — The jury's verdict of "guilty of driving automobile under the influence" was insufficient to support the judgment against defendant in a prosecution for driving under the influence of intoxicating liquor, second offense, because the verdict neither alluded to the warrant nor used language to show a conviction

of the offense charged therein. State v. Medlin, 15 N.C. App. 434, 190 S.E.2d 425 (1972).

Two Years' Imprisonment for First Offense Not Cruel or Unusual Punishment. — This section fixes no maximum period of imprisonment as punishment for the first offense of a violation of § 20-138, and it is well settled law in this jurisdiction that when no maximum time is fixed by the statute an imprisonment for two years will not be held cruel or unusual punishment, as prohibited by N.C. Const., Art. I, § 27. State v. Lee, 247 N.C. 230, 100 S.E.2d 372 (1957); State v. Morris, 275 N.C. 50, 165 S.E.2d 245 (1969).

The offense condemned by § 20-138 is a general misdemeanor for which an offender, for the first offense, may be imprisoned for two years in the discretion of the court. State v. Morris, 275 N.C. 50, 165 S.E.2d 245 (1969).

Sentences Not Excessive. — A sentence to the county jail for a term of six months, and to be assigned to work on the public roads, upon defendant's plea of nolo contendere to a warrant charging him with the operation of an automobile upon the public highways while under the influence of intoxicating liquor, is not excessive. State v. Parker, 220 N.C. 416, 17 S.E.2d 475 (1941).

Under this section a maximum sentence of two years may be imposed, and therefore a sentence of six months in prison is not excessive. State v. Grant, 3 N.C. App. 586, 165 S.E.2d 505 (1969).

Revocation of License Not Part of Punishment Fixed by Court. — See § 20-17 and the note thereto.

License Suspensions Held Separate and Distinct Revocations. — The suspension of a license for refusal to submit to a chemical test at the time of an arrest for drunken driving and a suspension which results from a plea of guilty or a conviction of that charge are separate and distinct revocations. Vuncannon v. Garrett, 17 N.C. App. 440, 194 S.E.2d 364 (1973).

Suspension of Sentence on Condition Defendant Not Operate Motor Vehicle during Period of Suspension. — Upon defendant's conviction of operating a motor vehicle while under the influence of intoxicating beverage, the court may not suspend judgment upon condition that the defendant not operate a motor vehicle upon the public roads during the period of suspension unless defendant consents thereto, expressly or by implication. State v. Cole, 241 N.C. 576, 86 S.E.2d 203 (1955).

District Court Judge May Now Grant Limited Driving Privilege without Suspended Sentence. — See opinion of Attorney General to Mr. J.E. Holshouser, Sr., 41 N.C.A.G. 659 (1971).

Ten-Year Limitation in § 20-36 Applies only to Department of Motor Vehicle Action. — See opinion of Attorney General to Honorable Robert A. Collier, Jr., 41 N.C.A.G. 322 (1971).

Ten-Year Limitation in Subsection (b)(1) Applies Only to Consideration by Trial Judge of Feasibility of Allowing Limited Driving Privilege. — See opinion of Attorney General to Solicitor F. Ogden Parker, 41 N.C.A.G. 535 (1971).

Authority to Modify Limited Driving Privileges Judgment. — See opinion of Attorney General to Honorable Charles M. Johnson, Clerk of Superior Court, Montgomery County, 40 N.C.A.G. 418 (1970).

Except for period from February 19, 1971, to July 21, 1971, trial judge has no authority to modify judgment to allow limited driving privileges when such judgment was entered at past session of district court. Opinion of Attorney General to Honorable J. Ray Braswell, 21 N.C.A.G. 706 (1971).

Status of Limited Driving Privilege When Defendant Violates Provisions; Disposition of Judgment. — See opinion of Attorney General to Honorable Wm. Pope Barfield, Magistrate, Harnett County, 40 N.C.A.G. 407 (1970).

Subsection (b)(4) speaks of "any violation," not just knowing or willful violations of the conditions of a restrictive driving privilege; therefore, if a defendant was not "at work" when he drove the automobile on May 15, 1971, while his restrictive driving privilege was effective, then he is guilty of violation of § 20-28 regardless of his intent, or whether he thought he was "at work." State v. Hurley, 18 N.C. App. 285, 196 S.E.2d 542 (1973).

Department of Motor Vehicles May Revoke Limited Driving Privilege Granted by Court. — See opinion of Attorney General to Mr. Joe W. Garrett, Commissioner, N.C. Department of Motor Vehicles, 40 N.C.A.G. 414 (1970).

Driver accompanying operator holding learning permit may hold restricted driving permit if holder is within restrictions noted and if person with learner's permit is member of his family. Opinion of Attorney General to Lt. O.H. Page, 41 N.C.A.G. 596 (1971).

Applied in State v. Blankenship, 229 N.C. 589, 50 S.E.2d 724 (1948); State v. Nall, 239 N.C. 60, 79 S.E.2d 354 (1953); State v. Broadway, 256 N.C. 608, 124 S.E.2d 568 (1962); State v. Morgan, 263 N.C. 400, 139 S.E.2d 708 (1965); State v. Gallamore, 6 N.C. App. 608, 170 S.E.2d 573 (1969); State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Tuggle, 17 N.C. App. 329, 194 S.E.2d 50 (1973).

Stated in Fox v. Scheidt, 241 N.C. 31, 84 S.E.2d 259 (1954); State v. Green, 251 N.C. 141, 110 S.E.2d 805 (1959).

Cited in State v. Ball, 255 N.C. 351, 121 S.E.2d 604 (1961); State v. Thompson, 257 N.C. 452, 126 S.E.2d 58 (1962); Brewer v. Garner, 264 N.C. 384, 141 S.E.2d 806 (1965); Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971); State v. Brown,

13 N.C. App. 327, 185 S.E.2d 453 (1971); State v. Burris, 17 N.C. App. 710, 195 S.E.2d 345 (1973); Helms v. Powell, 32 N.C. App. 266. 231 S.E.2d 912 (1977).

§ 20-179.1. Presentence investigation of persons convicted of driving while under the influence of intoxicating liquor. — (a) In the case of a first or subsequent conviction of driving a motor vehicle upon a highway while under the influence of intoxicating liquor, the trial judge may request a presentence investigation to determine whether a person convicted of such offense would benefit from treatment for persons who are habitual users of alcohol. Provided however, if the person convicted objects, the sentence of the court shall be entered.

(b) In any case, the trial court may order suitable treatment for the person, as a condition for suspension of a sentence, in addition to imposing any penalties required by this Article. (1973, c. 612.)

§ 20-180: Repealed by Session Laws 1973, c. 1330, s. 39.

§ 20-181. Penalty for failure to dim, etc., beams of headlamps. — Any person operating a motor vehicle on the highways of this State, who shall fail to shift, depress, deflect, tilt or dim the beams of the headlamps thereon whenever another vehicle is met on such highways or when following another vehicle at a distance of less than 200 feet, except when engaged in the act of overtaking and passing shall, upon conviction thereof, be fined not more than ten dollars ($10.00) or imprisoned for not more than 10 days. (1939, c. 351, s. 3; 1955, c. 913, s. 1.)

Cross Reference. — As to conviction not being ground for revocation of operator's or chauffeur's license, see § 20-18.

Cars are required to dim or slant their headlights in passing. Cummins v. Southern Fruit Co., 225 N.C. 625, 36 S.E.2d 11 (1945).

Right to Assume That Approaching Driver Will Dim Lights. — A motorist may assume that whenever he meets another motor vehicle traveling in the opposite direction, its driver will seasonably dim its headlights and not persist in projecting its glaring light into his eyes. Chaffin v. Brame, 233 N.C. 377, 64 S.E.2d 276 (1951); United States v. First-Citizens Bank & Trust Co., 208 F.2d 280 (4th Cir.), aff'g Rosenblatt v. United States, 112 F. Supp. 114 (E.D.N.C. 1953).

Applied in Keener v. Beal, 246 N.C. 247, 98 S.E.2d 19 (1957); Beasley v. Williams, 260 N.C. 561, 133 S.E.2d 227 (1963).

§ 20-182. Penalty for failure to stop in event of accident involving injury or death to a person. — Every person convicted of willfully violating G.S. 20-166, relative to the duties to stop or render aid or give the information required in the event of accidents, except as otherwise provided, involving injury or death to a person, shall be punished by imprisonment for not less than one nor more than five years, or in the State prison for not less than one nor more than five years, or by fine of not less than five hundred dollars ($500.00) or by both such fine and imprisonment. The Commissioner shall revoke the operator's or chauffeur's license of the person so convicted. In no case shall the court have power to suspend judgment upon payment of costs. (1937, c. 407, s. 142; 1955, c. 913, s. 8.)

Cross Reference. — As to mandatory revocation of license in event of failure to stop and render aid in case of accident, see § 20-17, subdivision (4).

Instruction. — The defendant was entitled to have the trial judge instruct the jury that the burden was on the State to establish beyond a reasonable doubt that the defendant knowingly or intentionally failed to render reasonable assistance to his injured passenger, including the carrying of him to a physician or surgeon for medical or surgical treatment if it was apparent that such treatment was necessary. State v. Coggin, 263 N.C. 457, 139 S.E.2d 701 (1965).

Applied in State v. Smith, 238 N.C. 82, 76 S.E.2d 363 (1953).

Cited in State v. King, 219 N.C. 667, 14 S.E.2d 803 (1941); State v. Ray, 229 N.C. 40, 47 S.E.2d 494 (1948); State v. Massey, 271 N.C. 555, 157 S.E.2d 150 (1967); State v. Markham, 5 N.C. App. 391, 168 S.E.2d 449 (1969).

§ 20-183. Duties and powers of law-enforcement officers; warning by local officers before stopping another vehicle on highway; warning tickets. — (a) It shall be the duty of the law-enforcement officers of the State and of each county, city, or other municipality to see that the provisions of this Article are enforced within their respective jurisdictions, and any such officer shall have the power to arrest on sight or upon warrant any person found violating the provisions of this Article. Such officers within their respective jurisdictions shall have the power to stop any motor vehicle upon the highways of the State for the purpose of determining whether the same is being operated in violation of any of the provisions of this Article. Provided, that when any county, city, or other municipal law-enforcement officer operating a motor vehicle overtakes another vehicle on the highways of the State, outside of the corporate limits of cities and towns, for the purpose of stopping the same or apprehending the driver thereof, for a violation of any of the provisions of this Article, he shall, before stopping such other vehicle, sound a siren or activate a special light, bell, horn, or exhaust whistle approved for law-enforcement vehicles under the provisions of G.S. 20-125(b).

(b) In addition to other duties and powers heretofore existing, all law-enforcement officers charged with the duty of enforcing the motor vehicle laws are authorized to issue warning tickets to motorists for conduct constituting a potential hazard to the motoring public which does not amount to a definite, clear-cut, substantial violation of the motor vehicle laws. Each warning ticket issued shall be prenumbered and shall contain information necessary to identify the offender, and shall be signed by the issuing officer. A copy of each warning ticket issued shall be delivered to such offender and a copy thereof forwarded by the issuing officer forthwith to the Driver License Section of the Division of Motor Vehicles but shall not be filed with or in any manner become a part of the offender's driving record. Warning tickets issued as well as the fact of issuance shall be privileged information and available only to authorized personnel of the Division for statistical and analytical purposes. (1937, c. 407, s. 143; 1961, c. 793; 1965, cc. 537, 999; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Driver License Section of the Division of Motor Vehicles" for "Driver License Division of the Department of Motor Vehicles" and "Division" for "Department" in subsection (b).

Constitutionality. — The provisions of subsection (a) of this section, when balanced with the State's obligation to preserve order and enforce safety on its streets and highways, do not constitute such an encroachment on the individual's constitutional rights as to render the statute invalid. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

Persons stopped pursuant to this section may not be indiscriminately searched or arrested without probable cause in contravention of recognized constitutional principles. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

Authority Granted Law-Enforcement Officers under Section. — This section authorizes State law-enforcement officers to stop any motor vehicle upon the highway of the State for the purpose of determining whether the same is being operated in violation of any of the provisions of the Motor Vehicles Code, including the provisions requiring registration of the vehicle, operation by a properly licensed driver, etc. United States v. Kelley, 462 F.2d 372 (4th Cir. 1972).

Because of their authority under this section, the police were acting properly when they turned on their siren and light and requested a truck to stop even though they had no probable cause to believe that a crime had been committed. United States v. Kelley, 462 F.2d 372 (4th Cir. 1972).

Seizure of marijuana from defendants' car and their arrest for its possession did not amount to an unconstitutional invasion of defendants' rights where officers discovered the marijuana in plain view after lawfully stopping defendants' vehicle to check driver's license and vehicle

registration. State v. Garcia, 16 N.C. App. 344, 192 S.E.2d 2 (1972).

Although when a police officer first stopped and approached the truck he had no probable cause to believe that defendant had committed any offense, nevertheless, the officer had authority to stop the truck under this section and the existence of probable cause at the time the truck was stopped was not essential to the validity of the subsequent arrest. State v. Dark, 22 N.C. App. 566, 207 S.E.2d 290 (1974).

Subdivisions (2) and (4) of § 20-49 are not irreconcilable with this section. State v. Allen, 15 N.C. App. 670, 190 S.E.2d 714 (1972), rev'd on other grounds, 282 N.C. 503, 194 S.E.2d 9 (1973).

Verdict of Not Guilty Not Tantamount to a Finding of No Reasonable Grounds for Arrest. — Verdict of not guilty of the misdemeanor for which defendant was arrested — drunken driving — was not tantamount to a finding that the arresting officer did not have reasonable grounds to believe that defendant had committed such offense in his presence and that defendant therefore could lawfully resist the arrest. State v. Jefferies, 17 N.C. App. 195, 193 S.E.2d 388 (1972).

Applied in State v. Eason, 242 N.C. 59, 86 S.E.2d 774 (1955); State v. White, 18 N.C. App. 31, 195 S.E.2d 576 (1973); State v. Keziah, 24 N.C. App. 298, 210 S.E.2d 436 (1974).

Quoted in State v. Borland, 21 N.C. App. 559, 205 S.E.2d 340 (1974).

Stated in State v. Mobley, 240 N.C. 476, 83 S.E.2d 100 (1954).

Cited in State v. Cole, 241 N.C. 576, 86 S.E.2d 203 (1955); Lowe v. Department of Motor Vehicles, 244 N.C. 353, 93 S.E.2d 448 (1956).

ARTICLE 3A

Motor Vehicle Law of 1947.

Part 1. Safe Use of Streets and Highways.

§ 20-183.1. Rights, privileges and duties; declarations of policy. — Fully cognizant of the fact that preservation of human life is a sacred duty and obligation of the legislative, the judicial, and the executive branches of the government, the General Assembly hereby recognizes the following rights, privileges, and duties, and makes the following declarations of policy:

(1) Each of the citizens of the State of North Carolina has the right and privilege of using the streets and highways of the State either as a pedestrian or a motorist or both, without needless exposure to accident, injury, or death occasioned by the reckless or otherwise unlawful operation by others of vehicles over or upon said streets and highways;

(2) The right and privilege of any person to use the streets and highways of the State is, however, subject to the right and privilege of other persons to use said streets and highways in a safe, lawful, sane, and prudent manner;

(3) In order to secure to law-abiding and prudent pedestrians and motorists the full enjoyment of the right and privilege herein declared to exist, those operators of vehicles who are heedless of the duties and obligations imposed upon them and unmindful of the rights of others shall be barred from the streets and highways of the State;

(4) To guarantee to motorists and pedestrians the safe use of the streets and highways of the State is the purpose of the General Assembly in enacting this act. (1947, c. 1067, s. 1.)

Part 2. Equipment Inspection of Motor Vehicles.

§ 20-183.2. Equipment inspection required; inspection certificate; one-way permit to move vehicle to inspection station. — (a) Every motor vehicle, trailer, semitrailer, and pole trailer not including trailers of a gross weight of less than 4,000 pounds and house trailers, registered or required to be registered in North Carolina when operated on the streets and highways of this State must display a current approved inspection certificate at such place on the vehicle as may be designated by the Commissioner, indicating that it has been inspected in accordance with this Part. Such motor vehicle shall thereafter be inspected

and display a current inspection certificate as is required by subsection (b) hereof.

(b) Every inspection certificate issued under this Part shall be valid for not less than 12 months and shall expire at midnight on the last day of the month designated on said inspection certificate. It shall be unlawful to operate any motor vehicle on the highway until there is displayed thereon a current inspection certificate as provided by this Part, indicating that the vehicle has been inspected within the previous 12 months and has been found to comply with the standard for safety equipment prescribed by this Chapter subject to the following provisions:

(1) Vehicles of a type required to be inspected under subsection (a), which are owned by a resident of this State, that have been outside of North Carolina continuously for a period of 30 days, or more, immediately preceding the expiration of the then current inspection certificate shall within 10 days of reentry to the State be inspected and have an approved certificate attached thereto if vehicle is to continue operation on the streets and highways.

(2) Any vehicle owned or possessed by a dealer, manufacturer or transporter within this State and operated over the public streets and highways displaying thereon a dealer demonstration, manufacturer or transporter plate must have affixed to the windshield thereof a valid certificate of inspection and approval, except a dealer, manufacturer or transporter or his agent may operate a motor vehicle displaying dealer demonstration, manufacturer or transporter plates from source of purchase to his place of business or to an inspection station, provided it is within 10 days of purchase, foreclosure or repossession. Provided further, that a new car dealer may operate a new motor vehicle prior to first sale for customer demonstration purposes only without affixing thereto an inspection certificate as required by this section if such dealer causes an inspection of the equipment enumerated in G.S. 20-183.3 to be made and affixes on the window of the vehicle adjacent to the manufacturer's price list a certificate as near as practical in form and content as follows:

Dealer .....
Dealer license number .....
Vehicle make..... Year model .....
Vehicle identification number .....

Equipment Item	*Check square when inspected and approved*
Brakes	☐
Lights	☐
Horn	☐
Steering Mechanism	☐
Windshield Wiper	☐
Directional Signals	☐
Tires	☐
Rear View Mirror	☐
Exhaust System	☐

I certify that the above items of equipment have been inspected and found to be in good working order.

.....
Dealer or Agent

(3) Vehicles acquired by residents of this State from dealers or owners located outside of the State must, upon entry to this State, be inspected

and approved, certificate attached, within 10 days after the vehicle becomes subject to registration.

(4) Vehicles acquired by residents within this State, not displaying current North Carolina inspection certificates, must be inspected and have approved inspection certificate attached within 10 days from date registration plate issued or if registration plate is to be transferred, within 10 days of the date of purchase.

(5) Owners of motor vehicles moving their residence to North Carolina from other states must within 10 days from the date the vehicles are subject to registration have same inspected and have an approved certificate attached thereto.

(6) The Commissioner of Motor Vehicles or his duly authorized agent is empowered to grant special written one-way permits to operate motor vehicles without current inspection certificates solely for the purpose of moving such vehicles to an authorized inspection station to obtain the inspection required under this Part.

(c) On and after February 16, 1966, all motor vehicle dealers in North Carolina shall, prior to retail sale of any new or used motor vehicle, have such motor vehicle inspected by an approved inspection station as required by this Part. Provided, however, a purchaser of a motor vehicle, who is licensed as a self-inspector, may conduct the required inspection, after entering into a written agreement with the dealer to follow such a procedure. A copy of such dealer-purchaser agreement must be filed with the Division of Motor Vehicles. Provided further, that any new and unregistered vehicle sold to a nonresident (as defined in G.S. 20-6) shall be exempt from the requirements of this section if such vehicle is not required to be registered in this State.

(d) When a motor vehicle required to be inspected under this Part shall, upon inspection, fail to meet the safety requirements of this Part, the safety equipment inspection station making such inspection, shall issue an authorized receipt for such vehicle indicating that it has been inspected and shall enumerate the defects found. The owner or operator may have such defects corrected at such place as he or she chooses. The vehicle may be reinspected at the safety equipment inspection station, first making the inspection, without additional charge, or the owner or operator may have same inspected at another safety equipment station upon payment of a new inspection fee.

(e) On and after January 1, 1974, each motor vehicle safety inspection certificate shall contain, on the portion readable from the vehicle interior, the following information:

(1) The date of the current inspection;

(2) The odometer reading at the time of the current inspection;

(3) The signature, initials or other identification of the person making the inspection and affixing the certificate to the windshield. (1965, c. 734, s. 1; 1967, c. 692, s. 1; 1969, c. 179, s. 2; cc. 219, 386; 1973, c. 679, s. 2; 1975, c. 683; c. 716, s. 5.)

Editor's Note. — The first 1975 amendment added to subdivision (2) of subsection (b) the proviso relating to operation of a new motor vehicle by a dealer without an inspection certificate.

The second 1975 amendment substituted "Division" for "Department" in subsection (c).

Section 20-6, referred to in subsection (c) of this section, was repealed by Session Laws 1973, c. 1330, s. 39. For present definition of "nonresident," see § 20-4.01(24).

Sale of Uninspected Vehicle by Dealer Is Negligence Per Se. — The retail sale of an automobile by a dealer, without first having the official inspection required by this statute, is negligence per se. This is the general rule as to statutes enacted for the safety and protection of the public. In such cases, the only remaining question is whether such negligence was a proximate cause of the injury for which recovery is sought. Anderson v. Robinson, 8 N.C. App. 224, 174 S.E.2d 45 (1970).

Cited in State v. White, 3 N.C. App. 31, 164 S.E.2d 36 (1968).

§ 20-183.3. Inspection requirements. — Before an approval certificate may be issued for a motor vehicle, the vehicle must be inspected by a safety equipment inspection station, and if required by Chapter 20 of the General Statutes of North Carolina, must be found to possess in safe operating condition the following articles and equipment:

(1) Brakes,
(2) Lights,
(3) Horn,
(4) Steering mechanism,
(5) Windshield wiper,
(6) Directional signals,
(7) Tires,
(8) Rearview mirror or mirrors.

No inspection certificate shall be issued by a safety equipment inspection station for a motor vehicle manufactured after model year 1967 unless the vehicle is equipped with such emission control devices to reduce air pollution as were installed at the time of manufacture which are readily visible, provided the foregoing requirements shall not apply where such devices have been removed for the purpose of converting the motor vehicle to operate on natural or liquified petroleum gas or other modifications have been made in order to reduce air pollution, further provided that such modifications shall have first been approved by the Department of Water and Air Resources [Department of Natural Resources and Community Development].

In addition to the items listed above, safety inspection equipment stations shall inspect the exhaust systems of all vehicles inspected and report the condition of each exhaust system to the owners or to the persons offering the vehicles for inspection.

The inspection requirements herein provided for shall not exceed the standards provided in the current General Statutes for such equipment. (1965, c. 734, s. 1; 1969, c. 378, s. 2; 1971, c. 455, s. 2; c. 478, ss. 1, 2.)

Editor's Note. — Session Laws 1973, c. 1262, which reorganized the Department of Natural and Economic Resources, did not provide for substituting "Department of Natural and Economic Resources" for "Department of Water and Air Resources" throughout the General Statutes, but, because the functions of the former Department of Water and Air Resources had devolved upon the Department of Natural and Economic Resources, the editors inserted "Department of Natural and Economic Resources" in brackets in this section.

The title of the Department of Natural and Economic Resources was changed to Department of Natural Resources and Community Development by Session Laws 1977, c. 771, s. 4.

Stated in Anderson v. Robinson, 8 N.C. App. 224, 174 S.E.2d 45 (1970).

§ 20-183.4. Licensing of safety equipment inspection stations. — Every person, firm or agency with employees meeting the following qualifications shall, upon application, be issued a license designating the person, firm or agency as a safety equipment inspection station:

(1) Be of good character and have a good reputation for honesty.
(2) Have adequate knowledge of the equipment requirements of the motor vehicle laws of North Carolina.
(3) Be able to satisfactorily conduct the mechanical inspection required by this Part.
(4) Have adequate facilities as to space and equipment in order to check each of the items of safety equipment listed herein.

(5) Have a general knowledge of motor vehicles sufficient to recognize a mechanical condition which is not safe.

Any person, firm or agency meeting the above requirements and desiring to be licensed as a motor vehicle inspection station may apply to the Commissioner of Motor Vehicles on forms provided by the Commissioner. The Commissioner shall cause an investigation to be made as to the applicant's qualifications, and if, in the opinion of the Commissioner, the applicant fulfills such qualifications, he shall issue a certificate of appointment to such person, firm or agency as a safety equipment inspection station. Such appointment shall be issued without charge and shall be effective until canceled by request of licensee or until revoked or suspended by the Commissioner. Any licensee whose license has been revoked or suspended or any applicant whose application has been refused may, within 10 days from the notice of such revocation, suspension or refusal, request a hearing before the Commissioner and, in such cases, the hearing shall be conducted within 10 days of receipt of request for such hearing. The Commissioner, following such hearing, may rescind the order of suspension, revocation or the refusal to issue license, or he may affirm the previous order of revocation, suspension or refusal. Any applicant or licensee aggrieved by the decision of the Commissioner may, following such decision, file a petition in the Superior Court of Wake County or in the county wherein applicant or licensee resides. Such petition shall recite the fact that the administrative remedy, as provided above, has been exhausted. Provided, that no restraining order shall issue against the Division of Motor Vehicles under this section until and unless the Division shall have had at least five days' notice of the petitioner's intention to seek such restraining order.

The Commissioner may designate the State or any political subdivision thereof or any person, firm or corporation as self-inspectors for the sole purpose of inspecting vehicles owned or operated by such agencies, persons, firms, or corporations so designated. (1965, c. 734, s. 1; 1967, c. 692, s. 2; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the second paragraph.

§ 20-183.5. Supervision of safety equipment inspection stations. — When a person, firm or agency is designated as a safety equipment inspection station the Commissioner of Motor Vehicles shall record such appointment and shall cause periodic checks to be made to determine that inspections are being conducted in accordance with this Part, and shall cause investigations to be made of bona fide complaints received regarding any such inspection station. (1965, c. 734, s. 1.)

§ 20-183.6. Commissioner of Motor Vehicles to establish procedures; unlawful possession, etc., of certificates. — (a) The Commissioner of Motor Vehicles shall establish procedures for the control, distribution, sale, refund, and display of certificates and for the accounting for proceeds of their sale, consistent with this Article. It shall be unlawful knowingly to possess, affix, transfer, remove, imitate or reproduce an inspection certificate, except by direction of the Commissioner of Motor Vehicles under the terms of this Article.

(b) Notwithstanding any other provision of this Article, those who replace windshields in motor vehicles shall place on the replacement windshield an inspection certificate having the same expiration date as the certificate attached to the windshield removed and shall retain the certificate attached to the windshield removed until 30 days after the expiration thereof. In addition to the authority granted in subsection (a), the Commissioner is hereby authorized to

adopt and enforce such rules and regulations as may be necessary to carry out the provisions of this section. (1965, c. 734, s. 1; 1975, c. 109.)

Editor's Note. — The 1975 amendment designated the former provisions of the section as subsection (a) and added subsection (b).

§ 20-183.7. Fees to be charged by safety equipment inspection station. — Every inspection station, except self-inspectors as designated herein, shall charge a fee of three dollars ten cents ($3.10) for inspecting a motor vehicle to determine compliance with this Article and shall give the operator a receipt indicating the articles and equipment approved and disapproved; provided, that inspection stations approved by the Commissioner, and operated under rules, regulations and supervision of any governmental agency, when inspecting vehicles required to be inspected by such agencies' rules and regulations and by the provisions of this Part, may, upon approval by such inspection station and the payment of a fee of thirty-five cents (35¢), attach to the vehicle inspected a North Carolina inspection certificate as required by this Part. When the receipt is presented to the inspection station which issued it, at any time within 90 days, that inspection station shall reinspect the motor vehicle free of additional charge until approved. When said vehicle is approved, and upon payment to the inspection station of the fee, the inspection station shall affix a valid inspection certificate to said motor vehicle, and said inspection station shall maintain a record of the motor vehicles inspected which shall be available for 18 months. The Division of Motor Vehicles shall receive thirty-five cents (35¢) for each inspection certificate, and these proceeds shall be placed in the Highway Fund. (1965, c. 734, s. 1; 1969, c. 1242; 1973, c. 1480; 1975, c. 547; c. 716, s. 5; c. 875, s. 4.)

Editor's Note. — The first 1975 amendment substituted "three dollars ten cents ($3.10)" for "three dollars ($3.00)" near the beginning of the first sentence, and "thirty-five cents (35¢)" for "twenty-five cents (25¢)" near the end of the first sentence and near the beginning of the last sentence.

The second 1975 amendment substituted "Division" for "Department" in the last sentence.

The third 1975 amendment rewrote the last sentence, which formerly provided for a fee of thirty-five cents (35¢) for each inspection certificate, the proceeds to be placed in the "Motor Vehicle Safety Equipment Inspection Fund," to be used for the administration of this Article.

Pursuant to Session Laws 1975, c. 716, s. 5, "Division" has been substituted for "Department" in the last sentence of the section as amended by Session Laws 1975, c. 875, s. 4.

§ 20-183.8. Commissioner of Motor Vehicles to issue regulations subject to approval of Governor; penalties for violation; fictitious or unlawful safety inspection certificate; 30-day grace period for expired inspection certificates. — (a) It is the intent of the Article that the provisions herein shall be carried out by the Commissioner of Motor Vehicles for the safety and convenience of the motoring public. The Commissioner shall have authority to promulgate only such regulations as are reasonably necessary for the purpose of carrying out the provisions of this inspection program, but such regulations shall not be effective until the same have been approved by the Governor.

(b) The Commissioner of Motor Vehicles is authorized to enter into agreements or arrangements with the duly authorized representatives of other jurisdictions whereby the safety equipment inspection required under this Article may be waived with respect to vehicles which have undergone substantially similar safety equipment inspections in such other jurisdictions and for which valid inspection certificates have been issued by such other

jurisdictions. Such agreements or arrangements shall provide that vehicles inspected in this State and for which valid inspection certificates have been issued shall be accorded a similar privilege when subject to the laws of such other jurisdictions. Each such agreement or arrangement shall, in the judgment of the Commissioner, be in the best interest of this State and the citizens thereof and shall be fair and equitable to this State and citizens thereof; and all of the same shall be determined upon the basis and recognition of the benefits which accrue to the citizens of this State by reason of the agreement or arrangement.

The Commissioner is also authorized to promulgate rules and regulations providing that the safety equipment inspection may be waived with respect to any vehicle which has undergone a similar inspection in another jurisdiction and for which a valid and current inspection certificate has been issued by such other jurisdiction.

(c) Violation of any provision of this Article shall, upon conviction, be punishable by a fine not to exceed fifty dollars ($50.00) or imprisonment not to exceed 30 days, except that the unauthorized reproduction of an inspection certificate shall be punishable as a forgery under G.S. 14-119.

(d) No person shall display or cause to be displayed or permit to be displayed upon any motor vehicle any safety inspection certificate, knowing the same to be fictitious or to be issued for another motor vehicle or to be issued without inspection and approval having been made. The Division is hereby authorized to take immediate possession of any safety inspection certificate which is fictitious or which has been otherwise unlawfully or erroneously issued or which has been unlawfully used. Any person violating the provisions of this subsection shall be guilty of a misdemeanor punishable by fine not to exceed fifty dollars ($50.00) or imprisonment not to exceed 30 days.

(e) No person shall be convicted of failing to display current inspection certificate as provided under this Article if he produces in court at the time of his trial a receipt from a licensed motor vehicle inspection station showing that a valid inspection certificate was issued for the vehicle involved within 30 days after expiration of the previous inspection certificate issued for the vehicle.

(f) It shall be unlawful for any person to attach an inspection certificate to a vehicle if he knows, or has reasonable grounds to know, that the required inspection has not been performed according to law, including rules and regulations promulgated by the Commissioner. (1965, c. 734, s. 1; 1967, c. 692, s. 3; 1969, c. 179, s. 1; c. 620; 1973, cc. 909, 1322; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsection (d).

ARTICLE 3B.

Permanent Weighing Stations and Portable Scales.

§ 20-183.9. Establishment and maintenance of permanent weighing stations. — The Department of Transportation is hereby authorized, empowered and directed to establish during the biennium ending June 30, 1953, not less than six nor more than 12 permanent weighing stations equipped to weigh vehicles using the streets and highways of this State to determine whether such vehicles are being operated in accordance with legislative enactments relating to weights of vehicles and their loads. The permanent weighing stations shall be established at such locations on the streets and highways in this State as will enable them to be used most advantageously in determining the weight of vehicles and their loads. Said permanent weighing stations shall be equipped by the Department of Transportation and shall be maintained by said Department of

Transportation. (1951, c. 988, s. 1; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, ss. 34, 37.)

Editor's Note. — The 1977 amendment substituted "Department of Transportation" for "Board of Transportation" in three places. The amendment also deleted the former second paragraph of the section, which made an appropriation.

§ 20-183.10. Operation by Division of Motor Vehicles; uniformed personnel with powers of peace officers. — The permanent weighing stations to be established pursuant to the provisions of this Article shall be operated by the Division of Motor Vehicles, and the personnel assigned to the various stations shall wear uniforms to be selected and furnished by the Division of Motor Vehicles. The uniformed officers assigned to the various permanent weighing stations shall have the powers of peace officers for the purpose of enforcing the provisions of this Chapter and in making arrests, serving process, and appearing in court in all matters and things relating to the weight of vehicles and their loads.

There is hereby appropriated to the Division of Motor Vehicles out of the State Highway and Public Works Fund the sum of two hundred fifty thousand dollars ($250,000) for each year of the biennium ending June 30, 1953. The funds appropriated in this paragraph shall be expended exclusively for the operation of the permanent weighing stations established pursuant to this Article. (1951, c. 988, s. 2; 1975, c. 716, s. 5; 1977, c. 319.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout the section.

The 1977 amendment inserted "for the purpose of enforcing the provisions of this Chapter and" in the second sentence of the first paragraph.

§ 20-183.11. Refusal of operator to cooperate in weighing vehicle; removal of excess portion of load. — When a permanent weighing station is established under the provisions of this section, it shall constitute a misdemeanor for the operator of any vehicle to refuse to permit his vehicle to be weighed at such station or to refuse to drive his vehicle upon the scales so that the same may be weighed. Any vehicle and its load found to be above the weight authorized in Chapter 20 of the General Statutes shall have immediately removed by the operator such portion of its load as may be necessary to decrease the gross weight of the vehicle to the maximum therefor specified in Chapter 20 of the General Statutes: Provided, that the Division may allow any vehicle transporting refrigerated or iced perishable foods for human consumption to proceed without removing all or a portion of its load when the owner or operator has paid the taxes and penalties due because of the overload or has made satisfactory arrangements with the Commissioner of Motor Vehicles to pay said taxes and penalties. The material so unloaded shall be cared for by the owner or operator of such vehicle at the risk of the owner or operator of such vehicle. (1951, c. 988, s. 3; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the proviso to the second sentence.

§ 20-183.12. Portable scales. — In addition to the appropriation contained in G.S. 20-183.9, there is hereby appropriated to the Division of Motor Vehicles out of the State Highway and Public Works Fund the sum of sixty-five thousand dollars ($65,000) for each year of the biennium ending June 30, 1953. The money appropriated in this section shall be used by the Commissioner of Motor Vehicles for the purchase and use of portable scales for weighing vehicles traveling over the streets and highways of this State. (1951, c. 988, s. 4; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the first sentence.

ARTICLE 3C.

Vehicle Equipment Safety Compact.

§ 20-183.13. Compact enacted into law; form of Compact. — The Vehicle Equipment Safety Compact is hereby enacted into law and entered into with all other jurisdictions legally joining therein in the form substantially as follows:

VEHICLE EQUIPMENT SAFETY COMPACT

ARTICLE I. Findings and Purposes.

(a) The party states find that:

(1) Accidents and deaths on their streets and highways present a very serious human and economic problem with a major deleterious effect on the public welfare.

(2) There is a vital need for the development of greater interjurisdictional cooperation to achieve the necessary uniformity in the laws, rules, regulations and codes relating to vehicle equipment, and to accomplish this by such means as will minimize the time between the development of demonstrably and scientifically sound safety features and their incorporation into vehicles.

(b) The purposes of this Compact are to:

(1) Promote uniformity in regulation of and standards for equipment.

(2) Secure uniformity of law and administrative practice in vehicular regulation and related safety standards to permit incorporation of desirable equipment changes in vehicles in the interest of greater traffic safety.

(3) To provide means for the encouragement and utilization of research which will facilitate the achievement of the foregoing purposes, with due regard for the findings set forth in subdivision (a) of this article.

(c) It is the intent of this Compact to emphasize performance requirements and not to determine the specific detail of engineering in the manufacture of vehicles or equipment except to the extent necessary for the meeting of such performance requirements.

ARTICLE II. Definitions.

As used in this Compact:

(a) "Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks.

(b) "State" means a state, territory or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

(c) "Equipment" means any part of a vehicle or any accessory for use thereon which affects the safety of operation of such vehicle or the safety of the occupants.

ARTICLE III. The Commission.

(a) There is hereby created an agency of the party states to be known as the "Vehicle Equipment Safety Commission" hereinafter called the Commission. The Commission shall be composed of one commissioner from each party state

who shall be appointed, serve and be subject to removal in accordance with the laws of the state which he represents. If authorized by the laws of his party state, a commissioner may provide for the discharge of his duties and the performance of his functions on the Commission, either for the duration of his membership or for any lesser period of time, by an alternate. No such alternate shall be entitled to serve unless notification of his identity and appointment shall have been given to the Commission in such form as the Commission may require. Each commissioner, and each alternate, when serving in the place and stead of a commissioner, shall be entitled to be reimbursed by the Commission for expenses actually incurred in attending Commission meetings or while engaged in the business of the Commission.

(b) The commissioners shall be entitled to one vote each on the Commission. No action of the Commission shall be binding unless taken at a meeting at which a majority of the total number of votes on the Commission are cast in favor thereof. Action of the Commission shall be only at a meeting at which a majority of the commissioners, or their alternates, are present.

(c) The Commission shall have a seal.

(d) The Commission shall elect annually, from among its members, a chairman, a vice-chairman and a treasurer. The Commission may appoint an Executive Director and fix his duties and compensation. Such Executive Director shall serve at the pleasure of the Commission, and together with the treasurer shall be bonded in such amount as the Commission shall determine. The Executive Director also shall serve as secretary. If there be no Executive Director, the Commission shall elect a secretary in addition to the other officers provided by this subdivision.

(e) Irrespective of the civil service, personnel or other merit system laws of any of the party states, the Executive Director with approval of the Commission, or the Commission if there be no Executive Director, shall appoint, remove or discharge such personnel as may be necessary for the performance of the Commission's functions, and shall fix the duties and compensation of such personnel.

(f) The Commission may establish and maintain independently or in conjunction with any one or more of the party states, a suitable retirement system for its full-time employees. Employees of the Commission shall be eligible for Social Security coverage in respect of old age and survivor's insurance provided that the Commission takes such steps as may be necessary pursuant to the laws of the United States, to participate in such program of insurance as a government agency or unit. The Commission may establish and maintain or participate in such additional programs of employee benefits as may be appropriate.

(g) The Commission may borrow, accept or contract for the services of personnel from any party state, the United States, or any subdivision or agency of the aforementioned governments, or from any agency of two or more of the party states or their subdivisions.

(h) The Commission may accept for any of its purposes and functions under this Compact any and all donations, and grants of money, equipment, supplies, materials, and services, conditional or otherwise, from any state, the United States, or any other governmental agency and may receive, utilize and dispose of the same.

(i) The Commission may establish and maintain such facilities as may be necessary for the transacting of its business. The Commission may acquire, hold, and convey real and personal property and any interest therein.

(j) The Commission shall adopt bylaws for the conduct of its business and shall have the power to amend and rescind these bylaws. The Commission shall publish its bylaws in convenient form and shall file a copy thereof and a copy of any amendment thereto, with the appropriate agency or officer in each of the

party states. The bylaws shall provide for appropriate notice to the commissioners of all Commission meetings and hearings and the business to be transacted at such meetings or hearings. Such notice shall also be given to such agencies or officers of each party state as the laws of such party state may provide.

(k) The Commission annually shall make to the governor and legislature of each party state a report covering the activities of the Commission for the preceding year, and embodying such recommendations as may have been issued by the Commission. The Commission may make such additional reports as it may deem desirable.

ARTICLE IV. Research and Testing.

The Commission shall have power to:

(a) Collect, correlate, analyze and evaluate information resulting or derivable from research and testing activities in equipment and related fields.

(b) Recommend and encourage the undertaking of research and testing in any aspect of equipment or related matters when, in its judgment, appropriate or sufficient research or testing has not been undertaken.

(c) Contract for such equipment research and testing as one or more governmental agencies may agree to have contracted for by the Commission, provided that such governmental agency or agencies shall make available the funds necessary for such research and testing.

(d) Recommend to the party states changes in law or policy with emphasis on uniformity of laws and administrative rules, regulations or codes which would promote effective governmental action or coordination in the prevention of equipment-related highway accidents or the mitigation of equipment-related highway safety problems.

ARTICLE V. Vehicular Equipment.

(a) In the interest of vehicular and public safety, the Commission may study the need for or desirability of the establishment of or changes in performance requirements or restrictions for any item of equipment. As a result of such study, the Commission may publish a report relating to any item or items of equipment, and the issuance of such a report shall be a condition precedent to any proceedings or other action provided or authorized by this article. No less than 60 days after the publication of a report containing the results of such study, the Commission upon due notice shall hold a hearing or hearings at such place or places as it may determine.

(b) Following the hearing or hearings provided for in subdivision (a) of this article, and with due regard for standards recommended by appropriate professional and technical associations and agencies, the Commission may issue rules, regulations or codes embodying performance requirements or restrictions for any item or items of equipment covered in the report, which in the opinion of the Commission will be fair and equitable and effectuate the purposes of this Compact.

(c) Each party state obligates itself to give due consideration to any and all rules, regulations and codes issued by the Commission and hereby declares its policy and intent to be the promotion of uniformity in the laws of the several party states relating to equipment.

(d) The Commission shall send prompt notice of its action in issuing any rule, regulation or code pursuant to this article to the appropriate motor vehicle agency of each party state and such notice shall contain the complete text of the rule, regulation or code.

(e) If the constitution of a party state requires, or if its statutes provide, the approval of the legislature by appropriate resolution or act may be made a condition precedent to the taking effect in such party state of any rule, regulation or code. In such event, the commissioner of such party state shall submit any Commission rule, regulation or code to the legislature as promptly

as may be in lieu of administrative acceptance or rejection thereof by the party state.

(f) Except as otherwise specifically provided in or pursuant to subdivisions (e) and (g) of this article, the appropriate motor vehicle agency of a party state shall in accordance with its constitution or procedural laws adopt the rule, regulation or code within six months of the sending of the notice, and, upon such adoption, the rule, regulation or code shall have the force and effect of law therein.

(g) The appropriate motor vehicle agency of a party state may decline to adopt a rule, regulation or code issued by the Commission pursuant to this article if such agency specifically finds, after public hearing on due notice, that a variation from the Commission's rule, regulation or code is necessary to the public safety, and incorporates in such finding the reasons upon which it is based. Any such finding shall be subject to review by such procedure for review of administrative determinations as may be applicable pursuant to the laws of the party state. Upon request, the Commission shall be furnished with a copy of the transcript of any hearings held pursuant to this subdivision.

ARTICLE VI. Finance.

(a) The Commission shall submit to the executive head or designated officer or officers of each party state a budget of its estimated expenditures for such period as may be required by the laws of that party state for presentation to the legislature thereof.

(b) Each of the Commission's budgets of estimated expenditures shall contain specific recommendations of the amount or amounts to be appropriated by each of the party states. The total amount of appropriations under any such budget shall be apportioned among the party states as follows: one third in equal shares; and the remainder in proportion to the number of motor vehicles registered in each party state. In determining the number of such registrations, the Commission may employ such source or sources of information as, in its judgment present the most equitable and accurate comparisons among the party states. Each of the Commission's budgets of estimated expenditures and requests for appropriations shall indicate the source or sources used in obtaining information concerning vehicular registrations.

(c) The Commission shall not pledge the credit of any party state. The Commission may meet any of its obligations in whole or in part with funds available to it under Article III(h) of this Compact, provided that the Commission takes specific action setting aside such funds prior to incurring any obligation to be met in whole or in part in such manner. Except where the Commission makes use of funds available to it under Article III(h) hereof, the Commission shall not incur any obligation prior to the allotment of funds by the party states adequate to meet the same.

(d) The Commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the Commission shall be subject to the audit and accounting procedures established under its rules. However, all receipts and disbursements of funds handled by the Commission shall be audited yearly by a qualified public accountant and the report of the audit shall be included in and become part of the annual reports of the Commission.

(e) The accounts of the Commission shall be open at any reasonable time for inspection by duly constituted officers of the party states and by any persons authorized by the Commission.

(f) Nothing contained herein shall be construed to prevent Commission compliance with laws relating to audit or inspection of accounts by or on behalf of any government contributing to the support of the Commission.

ARTICLE VII. Conflict of Interest.

(a) The Commission shall adopt rules and regulations with respect to conflict of interest for the commissioners of the party states, and their alternates, if any, and for the staff of the Commission and contractors with the Commission to the end that no member or employee or contractor shall have a pecuniary or other incompatible interest in the manufacture, sale or distribution of motor vehicles or vehicular equipment or in any facility or enterprise employed by the Commission or on its behalf for testing, conduct of investigations or research. In addition to any penalty for violation of such rules and regulations as may be applicable under the laws of the violator's jurisdiction of residence, employment or business, any violation of a Commission rule or regulation adopted pursuant to this article shall require the immediate discharge of any violating employee and the immediate vacating of membership, or relinquishing of status as a member on the Commission by any commissioner or alternate. In the case of a contractor, any violation of any such rule or regulation shall make any contract of the violator with the Commission subject to cancellation by the Commission.

(b) Nothing contained in this article shall be deemed to prevent a contractor for the Commission from using any facilities subject to his control in the performance of the contract even though such facilities are not devoted solely to work of or done on behalf of the Commission; nor to prevent such a contractor from receiving remuneration or profit from the use of such facilities.

ARTICLE VIII. Advisory and Technical Committees.

The Commission may establish such advisory and technical committees as it may deem necessary, membership on which may include private citizens and public officials, and may cooperate with and use the services of any such committees and the organizations which the members represent in furthering any of its activities.

ARTICLE IX. Entry into Force and Withdrawal.

(a) This Compact shall enter into force when enacted into law by any six or more states. Thereafter, this Compact shall become effective as to any other state upon its enactment thereof.

(b) Any party state may withdraw from this Compact by enacting a statute repealing the same, but no such withdrawal shall take effect until one year after the executive head of the withdrawing state has given notice in writing of the withdrawal to the executive heads of all other party states. No withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal.

ARTICLE X. Construction and Severability.

This Compact shall be liberally construed so as to effectuate the purposes thereof. The provisions of this Compact shall be severable and if any phrase, clause, sentence or provision of this Compact is declared to be contrary to the Constitution of any state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this Compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this Compact shall be held contrary to the constitution of any state participating herein, the Compact shall remain in full force and effect as to the remaining party states and in full force and effect as to the state affected as to all severable matters. (1963, c. 1167, s. 1.)

§ 20-183.14. Legislative findings. — The General Assembly finds that:

(1) The public safety necessitates the continuous development, modernization and implementation of standards and requirements of law relating to vehicle equipment, in accordance with expert knowledge and opinion.

(2) The public safety further requires that such standards and requirements be uniform from jurisdiction to jurisdiction, except to the extent that specific and compelling evidence supports variation.

(3) The Division of Motor Vehicles, acting upon recommendations of the Vehicle Equipment Safety Commission and pursuant to the Vehicle Equipment Safety Compact provides a just, equitable and orderly means of promoting the public safety in the manner and within the scope contemplated by this Article. (1963, c. 1167, s. 2; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subdivision (3).

§ 20-183.15. Approval of rules and regulations by General Assembly required. — Pursuant to Article V(e) of the Vehicle Equipment Safety Compact, it is the intention of this State and it is hereby provided that no rule, regulation or code issued by the Vehicle Equipment Safety Commission in accordance with Article V of the Compact shall take effect until approved by act of the General Assembly. (1963, c. 1167, s. 3.)

§ 20-183.16. Compact Commissioner. — The Commissioner of this State on the Vehicle Equipment Safety Commission shall be the Secretary of Transportation or such other officer of the Department of Transportation as the Secretary may designate. (1963, c. 1167, s. 4; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Secretary of Transportation or such other officer of the Department of Transportation as the Secretary may designate" for "Commissioner of Motor Vehicles or such other officer of the Department as the Commissioner may designate."

State Government Reorganization. — The administration of the Vehicle Equipment Safety Compact was transferred to the Department of Transportation and Highway Safety by § 143A-108, enacted by Session Laws 1971, c. 864.

§ 20-183.17. Cooperation of State agencies authorized. — Within appropriations available therefor, the departments, agencies and officers of the government of this State may cooperate with and assist the Vehicle Equipment Safety Commission within the scope contemplated by Article III(h) of the Compact. The departments, agencies and officers of the government of this State are authorized generally to cooperate with said Commission. (1963, c. 1167, s. 5.)

§ 20-183.18. Filing of documents. — Filing of documents as required by Article III(j) of the Compact shall be with the Secretary of State. (1963, c. 1167, s. 6.)

§ 20-183.19. Budget procedure. — Pursuant to Article VI(a) of the Compact, the Vehicle Equipment Safety Commission shall submit its budgets to the Director of the Budget. (1963, c. 1167, s. 7.)

§ 20-183.20. Inspection of financial records of Commission. — Pursuant to Article VI(e) of the Compact, the State Auditor is hereby empowered and authorized to inspect the accounts of the Vehicle Equipment Safety Commission. (1963, c. 1167, s. 8.)

§ 20-183.21. "Executive head" defined. — The term "executive head" as used in Article IX(b) of the Compact shall, with reference to this State, mean the Governor. (1963, c. 1167, s. 9.)

ARTICLE 4.

State Highway Patrol.

§ 20-184. Patrol under supervision of Department of Crime Control and Public Safety. — The Secretary of Crime Control and Public Safety, under the direction of the Governor, shall have supervision, direction and control of the State Highway Patrol. The Secretary shall establish in the Department of Crime Control and Public Safety a State Highway Patrol Division, prescribe regulations governing said Division, and assign to the Division such duties as he may deem proper. (1935, c. 324, s. 2; 1939, c. 387, s. 1; 1941, c. 36; 1975, c. 716, s. 5; 1977, c. 70, ss. 13, 14, 15.)

Cross Reference. — As to transfer of the State Highway Patrol to the Department of Crime Control and Public Safety, see § 143A-292.

Editor's Note. — The 1975 amendment substituted "Division of Motor Vehicles" for "Department of Motor Vehicles" in the second sentence.

The 1977 amendment substituted "Secretary of Crime Control and Public Safety" for "Commissioner of Motor Vehicles," "Department of Crime Control and Public Safety" for "Division of Motor Vehicles," and "State Highway Patrol Division" for "Division of Highway Safety and Patrol."

§ 20-185. Personnel; appointment; salaries. — (a) The State Highway Patrol shall consist of a commanding officer, who shall be appointed by the Governor and whose rank shall be designated by the Governor, and such additional subordinate officers and members as the Secretary of Crime Control and Public Safety, with the approval of the Governor, shall direct. Members of the State Highway Patrol shall be appointed by the Secretary, with the approval of the Governor, and shall serve at the pleasure of the Governor and Secretary. The commanding officer, other officers and members of the State Highway Patrol shall be paid such salaries as may be established by the Division of Personnel of the Department of Administration. Notwithstanding any other provision of this Article, the number of supervisory personnel of the State Highway Patrol shall not exceed a number equal to twenty-one percent (21%) of the personnel actually serving as uniformed highway patrolmen. Nothing in the previous sentence is intended to require the demotion, reassignment or change in status of any member of the State Highway Patrol presently assigned in a supervisory capacity. If a reduction in the number of Highway Patrol personnel assigned in supervisory capacity is required in order for the State Highway Patrol to meet the mandatory maximum percentage of supervisory personnel as set out in the fourth sentence of this subsection, that reduction shall be achieved through normal attrition resulting from supervisory personnel resigning, retiring or voluntarily transferring from supervisory positions.

(b) The salary of any officer or member of the State Highway Patrol shall be paid to him so long as his employment as such officer or member of the patrol shall continue, notwithstanding his total or partial incapacity to perform any duties to which he may lawfully be assigned by the commanding officer of the State Highway Patrol, if such incapacity be the result of an injury by accident or occupational disease arising out of and in the course of the performance by him of his official duties; provided, however, that if such incapacity continue for more than two years from its inception, such officer or member of the State Highway Patrol shall during the further continuance of such incapacity be subject to the provisions of Chapter 97 of the General Statutes. Salary paid to an officer or member of the State Highway Patrol pursuant to this subsection

shall cease upon the resumption of his regularly assigned duties, retirement, resignation, or death, whichever first occurs; provided, however, that temporary return to duty shall not prohibit payment of salary to such officer or member of the State Highway Patrol provided the officer or member submits to the commanding officer of the State Highway Patrol prior to the beginning of each subsequent period of disability during the two-year period medical evidence that such disability is directly related to the original cause of incapacity; provided further, that officers or members of the State Highway Patrol, notwithstanding the provisions of subsection (c) of this section, shall during the two-year period salary is paid pursuant to this subsection be subject to the provisions of G.S. 97-27. All payments of salary provided for in this subsection shall be made at the same time and in the same manner as other salaries are paid to members of the State Highway Patrol.

(c) The provisions of subsection (b) of this section shall be in lieu of all compensation provided for the first two years of such incapacity by G.S. 97-29 and 97-30, but shall be in addition to any other benefits or compensation to which such officer or member of the State Highway Patrol shall be entitled under the provisions of the Workmen's Compensation Act. The provisions of G.S. 97-24 will commence at the end of the two-year period salary is paid under subsection (b) of this section to any officer or member of the State Highway Patrol.

(d) The period for which the salary of any officer or member of the State Highway Patrol shall be paid to him, pursuant to subsection (b) of this section, while he is incapacitated as a result of injury by accident arising out of and in the course of the performance of his official duties, shall not be charged against any sick or other leave to which he shall be entitled under any other provision of law.

(e) Any officer or member of the State Highway Patrol, who as a result of an injury by accident arising out of and in the course of the performance by him of his official duties, shall be totally or partially incapacitated to perform any duties to which he may be lawfully assigned, shall report such incapacity to the commanding officer of the State Highway Patrol as soon as may be practicable in such manner as the commanding officer of the State Highway Patrol shall require. Upon the filing of such report, the commanding officer of the State Highway Patrol shall determine the cause of such incapacity, and to what extent the claimant may be assigned to other than his normal duties. The finding of the commanding officer of the State Highway Patrol shall determine the right of the claimant to benefits under subsection (b) of this section, unless the claimant, within 30 days after he receives notice thereof, files with the North Carolina Industrial Commission, upon such form as it shall require, a request for a hearing. Upon the filing of such request, the North Carolina Industrial Commission shall proceed to hear the matter in accordance with its regularly established procedure for hearing claims filed under the Workmen's Compensation Act, and shall report its findings to the commanding officer of the State Highway Patrol. From the decision of the North Carolina Industrial Commission an appeal shall lie as in other matters heard and determined by such Commission. Any officer or member of the State Highway Patrol who shall refuse to perform any duties to which he may properly be assigned as the result of the finding of the commanding officer of the State Highway Patrol, or of the North Carolina Industrial Commission, shall be entitled to no benefits pursuant to subsection (b) of this section so long as such refusal shall continue.

(f) The benefits provided for members of the State Highway Patrol under the provisions of subsections (b), (c), (d), and (e) of this section shall be granted to the Director and assistant director of the License and Theft Enforcement Section of the Division of Motor Vehicles, Department of Transportation, and to members of the License and Theft Enforcement Section of the Division of Motor Vehicles, Department of Transportation, designated by the Commissioner of

Motor Vehicles as "inspectors," and uniformed weigh station personnel in the same manner and under the same circumstances and subject to the same limitations as if the Director and assistant director and the inspectors were members of the State Highway Patrol. The benefits provided for members of the State Highway Patrol under the provisions of subsections (b), (c), (d), and (e) of this section shall be granted to incapacitated driver license examiners, if such total or partial incapacity is the result of an injury by accident arising out of and in the course of giving a road test.

(g), (h) Struck out by Session Laws 1961, c. 833, s. 6.2. (1929, c. 218, s. 1; 1931, c. 381; 1935, c. 324, s. 1; 1937, c. 313, s. 1; 1941, c. 36; 1947, c. 461, s. 1; 1953, c. 1195, s. 1; 1955, c. 372; 1957, c. 1394; 1959, cc. 370, 1320; 1961, c. 833, s. 6.2; 1973, c. 59; 1975, c. 61, ss. 1, 2; c. 716, s. 5; 1977, c. 70, ss. 6-8, 13; c. 329, ss. 1-3; cc. 749, 889.)

Editor's Note. — The first 1975 amendment added the last three sentences of subsection (a).

The second 1975 amendment substituted "License and Theft Enforcement Section of the Division" for "License and Theft Enforcement Division of the Department" in the first sentence of subsection (f). The editors have also substituted "License and Theft Enforcement Section" for "License and Theft Enforcement Division" in the first sentence of subsection (f).

The first 1977 amendment inserted "who shall be appointed by the Governor and," substituted "members" for "men" and "Secretary of Crime Control and Public Safety" for "Commissioner of Motor Vehicles" and deleted "and Advisory Budget Commission" preceding "shall direct," all in the first sentence of subsection (a), and substituted "Secretary" for "Commissioner" in the second sentence of subsection (a). In subsection (f), the amendment inserted "of Motor Vehicles, Department of Transportation" and "of the Division of Motor Vehicles, Department of Transportation" and inserted "of Motor Vehicles" following "Commissioner," all in the first sentence.

The second 1977 amendment rewrote subsection (b), added the second sentence of subsection (c), and substituted "commanding officer of the State Highway Patrol" for "Commissioner of Motor Vehicles" and "Commissioner" throughout subsection (e).

The third 1977 amendment substituted "twenty-one percent (21%)" for "eighteen percent (18%)" in the fourth sentence of subsection (a).

The fourth 1977 amendment inserted "and uniformed weigh station personnel" in the first sentence of subsection (f).

Session Laws 1977, c. 329, s. 4, provides: "This act shall become effective upon ratification [May 9, 1977] and shall apply to all injuries occurring on or after Nov. 1, 1975."

Pursuant to Session Laws 1957, c. 269, s. 1, "Department of Administration" has been substituted for "Budget Bureau" in subsection (a).

§ 20-186. Oath of office. — Each member of the State Highway Patrol shall subscribe and file with the Secretary of Crime Control and Public Safety an oath of office for the faithful performance of his duties. (1929, c. 218, s. 2; 1937, c. 339, s. 1; 1941, c. 36; 1977, c. 70, s. 9.)

Editor's Note. — The 1977 amendment inserted "State," substituted "Secretary of Crime Control and Public Safety" for "Commissioner of Motor Vehicles" and deleted former provisions relating to bonds of members of the Highway Patrol.

§ 20-187. Orders and rules for organization and conduct. — The Secretary of Crime Control and Public Safety is authorized and empowered to make all necessary orders, rules and regulations for the organization, assignment, and conduct of the members of the State Highway Patrol. Such orders, rules and regulations shall be subject to the approval of the Governor. (1929, c. 218, ss. 1, 3; 1931, c. 381; 1933, c. 214, ss. 1, 2; 1939, c. 387, s. 2; 1941, c. 36; 1977, c. 70, s. 13.)

Editor's Note. — The 1977 amendment, effective April 1, 1977, substituted "Secretary of Crime Control and Public Safety" for "Commissioner of Motor Vehicles" in the first sentence.

Cited in Darnell v. North Carolina Dep't of Transp. & Hwy. Safety, 30 N.C. App. 328, 226 S.E.2d 879, cert. denied, 290 N.C. 776, 229 S.E.2d 32 (1976).

§ 20-187.1. Awards. — (a) The patrol commander shall appoint an awards committee consisting of one troop commander, one troop executive officer, one district sergeant, one corporal, two troopers and one member of patrol headquarters staff. All committee members shall serve for a term of one year. The member from patrol headquarters staff shall serve as secretary to the committee and shall vote only in case of ties. The committee shall meet at such times and places designated by the patrol commander.

(b) The award to be granted under the provisions of this section shall be the North Carolina State Highway Patrol award of honor. The North Carolina State Highway Patrol award of honor is awarded in the name of the people of North Carolina and by the Governor to a person who, while a member of the North Carolina State Highway Patrol, distinguishes himself conspicuously by gallantry and intrepidity at the risk of personal safety and beyond the call of duty while engaged in the preservation of life and property. The deed performed must have been one of personal bravery and self-sacrifice so conspicuous as to clearly distinguish the individual above his colleagues and must have involved risk of life. Proof of the performance of the service will be required and each recommendation for the award of this decoration will be considered on the standard of extraordinary merit.

(c) Recipients of the awards hereinabove provided for will be entitled to receive a framed certificate of the award and an insignia designed to be worn as a part of the State Highway Patrol uniform.

(d) The awards committee shall review and investigate all reports of outstanding service and shall make recommendations to the patrol commander with respect thereto. The committee shall consider members of the Patrol for the awards created by this section when properly recommended by any individual having personal knowledge of an act, achievement or service believed to warrant the award of a decoration. No recommendation shall be made except by majority vote of all members of the committee. All recommendations of the committee shall be in writing and shall be forwarded to the patrol commander.

(e) Upon receipt of a recommendation of the committee, the patrol commander shall inquire into the facts of the matter and shall reduce his recommendation to writing. The patrol commander shall forward his recommendation, together with the recommendation of the committee, to the Secretary of Crime Control and Public Safety. The Secretary shall have final authority to approve or disapprove recommendations affecting the issuance of all awards except the award of honor. All recommendations for the award of honor shall be forwarded to the Governor for final approval or disapproval.

(f) The patrol commander shall, with the approval of the Secretary, establish all necessary rules and regulations to fully implement the provisions of this section and such rules and regulations shall include, but shall not be limited to, the following:

(1) Announcement of awards
(2) Presentation of awards
(3) Recording of awards
(4) Replacement of awards
(5) Authority to wear award insignias. (1967, c. 1179; 1971, c. 848; 1977, c. 70, s. 13.)

Editor's Note. — The 1977 amendment substituted "Secretary of Crime Control and Public Safety" for "Commissioner of Motor Vehicles" in the second sentence of subsection (e). The editors have also substituted "Secretary" for "Commissioner" in the third sentence of subsection (e) and in the introductory paragraph of subsection (f), although that substitution was not expressly directed by the amendatory act.

§ 20-187.2. Badges and service revolvers of deceased or retiring members of State, city and county law-enforcement agencies; revolvers of active members. — (a) Surviving spouses, or in the event such members die unsurvived by a spouse, surviving children, of members of North Carolina State, city and county law-enforcement agencies killed in the line of duty or who are members of such agencies at the time of their deaths, and retiring members of such agencies, shall receive, upon request and at no cost to them, the badge and service revolver worn or carried by such deceased or retiring member, upon securing a permit as required by G.S. 14-402 et seq. or G.S. 14-409.1 et seq., or without such permit provided the revolver shall have been rendered incapable of being fired.

(b) Active members of North Carolina State law-enforcement agencies, upon change of type of revolvers, may purchase the revolver worn or carried by such member at a price which shall be the average yield to the State from the sale of similar revolvers during the preceding year. (1971, c. 669; 1973, c. 1424; 1975, c. 44; 1977, c. 548.)

Editor's Note. — The 1975 amendment inserted "city and county" between "State" and "law-enforcement agencies" near the beginning of subsection (a). Similar language in subsection (b) was not changed.

The 1977 amendment substituted "Surviving spouses" for "Widows" and "spouse" for "widow" in subsection (a).

§ 20-188. Duties of Highway Patrol. — The State Highway Patrol shall be subject to such orders, rules and regulations as may be adopted by the Secretary of Crime Control and Public Safety, with the approval of the Governor, and shall regularly patrol the highways of the State and enforce all laws and regulations respecting travel and the use of vehicles upon the highways of the State and all laws for the protection of the highways of the State. To this end, the members of the Patrol are given the power and authority of peace officers for the service of any warrant or other process issuing from any of the courts of the State having criminal jurisdiction, and are likewise authorized to arrest without warrant any person who, in the presence of said officers, is engaged in the violation of any of the laws of the State regulating travel and the use of vehicles upon the highways, or of laws with respect to the protection of the highways, and they shall have jurisdiction anywhere within the State, irrespective of county lines. The State Highway Patrol shall enforce the provisions of G.S. 14-399.

The State Highway Patrol shall have full power and authority to perform such additional duties as peace officers as may from time to time be directed by the Governor, and such officers may at any time and without special authority, either upon their own motion or at the request of any sheriff or local police authority, arrest persons accused of highway robbery, bank robbery, murder, or other crimes of violence.

The Secretary of Crime Control and Public Safety shall direct the officers and members of the State Highway Patrol in the performance of such other duties as may be required for the enforcement of the motor vehicle laws of the State.

Members of the State Highway Patrol, in addition to the duties, power and authority hereinbefore given, shall have the authority throughout the State of North Carolina of any police officer in respect to making arrests for any crimes committed in their presence and shall have authority to make arrests for any crime committed on any highway.

Regardless of territorial jurisdiction, any member of the State Highway Patrol who initiates an investigation of an accident or collision may not relinquish responsibility for completing the investigation, or for filing criminal charges as appropriate, without clear assurance that another law-enforcement officer or agency has fully undertaken responsibility, and in such cases he shall render

reasonable assistance to the succeeding officer or agency if requested. (1929, c. 218, s. 4; 1933, c. 214, ss. 1, 2; 1935, c. 324, s. 3; 1939, c. 387, s. 2; 1941, c. 36; 1945, c. 1048; 1947, c. 1067, s. 20; 1973, c. 689; 1975, c. 716, s. 5; 1977, c. 70, ss. 10, 13; c. 887, s. 3.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the third paragraph as it stood before the 1977 amendments.

The first 1977 amendment substituted "Secretary of Crime Control and Public Safety" for "Commissioner of Motor Vehicles" in the first sentence of the first paragraph and rewrote the third paragraph.

The second 1977 amendment added the third sentence of the first paragraph.

When acting as such, a State highway patrolman is a public officer within the purview of § 14-223. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Right to Employ Reasonable Means in Fulfilling Duties. — By this section the Patrol is directed to "enforce all laws and regulations respecting travel and use of vehicles upon the highways of the State." Imposition of this duty implies the right to employ reasonable means in a reasonable manner in fulfilling it. Collins v. Christenberry, 6 N.C. App. 504, 170 S.E.2d 515 (1969).

Power to Make Arrests. — As to power of highway patrolman to make arrests, see 23 N.C.L. Rev. 338.

Where a highway patrolman is advised by a person that an armed convict had come to her home, made threats, and demanded food, such patrolman is given authority under this section to arrest such convict. Galloway v. Department of Motor Vehicles, 231 N.C. 447, 57 S.E.2d 799 (1950).

Arrest without Warrant. — A highway patrolman apprehending a person driving a motor vehicle on the public highway while under the influence of intoxicating liquor is authorized, by virtue of the provisions of this section and subdivision (1) of former § 15-41 [now § 15A-401 (b)] to arrest such person without a warrant, and such arrest is legal. State v. Broome, 269 N.C. 661, 153 S.E.2d 384 (1967).

Care Required of Officer in Pursuit of Lawbreaker. — It is not held that an officer, when in pursuit of a lawbreaker, is under no obligation to exercise a reasonable degree of care to avoid injury to others who may be on the public roads and streets. It is held that, when so engaged, he is not to be deemed negligent merely because he fails to observe the requirements of the Motor Vehicle Act. His conduct is to be examined and tested by another standard. He is required to observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances. Collins v. Christenberry, 6 N.C. App. 504, 170 S.E.2d 515 (1969).

Armed robbery is a crime of violence within the meaning of this section. Galloway v. Department of Motor Vehicles, 231 N.C. 447, 57 S.E.2d 799 (1950).

The word "accused" in this section is used in the generic sense and does not import that the person to be arrested must have been accused of crime by judicial procedure. Galloway v. Department of Motor Vehicles, 231 N.C. 447, 57 S.E.2d 799 (1950).

The use of an airplane by highway patrolmen to locate a person sought to be arrested by them is not a departure from the terms of their employment. Galloway v. Department of Motor Vehicles, 231 N.C. 447, 57 S.E.2d 799 (1950).

§ 20-189. Patrolmen assigned to Governor's office. — The Secretary of Crime Control and Public Safety, at the request of the Governor, shall assign and attach two members of the State Highway Patrol to the office of the Governor, there to be assigned such duties and perform such services as the Governor may direct. The salary of the State highway patrolmen so assigned to the office of the Governor shall be paid from appropriations made to the office of the Governor and shall be fixed in an amount to be determined by the Governor and the Advisory Budget Commission. (1941, cc. 23, 36; 1965, c. 1159; 1977, c. 70, s. 13.)

Editor's Note. — The 1977 amendment substituted "Secretary of Crime Control and Public Safety" for "Commissioner of Motor Vehicles" in the first sentence.

§ 20-190. Uniforms; motor vehicles and arms; expense incurred; color of vehicle. — The Department of Crime Control and Public Safety shall adopt some

distinguishing uniform for the members of said State Highway Patrol, and furnish each member of the Patrol with an adequate number of said uniforms and each member of said Patrol force when on duty shall be dressed in said uniform. The Department of Crime Control and Public Safety shall likewise furnish each member of the Patrol with a suitable motor vehicle, and necessary arms, and provide for all reasonable expense incurred by said Patrol while on duty, provided, that not less than seventy-nine percent (79%) of the number of motor vehicles operated on the highways of the State by members of the State Highway Patrol shall be painted a uniform color of black and silver. (1929, c. 218, s. 5; 1941, c. 36; 1955, c. 1132, ss. 1, 1¼, 1¾; 1957, c. 478, s. 1; c. 673, s. 1; 1961, c. 342; 1975, c. 716, s. 5; 1977, c. 70, s. 15.)

Editor's Note. — The 1975 amendment substituted "Division of Motor Vehicles" for "Department of Motor Vehicles" in two places.

The 1977 amendment substituted "Department of Crime Control and Public Safety" for "Division of Motor Vehicles" in two places.

§ 20-190.1. Patrol vehicles to have sirens; sounding siren. — Every motor vehicle operated on the highways of the State by officers and members of the State Highway Patrol shall be equipped with a siren. Whenever any such officer or member operating any unmarked car shall overtake another vehicle on the highway after sunset of any day and before sunrise for the purpose of stopping the same or apprehending the driver thereof, he shall sound said siren before stopping such other vehicle. (1957, c. 478, s. 1½.)

§ 20-190.2. Signs showing highways patrolled by unmarked vehicles. — The Department of Transportation shall erect or cause to be erected signs at all points where paved highways enter this State from adjacent states stating that the highways are patrolled by unmarked police vehicles. (1957, c. 673, s. 2; 1973, c. 507, s. 5; 1977, c. 464, s. 34.)

Editor's Note. — The 1977 amendment substituted "Department of Transportation" for "Board of Transportation."

§ 20-191. Use of facilities. — Office space and other equipment and facilities of the Division of Motor Vehicles, Department of Transportation, presently being used by the State Highway Patrol shall continue to be used by the Patrol, and joint use of space, equipment and facilities between any division of the Department of Transportation and the State Highway Patrol may continue, unless such arrangements are changed by agreements between the Secretary of Crime Control and Public Safety and the Secretary of Transportation. (1929, c. 218, s. 6; 1937, c. 313, s. 1; 1941, c. 36; 1947, c. 461, s. 2; 1975, c. 716, s. 5; 1977, c. 70, s. 11.)

Editor's Note. — The 1975 amendment substituted "Division of Motor Vehicles" for "Department of Motor Vehicles" in the section as it stood before the 1977 amendment.

The 1977 amendment rewrote this section, which formerly related to the establishment of district headquarters.

§ 20-192. Shifting of patrolmen from one district to another. — The commanding officer of the State Highway Patrol under such rules and regulations as the Department of Crime Control and Public Safety may prescribe shall have authority from time to time to shift the forces from one district to another, or to consolidate more than one district force at any point for special

purposes. Whenever a member of the State Highway Patrol is transferred from one point to another for the convenience of the State or otherwise than upon the request of the patrolman, the Department shall be responsible for transporting the household goods, furniture and personal apparel of the patrolman and members of his household. (1929, c. 218, s. 7; 1937, c. 313, s. 1; 1941, c. 36; 1947, c. 461, s. 3; 1951, c. 285; 1975, c. 716, s. 5; 1977, c. 70, s. 15.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in two places.

The 1977 amendment substituted "Department of Crime Control and Public Safety" for "Division of Motor Vehicles" in the first sentence. The editors have also substituted "Department" for "Division" in the second sentence, although this substitution was not expressly directed by the amendatory act.

§ 20-193. Fees for service of process by patrolmen to revert to county. — All fees for arrests or service of process that may be taxed in the bill of costs for the various courts of the State on account of the official acts of the members of the State Highway Patrol shall be remitted to the general fund in the county in which the said cost is taxed. (1929, c. 218, s. 8.)

§ 20-194. Expense of administration; defense of members and other State law-enforcement officers in civil actions; payment of judgments. — (a) All expenses incurred in carrying out the provisions of this Article shall be paid out of the highway fund.

(b) In the event that a member of the Highway Patrol or any other State law-enforcement officer is sued in a civil action as an individual for acts occurring while such member was alleged to be acting within the course and scope of his office, employment, service, agency or authority, which was alleged to be a proximate cause of the injury or damage complained of, the Attorney General is hereby authorized to defend such employee through the use of a member of his staff or, in his discretion, employ private counsel, subject to the provisions of Article 31A of Chapter 143 and G.S. 147-17. Any judgment rendered as a result of said civil action against such member of the Highway Patrol or other State law-enforcement officer, for acts alleged to be committed within the course and scope of his office, employment, service, agency or authority shall be paid as an expense of administration up to the limit provided in the Tort Claims Act.

(c) The coverage afforded under this Article shall be excess coverage over any commercial liability insurance up to the limit of the Tort Claims Act. (1929, c. 218, s. 9; 1941, c. 36; 1957, c. 65, s. 11; 1973, c. 507, s. 5; c. 1323; 1975, c. 210; 1977, c. 70, s. 12.)

Editor's Note. — The 1975 amendment added subsection (c).

The 1977 amendment substituted "highway fund" for "maintenance funds of the Board of Transportation" at the end of subsection (a).

§ 20-195. Cooperation between Patrol and local officers. — The Secretary of Crime Control and Public Safety with the approval of the Governor, through the State Highway Patrol Division, shall encourage the cooperation between the Highway Patrol and the several municipal and county peace officers of the State for the enforcement of all traffic laws and the proper administration of the Uniform Drivers' License Law, and arrangements for compensation of special services rendered by such local officers out of the funds allotted to the State Highway Patrol Division may be made, subject to the approval of the Director

of the Budget. (1935, c. 324, s. 5; 1939, c. 387, s. 3; 1941, c. 36; 1977, c. 70, ss. 13, 14.)

Editor's Note. — The 1977 amendment substituted "Secretary of Crime Control and Public Safety" for "Commissioner of Motor Vehicles" in one place and "State Highway Patrol Division" for "Division of Highway Safety and Patrol" in two places.

§ 20-196. Statewide radio system authorized; use of telephone lines in emergencies. — The Secretary of Crime Control and Public Safety, through the State Highway Patrol Division is hereby authorized and directed to set up and maintain a statewide radio system, with adequate broadcasting stations so situate as to make the service available to all parts of the State for the purpose of maintaining radio contact with the members of the State Highway Patrol and other officers of the State, to the end that the traffic laws upon the highways may be more adequately enforced and that the criminal use of the highways may be prevented.

If the Director of the Budget shall find that the appropriation provided for the Division is not adequate to take care of the entire cost of the radio service herein provided for, after providing for the administration of other provisions of this law, the Department of Transportation, upon the order of the Director of the Budget approved by the Advisory Budget Commission, shall make available such additional sum as the said Budget Commission may find to be necessary to make the installation and operation of such radio service possible; and the sum so provided by the Department of Transportation shall constitute a valid charge against the appropriation item of betterments for State and county roads.

The Secretary of Crime Control and Public Safety is likewise authorized and empowered to arrange with the various telephone companies of the State for the use of their lines for emergency calls by the members of the State Highway Patrol, if it shall be found practicable to arrange apparatus for temporary contact with said telephone circuits along the highways of the State.

In order to make this service more generally useful, the various boards of county commissioners and the governing boards of the various cities and towns are hereby authorized and empowered to provide radio receiving sets in the offices and vehicles of their various officers, and such expenditures are declared to be a legal expenditure of any funds that may be available for police protection. (1935, c. 324, s. 6; 1941, c. 36; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1975, c. 716, s. 5; 1977, c. 70, ss. 13, 14; c. 464, s. 34.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the second paragraph.

The first 1977 amendment substituted "Secretary of Crime Control and Public Safety" for "Commissioner of Motor Vehicles" in the first and third paragraphs and "State Highway Patrol Division" for "Division of Highway Safety and Patrol" in the first paragraph.

The second 1977 amendment substituted "Department of Transportation" for "Board of Transportation" in two places in the second paragraph.

§ 20-196.1. Use of airplanes to discover persons violating certain motor vehicle laws. — The State Highway Patrol is hereby prohibited from using airplanes to discover violations of Part 10 of Article 3 of Chapter 20 of the General Statutes relating to operation of motor vehicles and rules of the road. This section shall not prohibit the use of airplanes in discovering persons engaged in unlawful racing on streets and highways and to those persons who fail to stop in the event of accidents and render assistance and furnish information with respect thereto to the nearest available peace officer. Nor shall this section prohibit the use of airplanes for observing unusually heavy

congested traffic situations, such as occur during the State Fair, football games, and other such events, for the purpose of full coordination of traffic controls. (1963, c. 911, s. 1.)

§ 20-196.2. Use of airplanes to discover violations of §§ 20-138 to 20-171; testimony of pilots and observers; declaration of policy. — The State Highway Patrol is hereby permitted the use of airplanes to discover violations of Part 10 of Article 3 of Chapter 20 of the General Statutes relating to operation of motor vehicles and rules of the road; provided, however, neither the observer nor the pilot shall be competent to testify in any court of law in a criminal action charging violations of G.S. 20-141, 20-141.1, and 20-144. It is hereby declared the public policy of North Carolina that the airplanes should be used primarily for accident prevention and should also be used incident to the issuance of warning citations in accordance with the provisions of G.S. 20-183. (1967, c. 513.)

Editor's Note. — Section 20-141.1, referred to in this section, was repealed by Session Laws 1973, c. 1330, s. 39.

§ 20-196.3. Who may hold supervisory positions over uniformed personnel. — Notwithstanding any other provision of the General Statutes of North Carolina, it shall be unlawful for any person other than the Governor and the Secretary of Crime Control and Public Safety and other than a uniformed member of the North Carolina State Highway Patrol who has met all requirements for employment within the Patrol, including but not limited to completion of the basic Patrol school, to hold any supervisory position over uniformed personnel within the Patrol. (1975, c. 47; 1977, c. 70, s. 14.1.)

Editor's Note. — The 1977 amendment substituted "Secretary of Crime Control and Public Safety" for "Secretary of the Department of Transportation."

ARTICLE 5.

Enforcement of Collection of Judgments against Irresponsible Drivers of Motor Vehicles.

§§ 20-197 to 20-211: Repealed by Session Laws 1947, c. 1006, s. 58.

ARTICLE 6.

Giving Publicity to Highway Traffic Laws through the Public Schools.

§ 20-212. Department of Transportation to prepare digest. — The Department of Transportation shall cause to be prepared a digest of the traffic laws of the State suitable for use in the public schools of the State and have published in pamphlet form and delivered on or before the first day of August, 1927, to the State Superintendent of Public Instruction, a sufficient number of said pamphlets to supply at least one copy each to all of the public high school teachers of the State. (1927, c. 242, s. 1; 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 34.)

Editor's Note. — The 1977 amendment substituted "Department of Transportation" for "Board of Transportation."

§ 20-213. State Superintendent of Public Instruction to distribute pamphlets. — The State Superintendent of Public Instruction shall cause to be delivered to the superintendents or principals of the various high schools of the State sufficient number of said pamphlets to supply one to each of the teachers engaged for said schools. (1927, c. 242, s. 2.)

§ 20-214. Pamphlets brought to attention of children. — The superintendents or principals, or other persons in charge of the public high schools of the State, shall cause the contents of said pamphlet to be brought to the attention of all the children in attendance upon the said high schools in the form of lessons of at least one each week until the entire contents of said pamphlet shall have been read and explained. (1927, c. 242, s. 3.)

§ 20-215. Practice to be continued; Department of Transportation to supply additional copies yearly. — This practice shall be continued during each school year and the Department of Transportation is directed annually on or before the first Monday of August, to supply, as hereinbefore provided, such additional copies of the said pamphlet, having the same revised from time to time to meet any amendments of the traffic laws of the State, as the State Superintendent of Public Instruction may ascertain and report to the Department of Transportation to be necessary. (1927, c. 242, s. 4; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 34.)

Editor's Note. — The 1977 amendment substituted "Department of Transportation" for "Board of Transportation" in two places.

ARTICLE 6A.

Motor Carriers of Migratory Farm Workers.

§ 20-215.1. Definitions. — Unless the context otherwise requires, the following terms and phrases shall have, for the purpose of this Article, the following meaning:

(1) "Migratory farm worker" means any individual being transported by motor carrier to or from employment in agriculture.

(2) "Motor carrier of migratory farm workers" means any person, firm or corporation who or which for compensation transports at any one time in North Carolina five or more migratory farm workers to or from their employment by any motor vehicle, other than a passenger automobile or station wagon, except a migratory farm worker transporting himself or his immediate family, but does not include any "common carrier" certified by the North Carolina Utilities Commission or the Interstate Commerce Commission; provided, the provisions of this Article shall not apply to the transportation of migratory farm workers on a vehicle owned by a farmer when such migratory farm workers are employed or to be employed by the farmer to work on his own farm or farm controlled by him.

(3) Repealed by Session Laws 1973, c. 1330, s. 39. (1961, c. 505, s. 1; 1973, c. 1330, s. 39.)

Cross Reference. — For definitions applicable throughout this Chapter, see § 20-4.01.

§ 20-215.2. Power to regulate; rules and regulations establishing minimum standards. — Notwithstanding any other provisions of this Chapter the North Carolina Division of Motor Vehicles, hereinafter referred to as "Division," is

hereby vested with the power and duty to make and enforce reasonable rules and regulations applicable to motor carriers of migratory farm workers to and from their places of employment. The rules promulgated shall establish minimum standards:

(1) For the construction and equipment of such vehicles, including coupling devices, lighting equipment, exhaust systems, rear vision mirrors, brakes, steering mechanisms, tires, windshield wipers and warning devices.

(2) For the operation of such vehicles, including driving rules, distribution of passengers and load, maximum hours of service for drivers, minimum requirements of age and skill of drivers, physical conditions of drivers and permits, licenses or other credentials required of drivers.

(3) For the safety and comfort of passengers in such vehicles, including emergency kits, fire extinguishers, first-aid equipment, sidewalls, seating accommodations, tail gates or doors, rest and meal stops, maximum number of passengers, and safe means of ingress and egress. (1961, c. 505, s. 2; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in two places in the introductory paragraph.

§ 20-215.3. Adoption of I.C.C. regulations; public hearings on rules and regulations; distribution of copies. — The Division may adopt and enforce rules and regulations promulgated by the Interstate Commerce Commission, insofar as the Division finds such rules to be practicable in this State; shall conduct public hearings in connection with the formulation and adoption of rules and regulations; and shall cause the distribution of copies of such rules as are promulgated to interested persons and groups. (1961, c. 505, s. 3; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in two places.

§ 20-215.4. Violation of regulations a misdemeanor. — The violation of any rule or regulation promulgated by the Division hereunder by any person, firm or corporation shall be a misdemeanor, punishable by a fine of not more than fifty dollars ($50.00) or by imprisonment for a period of not more than 30 days, or by both such fine and imprisonment. (1961, c. 505, s. 4; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" near the beginning of the section.

§ 20-215.5. Duties and powers of law-enforcement officers. — It shall be the duty of the law-enforcement officers of the State, and of each county, city or town, to enforce the rules promulgated hereunder in their respective jurisdictions; and such officers shall have the power to stop any motor vehicle upon the highways of this State for the purpose of determining whether or not such motor vehicle is being operated in violation of such rules. (1961, c. 505, s. 5.)

ARTICLE 7.

Miscellaneous Provisions Relating to Motor Vehicles.

§ 20-216. Passing horses or other draft animals. — Any person operating a motor vehicle shall use reasonable care when approaching or passing a horse or other draft animal whether ridden or otherwise under control. (1917, c. 140, s. 15; C. S., s. 2616; 1969, c. 401.)

Passing Animals. — The laws with respect to passing animals, with the exception of establishing a speed limit, are to a great extent an embodiment of general principles of law applicable to motor vehicles when operated on the highway and in places where their use is likely to be a source of danger to others. Tudor v. Bowen, 152 N.C. 441, 67 S.E. 1015 (1910); Gaskins v. Hancock, 156 N.C. 56, 72 S.E. 80 (1911). See Curry v. Fleer, 157 N.C. 16, 72 S.E. 626 (1911).

Cited in Goss v. Williams, 196 N.C. 213, 145 S.E. 169 (1928); York v. York, 212 N.C. 695, 194 S.E. 486 (1938).

§ 20-217. Motor vehicles to stop for properly marked and designated school buses in certain instances. — The driver of any vehicle upon approaching from any direction on the same street or highway any school bus (including privately owned buses transporting children), while such bus is displaying its mechanical stop signal, or is stopped for the purpose of receiving or discharging passengers, shall bring his vehicle to a full stop before passing or attempting to pass such bus, and shall remain stopped until the mechanical stop signal has been withdrawn or until the bus has moved on. The driver of a vehicle upon any interstate or other controlled-access highway need not stop upon meeting or passing a school bus which is in the roadway across the dividing space or physical barrier separating the roadways.

The provisions of this section are applicable only in the event the school bus bears upon the front and rear a plainly visible sign containing the words "school bus" in letters not less than eight inches in height.

Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not to exceed two hundred dollars ($200.00) or imprisoned not to exceed 90 days. (1925, c. 265; 1943, c. 767; 1947, c. 527; 1955, c. 1365; 1959, c. 909; 1965, c. 370; 1969, c. 952; 1971, c. 245, s. 1; 1973, c. 1330, s. 35.)

This section is a safety statute, designed for the protection of life, limb and property. State v. Weston, 273 N.C. 275, 159 S.E.2d 883 (1968).

This section is designed for the protection of life, limb and property. Slade v. New Hanover County Bd. of Educ., 10 N.C. App. 287, 178 S.E.2d 316 (1971).

This section applies to passing a school bus from either direction, from the rear or from the front. State v. Webb, 210 N.C. 350, 186 S.E. 241 (1936).

No Duty to Stop When Bus Is across Median. — This section imposes no duty on a motorist to stop for a stopped school bus across the median from him on a divided highway. Holder v. Moore, 22 N.C. App. 134, 205 S.E.2d 732 (1974).

A violation of this section is negligence per se, but such violation must be proximate cause contributing to injury and death of intestate to warrant recovery on that ground. Morgan v. Carolina Coach Co., 225 N.C. 668, 36 S.E.2d 263 (1945).

Culpable Negligence. — The violation of a safety statute which results in injury or death will constitute culpable negligence if the violation is willful, wanton, or intentional. But where there is an unintentional or inadvertent violation of the statute, such violation standing alone does not constitute culpable negligence. The inadvertent or unintentional violation of the statute must be accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or a heedless indifference to the safety of others. State v. Weston, 273 N.C. 275, 159 S.E.2d 883 (1968).

Evidence Failing to Show Violation of This Section. — The evidence tended to show that a school bus and two following cars stopped on the right side of the highway, that two children alighted, one of whom ran immediately in front of the bus across the highway, and the other, a boy eight years old waited until the three vehicles were in motion and crossed the highway after the third vehicle had passed, and was struck by defendant's truck operated by defendant's agent which was traveling in the opposite direction about 30 miles per hour, and which failed to give any warning of its approach and failed to reduce speed prior to the collision. It was held that, although the evidence failed to show a violation of the letter of this section, since the school bus was in motion and its stop signal had been withdrawn prior to the impact, the evidence was sufficient to be submitted to the jury upon the issues of the negligence of the driver of the truck and the contributory negligence of defendant's intestate. Hughes v. Thayer, 229 N.C. 773, 51 S.E.2d 488 (1949).

Applied in Reeves v. Campbell, 264 N.C. 224, 141 S.E.2d 296 (1965).

§ 20-217.1. Receiving or discharging school bus passengers upon divided highway. — It shall be unlawful for any principal or superintendent of any school, routing a school bus, to authorize the driver of any such buses to stop and receive or discharge passengers upon any highway which has been divided into two roadways where passengers would be required to cross the highway to reach their destination or to board the bus; provided, that passengers may be discharged or received at points where pedestrians and vehicular traffic is controlled by adequate stop-and-go traffic signals. (1959, c. 909.)

§ 20-218. Standard qualifications for school bus drivers; speed limit. — (a) No person shall drive or operate a school bus over the public roads of North Carolina while the same is occupied by children unless said person shall be fully trained in the operation of motor vehicles, and shall furnish to the superintendent of the schools of the county in which said bus shall be operated a certificate from the Highway Patrol of North Carolina, or from any representative duly designated by the Commissioner of Motor Vehicles, and the chief mechanic in charge of school buses in said county showing that he has been examined by a member of the said Highway Patrol, or a representative duly designated by the Commissioner of Motor Vehicles, and said chief mechanic in charge of school buses in said county and that he is a fit and competent person to operate or drive a school bus over the public roads of the State. Notwithstanding the above, school activity buses may be operated by a person who holds a school bus driver's certificate or a chauffeur's license.

(b) It shall be unlawful for any person to operate or drive a school bus loaded with children over the public roads of North Carolina at a greater rate of speed than 35 miles per hour, with the following exceptions:

(1) For school activity buses which are painted a different color from regular school buses and which are being used for transportation of students or others to or from places for participation in events other than regular classroom work, it shall be unlawful to operate such a school activity bus at a greater rate of speed than 45 miles per hour.

(2) For school buses or special buses with a capacity of 16 pupils or less that are used to transport students who are children with special needs, it shall be unlawful to operate the buses at a greater rate of speed than 45 miles per hour.

(c) Any person violating this section shall, upon conviction, be fined not more than fifty dollars ($50.00) or imprisoned for not more than 30 days. (1937, c. 397, ss. 1-3; 1941, c. 21; 1943, c. 440; 1945, c. 216; 1957, cc. 139, 595; 1971, c. 293; 1977, c. 791, ss. 1, 2; c. 1102.)

Cross Reference. — As to selection and employment of school bus drivers, see § 115-185.

Cited in Shue v. Scheidt, 252 N.C. 561, 114 S.E.2d 237 (1960).

Editor's Note. — The first 1977 amendment rewrote this section to read as set out above. The amendment designated the first through third

paragraphs as subsections (a) through (c), combined the former first and second sentences of present subsection (b) into the introductory language and subdivision (1) by substituting "with the following exceptions:" and "(1) For" for "Provided, however, that as to," added subdivision (2) to subsection (b), and inserted "for" in present subsection (c).

The second 1977 amendment inserted "for anyone other than a person 21 years old or older who holds a school bus driver's certificate or a chauffeur's license" in the second sentence of the second paragraph of the section as it stood before the first 1977 amendment. The section as amended by the second 1977 act would read as follows:

"**§ 20-218. Standard qualifications for school bus drivers; speed limit.** — (a) No person shall drive or operate a school bus over the public roads of North Carolina while the same is occupied by children unless said person shall be fully trained in the operation of motor vehicles, and shall furnish to the superintendent of the schools of the county in which said bus shall be operated a certificate from the Highway Patrol of North Carolina, or from any representative duly designated by the Commissioner of Motor Vehicles, and the chief mechanic in charge of school buses in said county showing that he has been examined by a member of the said Highway Patrol, or a representative duly designated by the Commissioner of Motor Vehicles, and said chief mechanic in charge of school buses in said county and that he is a fit and competent person to operate or drive a school bus over the public roads of the State. Notwithstanding the above, school activity buses may be operated by a person who holds a school bus driver's certificate or a chauffeur's license.

(b) It shall be unlawful for any person to operate or drive a school bus loaded with children over the public roads of North Carolina at a greater rate of speed than 35 miles per hour, with the following exceptions:

(1) For school activity buses which are painted a different color from regular school buses and which are being used for transportation of students or others to or from places for participation in events other than regular classroom work, it shall be unlawful for anyone other than a person 21 years old or older who holds a school bus driver's certificate or a chauffeur's license to operate such a school activity bus at a greater rate of speed than 45 miles per hour.

(2) For school buses or special buses with a capacity of 16 pupils or less that are used to transport students who are children with special needs, it shall be unlawful to operate the buses at a greater rate of speed than 45 miles per hour.

(c) Any person violating this section shall, upon conviction, be fined not more than fifty dollars ($50.00) or imprisoned for not more than 30 days."

§ 20-218.1. Private and parochial school buses. — The term "school bus" as used in this Chapter shall include public, private, and parochial school buses, and the term "school activity bus" as used in this Chapter shall include public, private, and parochial school activity buses. (1969, c. 264.)

§ 20-218.2. Speed limit for activity buses for nonprofit purpose. — It shall be unlawful for any person to operate an activity bus for a nonprofit organization for a nonprofit purpose which is being used for transportation of persons in connection with nonprofit activities in excess of 45 miles per hour.

Any person violating this section shall, upon conviction, be fined not more than fifty dollars ($50.00) or imprisoned for not more than 30 days. (1969, c. 1000, s. 2.)

§ 20-219. Refund to counties of costs of prosecuting theft cases. — Whenever the Motor Vehicle Division of the State has caused to be instituted criminal prosecutions in the superior court of any county of the State for violation of the automobile theft laws, and the county wherein such case was tried has incurred court costs incident thereto, upon certificate of the clerk of the superior court of said county showing an itemized statement thereof, and that the same has been paid, upon the approval of the Commissioner of Motor Vehicles and the Attorney General, the sum or sums so paid shall be refunded to said county, the same to be paid from the highway maintenance fund from receipts from the motor vehicle registration title fees.

This section shall apply to costs incurred in the prosecution of automobile theft cases only. (1929, c. 275; 1941, c. 36; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" near the beginning of the first paragraph.

§ 20-219.1: Repealed by Session Laws 1971, c. 294, s. 2.

Cross Reference. — For present provision as to removal of vehicles parked or left standing on highways, see § 20-161.

§ 20-219.2. Removal of unauthorized vehicles from private lots. — (a) It shall be unlawful for any person other than the owner or lessee of a privately owned or leased parking space to park a motor or other vehicle in such private parking space without the express permission of the owner or lessee of such space; provided, that such private parking lot be clearly designated as such by a sign no smaller than 24 inches by 24 inches prominently displayed at the entrance thereto and the parking spaces within the lot be clearly marked by signs setting forth the name of each individual lessee or owner; a vehicle parked in a privately owned parking space in violation of this section may be removed from such space upon the written request of the parking space owner or lessee to a place of storage and the registered owner of such motor vehicle shall become liable for removal and storage charges. No person shall be held to answer in any civil or criminal action to any owner, lienholder or other person legally entitled to the possession of any motor vehicle removed from such lot pursuant to this section except where such motor vehicle is willfully, maliciously or negligently damaged in the removal from aforesaid space to place of storage.

(b) Any person violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined not more than ten dollars ($10.00) in the discretion of the court.

(c) This section shall apply only to the Counties of Craven, Forsyth, Gaston, Guilford, New Hanover, Orange, Robeson, Wake, Wilson and to the City of Durham. (1969, cc. 173, 288; 1971, c. 986; 1973, c. 183; c. 981, s. 1; c. 1330, s. 36; 1975, c. 575.)

Editor's Note. — The 1975 amendment added Forsyth to the list of counties in subsection (c). This section was originally codified as § 20-162.2. It was transferred to its present position by Session Laws 1973, c. 1330, s. 36.

§ 20-219.3. Removal of unauthorized vehicles from gasoline service station premises. — (a) No motor vehicle shall be left for more than 48 hours upon the premises of any gasoline service station without the consent of the owner or operator of the service station.

(b) The registered owner of any motor vehicle left unattended upon the premises of a service station in violation of subsection (a) shall be given notice by the owner or operator of said station of said violation. The notice given shall be by certified mail return receipt requested addressed to the registered owner of the motor vehicle.

(c) Upon the expiration of 10 days from the return of the receipt showing that the notice was received by the addressee, such vehicle left on the premises of

a service station in violation of this section may be removed from the station premises to a place of storage and the registered owner of such vehicle shall become liable for the reasonable removal and storage charges and the vehicle subject to the storage lien created by G.S. 44A-1 et seq. No person shall be held to answer in any civil or criminal action to any owner, lienholder or other person legally entitled to the possession of any vehicle removed from such station premises pursuant to this section except where such vehicle is willfully or maliciously damaged in the removal from such station premises to place of storage.

(d) In the alternative, the station owner or operator may charge for storage, assert a lien, and dispose of the vehicle under the terms of G.S. 44A-4(b) through (g). The proceeds from the sale of the vehicle shall be disbursed as provided in G.S. 44A-5. (1971, c. 1220; 1973, c. 1330, s. 36.)

Editor's Note. — This section was originally codified as § 20-162.3. It was transferred to its present position by Session Laws 1973, c. 1330, s. 36.

ARTICLE 8.

Habitual Offenders.

§§ 20-220 to 20-231: Repealed by Session Laws 1977, c. 243, s. 1.

Cross Reference. — As to issuance of new licenses to persons whose licenses were revoked under the repealed sections, see § 20-231.1.

ARTICLE 8A.

Issuance of New Licenses to Persons Adjudged Habitual Offenders.

§ 20-231.1. Issuance of new licenses to persons whose licenses were revoked under repealed §§ 20-220 to 20-231. — Any person whose driver's license has been revoked under the habitual offender statutes repealed by this act (Article 8 of Chapter 20) may apply to the Division of Motor Vehicles for a new license after three years from the commencement of the revocation. Upon the filing of such application, the Division may, with or without a hearing, issue a new license upon satisfactory proof that the former licensee has been of good behavior for a minimum of three years from the date the revocation became effective and that his conduct and attitude are such as to entitle him to favorable consideration. The Division must reissue a license to any person adjudged a habitual offender after five years from the commencement of the revocation if the person is otherwise eligible to be licensed under Article 2 of Chapter 20. If a person's license has been revoked for five years under the statutes repealed by this act (Article 8 of Chapter 20), his previous status as a habitual offender may not be used as a basis for denying him a license. (1977, c. 243, s. 2.)

ARTICLE 9.

Motor Vehicle Safety and Financial Responsibility Act.

§§ 20-232 to 20-279: Repealed by Session Laws 1953, c. 1300, s. 35.

Editor's Note. — The repealing act is codified as § 20-279.35. For law now effective, see §§ 20-279.1 to 20-279.39. And see §§ 20-309 to 20-319.

Former § 20-232 has been reenacted and renumbered as § 20-17.1.

ARTICLE 9A.

Motor Vehicle Safety and Financial Responsibility Act of 1953.

§ 20-279.1. Definitions. — The following words and phrases, when used in this Article, shall, for the purposes of this Article, have the meanings respectively ascribed to them in this section, except in those instances where the context clearly indicates a different meaning:

(1) Repealed by Session Laws 1973, c. 1330, s. 39.

(2) "Conviction": A conviction upon a plea of guilty, or of nolo contendere, or the determination of guilt by a jury or by a court though no sentence has been imposed or, if imposed, has been suspended, and it includes a forfeiture of bail or collateral deposited to secure appearance in court of the defendant, unless the forfeiture has been vacated.

(3) "Judgment": Any judgment which shall have become final by expiration without appeal of the time within which an appeal might have been perfected, or by final affirmation on appeal, rendered by a court of competent jurisdiction of any state or of the United States, upon a cause of action arising out of the ownership, maintenance or use of any motor vehicle, for damages, including damages for care and loss of services, because of bodily injury to or death of any person, or for damages because of injury to or destruction of property, including the loss of use thereof, or upon a cause of action on an agreement of settlement for such damages.

(4) to (6) Repealed by Session Laws 1973, c. 1330, s. 39.

(7) "Nonresident's operating privilege": The privilege conferred upon a nonresident by the laws of this State pertaining to the operation by him of a motor vehicle in this State.

(8) to (10) Repealed by Session Laws 1973, c. 1330, s. 39.

(11) "Proof of financial responsibility": Proof of ability to respond in damages for liability, on account of accidents occurring subsequent to the effective date of said proof, arising out of the ownership, maintenance or use of a motor vehicle, in the amount of fifteen thousand dollars ($15,000) because of bodily injury to or death of one person in any one accident, and, subject to said limit for one person, in the amount of thirty thousand dollars ($30,000) because of bodily injury to or death of two or more persons in any one accident, and in the amount of five thousand dollars ($5,000) because of injury to or destruction of property of others in any one accident. Nothing contained herein shall prevent an insurer and an insured from entering into a contract, not affecting third parties, providing for a deductible as to property damage at a rate approved by the Commissioner of Insurance.

(12) Repealed by Session Laws 1973, c. 1330, s. 39. (1953, c. 1300, s. 1; 1955, c. 1152, s. 3; c. 1355; 1967, c. 277, s. 1; 1971, c. 1205, s. 1; 1973, c. 745, s. 1; c. 1330, s. 39.)

Cross References. — For definitions applicable throughout this Chapter, see § 20-4.01. As to Vehicle Financial Responsibility Act of 1957, see §§ 20-309 to 20-319. As to liability insurance covering negligent operation of municipal vehicles, see § 160A-485.

Editor's Note. — For comment on this Article, see 31 N.C.L. Rev. 420 (1953). For comment on insurer's liability for intentionally inflicted injuries, see 43 N.C.L. Rev. 436 (1965). For case law survey as to automobile liability insurance, see 44 N.C.L. Rev. 1023 (1966). For case law survey as to insurance, see 45 N.C.L. Rev. 955 (1967). Allstate Ins. Co. v. Shelby Mut. Ins. Co., 269 N.C. 341, 152 S.E.2d 436 (1967), cited in the

note below, was commented on in 46 N.C.L. Rev. 433 (1968).

The object of the Motor Vehicle Safety and Financial Responsibility Act was to provide protection to the public. Indiana Lumbermens Mut. Ins. Co. v. Parton, 147 F. Supp. 887 (M.D.N.C. 1957).

It is the purpose of the Financial Responsibility Act to provide protection for persons injured or damaged by the negligent operation of automobiles. Hawley v. Indemnity Ins. Co. of N. America, 257 N.C. 381, 126 S.E.2d 161 (1962); Fidelity & Cas. Co. v. North Carolina Farm Bureau Mut. Ins. Co., 16 N.C. App. 194, 192 S.E.2d 113 (1972).

The purpose of the Financial Responsibility Law is to protect victims of automobile accidents. Allstate Ins. Co. v. Shelby Mut. Ins. Co., 269 N.C. 341, 152 S.E.2d 436 (1967).

The purpose of the Financial Responsibility Act is to provide protection from damages or injuries resulting from the negligent operation of automobiles. Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970).

The purpose of the Financial Responsibility Act is to provide protection to the public from damages resulting from the negligent operation of automobiles by irresponsible persons. Nationwide Mut. Ins. Co. v. Fireman's Fund Ins. Co., 279 N.C. 240, 182 S.E.2d 571 (1971).

Operators Must Be Financially Responsible. — The legislatures of 1953 and 1955 required operators of motor vehicles in this State to be "financially responsible," and proof of financial responsibility is defined in this section. Iowa Mut. Ins. Co. v. Fred M. Simmons, Inc., 262 N.C. 691, 138 S.E.2d 512 (1964).

This Article and Article 13 to Be Construed in Pari Materia. — The Motor Vehicle Safety and Financial Responsibility Act of 1953 applies to drivers whose licenses have been suspended and relates to the restoration of drivers' licenses, while the Vehicle Financial Responsibility Act of 1957 applies to all motor vehicle owners and relates to the registration of motor vehicles. The two acts are complementary, and the latter does not repeal or modify the former but incorporates portions of the former by reference, and the two acts are to be construed in pari materia so as to harmonize them and give effect to both. Faizan v. Grain Dealers Mut. Ins. Co., 254 N.C. 47, 118 S.E.2d 303 (1961).

This Article and Article 13 of this Chapter are to be construed together so as to harmonize their provisions and to effectuate the purpose of the legislature. Harrelson v. State Farm Mut. Auto. Ins. Co., 272 N.C. 603, 158 S.E.2d 812 (1968).

Article 13 Requires Proof of Financial Responsibility to Be Given in Manner Prescribed by This Article. — The Vehicle Financial Responsibility Act of 1957, Article 13 of this Chapter, requires every owner of a motor vehicle, as a prerequisite to the registration thereof, to show "proof of financial responsibility" in the manner prescribed by this Article. Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967).

Construction of Article. — Ambiguous provisions of the Financial Responsibility Law must be construed to accomplish the purpose of such law. Allstate Ins. Co. v. Shelby Mut. Ins. Co., 269 N.C. 341, 152 S.E.2d 436 (1967).

Contravening Policy Provision Is Void. — A provision in a policy of liability insurance which contravenes the Financial Responsibility Law is void. Allstate Ins. Co. v. Shelby Mut. Ins. Co., 269 N.C. 341, 152 S.E.2d 436 (1967).

Section Reduces Importance of Family Purpose Doctrine. — The importance of the family purpose doctrine in this State has been greatly reduced by this section. Smith v. Simpson, 260 N.C. 601, 133 S.E.2d 474 (1963).

Applied in Manning v. State Farm Mut. Auto. Ins. Co., 243 F. Supp. 619 (W.D.N.C. 1965); Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971).

Quoted in Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

Cited in State v. Anderson, 3 N.C. App. 124, 164 S.E.2d 48 (1968).

§ 20-279.2. Commissioner to administer Article; appeal to court. — (a) The Commissioner shall administer and enforce the provisions of this Article and may make rules and regulations necessary for its administration and shall provide for hearings upon request of persons aggrieved by orders or acts of the Commissioner under the provisions of this Article.

(b) Any person aggrieved by an order or act of the Commissioner requiring a suspension or revocation of his license under the provisions of this Article, or requiring the posting of security as provided in this Article, or requiring the furnishing of proof of financial responsibility, may file a petition in the superior court of the county in which the petitioner resides for a review, and the commencement of such a proceeding shall suspend the order or act of the Commissioner pending the final determination of the review. A copy of such petition shall be served upon the Commissioner, and the Commissioner shall have 20 days after such service in which to file answer. The appeal shall be heard in said county by the judge holding court in said county or by the resident judge.

At the hearing upon the petition the judge shall sit without the intervention of a jury and shall receive such evidence as shall be deemed by the judge to be relevant and proper. Except as otherwise provided in this section, upon the filing of the petition herein provided for, the procedure shall be the same as in civil actions.

The matter shall be heard de novo and the judge shall enter his order affirming the act or order of the Commissioner, or modifying same, including the amount of bond or security to be given by the petitioner. If the court is of the opinion that the petitioner was probably not guilty of negligence or that the negligence of the other party was probably the sole proximate cause of the collision, the judge shall reverse the act or order of the Commissioner. Either party may appeal from such order to the Supreme Court in the same manner as in other appeals from the superior court and the appeal shall have the effect of further staying the act or order of the Commissioner requiring a suspension or revocation of the petitioner's license.

No act, or order given or rendered in any proceeding hereunder shall be admitted or used in any other civil or criminal action. (1953, c. 1300, s. 2.)

Hearing and Judicial Review Provisions Comply with Due Process Requirements. — See opinion of Attorney General to Senator Clyde Norton, 41 N.C.A.G. 420 (1971).

Ample review is provided before a driver's license suspension becomes effective. State v. Martin, 13 N.C. App. 613, 186 S.E.2d 647 (1972).

The provisions for suspension of an automobile driver's license fully comply with constitutional requirements. State v. Martin, 13 N.C. App. 613, 186 S.E.2d 647 (1972).

This section makes no provision for intervention by persons who might recover damages from petitioner based on his actionable negligence in connection with an accident. Carter v. Scheidt, 261 N.C. 702, 136 S.E.2d 105 (1964).

But Commissioner May Notify Them of Hearing. — Persons who might recover damages from petitioner based on petitioner's actionable negligence in connection with an accident have no standing in a proceeding under subsection (b) as a matter of right. Even so, it is appropriate that the Commissioner notify such persons of the petition and of the hearing to the end that all competent and relevant evidence may be brought forward. Carter v. Scheidt, 261 N.C. 702, 136 S.E.2d 105 (1964).

And Court May Permit Such Persons to File Statements and Participate in Hearing. — While persons who might recover damages from petitioner based on petitioner's actionable negligence in connection with an accident may not be considered proper parties to the proceeding in a technical sense, the court, in its discretion, may permit such persons to file a statement relevant to the facts alleged in the petition and may permit them to participate in the hearing. Carter v. Scheidt, 261 N.C. 702, 136 S.E.2d 105 (1964).

However, Such Statements Are Not Evidence. — Statements by persons not considered proper parties to the proceeding in the technical sense, whether denominated an answer, affidavit, or otherwise, may not be considered competent evidence in the hearing. Carter v. Scheidt, 261 N.C. 702, 136 S.E.2d 105 (1964).

Commissioner Must Answer Petition. — Subsection (b) imposes upon the Commissioner (or his representative) the duty to answer all essential allegations of the petition and to be present and participate in the hearing before the judge. Carter v. Scheidt, 261 N.C. 702, 136 S.E.2d 105 (1964).

And Produce All Pertinent Evidence. — While the statute provides that the court shall make the crucial determinations, the statute contemplates that the Commissioner shall bring forward for the court's consideration all evidence in his possession pertinent to decision. Carter v. Scheidt, 261 N.C. 702, 136 S.E.2d 105 (1964).

Filing Petition Is Equivalent to Supersedeas. — The filing of a petition under subsection (b) of this section to review the Commissioner's order is the equivalent of a supersedeas suspending the order until the question at issue has been determined by the superior court. Robinson v. United States Cas. Co., 260 N.C. 284, 132 S.E.2d 629 (1963).

The burden of proof is on petitioner to show he "was probably not guilty of negligence" or "that the negligence of the other party was probably the sole proximate cause of the collision." Carter v. Scheidt, 261 N.C. 702, 136 S.E.2d 105 (1964).

Appeal to Supreme Court. — Where, upon petition for review of order of the Commissioner of Motor Vehicles suspending petitioners' operator's licenses, the owner of the other car involved in the collision is made a party by consent order and files answer, such owner must be served with statement of case on appeal to the

Supreme Court. Johnson v. Scheidt, 246 N.C. 452, 98 S.E.2d 451 (1957).

Commissioner and Court Held without Authority to Grant Relief. — Where petitioner did not allege that he was probably not guilty of negligence or that the negligence of the other party was probably the sole proximate cause of the collision, nor did he allege that the amount of the security required was excessive or that such security was not required by the terms of the statute and there were no allegations which if proved would entitle the petitioner to any relief, and the only relief requested by the petitioner was that the court postpone the posting of the security required by the Commissioner under § 20-279.5, neither the Commissioner nor the court had the authority to grant this relief and a motion to dismiss was properly granted. Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971).

§ 20-279.3. Commissioner to furnish operating record. — The Commissioner shall upon request furnish any person a certified abstract of the operating record of any person required to comply with the provisions of this Article, which abstract shall also fully designate the motor vehicle, if any, registered in the name of such person, and if there shall be no record of any conviction of such person of violating any law relating to the operation of a motor vehicle or of any injury or damage caused by such person, the Commissioner shall so certify. (1953, c. 1300, s. 3.)

§ 20-279.4. Information required in accident report. — In case of an accident in which any person is killed or injured or in which damage to the property of any one person in excess of two hundred dollars ($200.00) is sustained, the report required by G.S. 20-166 or 20-166.1 shall contain information to enable the Commissioner to determine whether the requirements for the deposit of security under G.S. 20-279.5 are inapplicable by reason of the existence of insurance or other exceptions specified in this Article. The Commissioner may rely upon the accuracy of the information unless and until he has reason to believe that the information is erroneous. The operator or the owner shall furnish such additional relevant information as the Commissioner shall require. (1953, c. 1300, s. 4; 1971, c. 763, s. 2.)

Cross Reference. — See note to § 20-279.5.

Information Required from Operator. — The operator of a motor vehicle is required by this section to inform the Department (now Division), when he notifies it of the accident, whether he carried liability insurance or was exempt from the statutory provision. Robinson v. United States Cas. Co., 260 N.C. 284, 132 S.E.2d 629 (1963).

Right of Injured Party Not Impaired by Insured's Failure to Notify Insurer or Report Accident. — The right of an injured party, after recovery of unsatisfied judgment against insured, to recover against insurer in an assigned risk liability policy may not be defeated by the failure of insured to notify insurer of the accident or failure of insured to file an accident report with the Department (now Division) of Motor Vehicles. Lane v. Iowa Mut. Ins. Co., 258 N.C. 318, 128 S.E.2d 398 (1962).

Stated in Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971).

§ 20-279.5. Security required unless evidence of insurance; when security determined; suspension; exceptions. — (a) If at the expiration of 20 days after the receipt of a report of a motor vehicle accident within this State which has resulted in bodily injury or death or damage to the property of any one person in excess of two hundred dollars ($200.00), the Commissioner does not have on file evidence satisfactory to him that the person who would otherwise be required to file security under subsection (b) of this section has been released from liability, or has been finally adjudicated not to be liable or has executed a duly acknowledged written agreement providing for the payment of an agreed amount, in installments or otherwise, or is for any other reason not required to file security under this Article with respect to all claims for injuries or damages resulting from the accident, the Commissioner shall determine the amount of security which shall be sufficient in his judgment to satisfy any judgment or

judgments for damages resulting from such accident as may be recovered against each operator or owner.

(b) The Commissioner shall, within 60 days after the receipt of such report of a motor vehicle accident, suspend the license of each operator and each owner of a motor vehicle in any manner involved in such accident, and if such operator or owner is a nonresident the privilege of operating a motor vehicle within this State, unless such operator or owner, or both, shall deposit security in the sum so determined by the Commissioner; provided, notice of such suspension shall be sent by the Commissioner to such operator and owner not less than 10 days prior to the effective date of such suspension and shall state the amount required as security; provided further, the provisions of this Article requiring the deposit of security and the suspension of license for failure to deposit security shall not apply to an operator or owner who would otherwise be required to deposit security in an amount not in excess of one hundred dollars ($100.00). Where erroneous information is given the Commissioner with respect to the matters set forth in subdivisions (1), (2) or (3) of subsection (c) of this section or with respect to the ownership or operation of the vehicle, the extent of damage and injuries, or any other matters which would have affected the Commissioner's action had the information been previously submitted, he shall take appropriate action as hereinbefore provided, within 60 days after receipt by him of correct information with respect to said matters. The Commissioner, upon request and in his discretion, may postpone the effective date of the suspension provided in this section by 15 days if, in his opinion, such extension would aid in accomplishing settlements of claims by persons involved in accidents.

(c) This section shall not apply under the conditions stated in G.S. 20-279.6 nor:

(1) To such operator or owner if such owner had in effect at the time of such accident an automobile liability policy with respect to the motor vehicle involved in such accident;

(2) To such operator, if not the owner of such motor vehicle, if there was in effect at the time of such accident a motor vehicle liability policy or bond with respect to his operation of motor vehicles not owned by him;

(3) To such operator or owner if the liability of such operator or owner for damages resulting from such accident is, in the judgment of the Commissioner, covered by any other form of liability insurance policy or bond or sinking fund or group assumption of liability;

(4) To any person qualifying as a self-insurer, nor to any operator for a self-insurer if, in the opinion of the Commissioner from the information furnished him, the operator at the time of the accident was probably operating the vehicle in the course of the operator's employment as an employee or officer of the self-insurer; nor

(5) To any employee of the United States government while operating a vehicle in its service and while acting within the scope of his employment, such operations being fully protected by the Federal Tort Claims Act of 1946, which affords ample security to all persons sustaining personal injuries or property damage through the negligence of such federal employee.

No such policy or bond shall be effective under this section unless issued by an insurance company or surety company authorized to do business in this State, except that if such motor vehicle was not registered in this State, or was a motor vehicle which was registered elsewhere than in this State at the effective date of the policy or bond, or the most recent renewal thereof, or if such operator not an owner was a nonresident of this State, such policy or bond shall not be effective under this section unless the insurance company or surety company if not authorized to do business in this State shall execute a power of attorney authorizing the Commissioner to accept service on its behalf of notice or process in any action upon such policy, or bond arising out of such accident, and unless

said insurance company or surety company, if not authorized to do business in this State, is authorized to do business in the state or other jurisdiction where the motor vehicle is registered or, if such policy or bond is filed on behalf of an operator not an owner who was a nonresident of this State, unless said insurance company or surety company, if not authorized to do business in this State, is authorized to do business in the state or other jurisdiction of residence of such operator; provided, however, every such policy or bond is subject, if the accident has resulted in bodily injury or death, to a limit, exclusive of interest and cost, of not less than fifteen thousand dollars ($15,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, to a limit of not less than thirty thousand dollars ($30,000) because of bodily injury to or death of two or more persons in any one accident, and, if the accident has resulted in injury to or destruction of property, to a limit of not less than five thousand dollars ($5,000) because of injury to or destruction of property of others in any one accident. (1953, c. 1300, s. 5; 1955, cc. 138, 854; c. 855, s. 1; c. 1152, ss. 4-8; c. 1355; 1967, c. 277, s. 2; 1971, c. 763, s. 3; 1973, c. 745, s. 2.)

Effect of Section. — This section makes it the duty of the Commissioner to suspend the driver's license if the owner-operator fails to discharge his liability for the damage resulting from the collision. Robinson v. United States Cas. Co., 260 N.C. 284, 132 S.E.2d 629 (1963).

Act of Commissioner in suspending an operator's license is quasi-judicial. Robinson v. United States Cas. Co., 260 N.C. 284, 132 S.E.2d 629 (1963).

And it cannot be collaterally attacked. Robinson v. United States Cas. Co., 260 N.C. 284, 132 S.E.2d 629 (1963).

The driver of an automobile may not sue his insurer for damages resulting from the revocation of his driver's license resulting from the false representation of his insurer that the driver did not have insurance in force at the time he was involved in an accident, since such action amounts to a collateral attack upon the order of the Commissioner suspending the license and is based on subornation of perjury. Robinson v. United States Cas. Co., 260 N.C. 284, 132 S.E.2d 629 (1963).

Plaintiff is entitled to hearing on factual question of whether he was insured. Robinson v. United States Cas. Co., 260 N.C. 284, 132 S.E.2d 629 (1963).

The second sentence in subsection (b) of this section gives the owner-operator of the motor vehicle full opportunity to present his evidence to the Commissioner to establish the fact that he did carry insurance as required. Robinson v. United States Cas. Co., 260 N.C. 284, 132 S.E.2d 629 (1963).

Allegations Insufficient to Authorize Postponement of Posting. — Where petitioner did not allege that he was probably not guilty of negligence or that the negligence of the other party was probably the sole proximate cause of the collision, nor did he allege that the amount of the security required was excessive or that such security was not required by the terms of the statute and there were no allegations which if proved would entitle the petitioner to any relief, and the only relief requested by the petitioner was that the court postpone the posting of the security required by the Commissioner under this section, neither the Commissioner nor the court had the authority to grant this relief and a motion to dismiss was properly granted. Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971).

Applied in Carter v. Scheidt, 261 N.C. 702, 136 S.E.2d 105 (1964); Carson v. Godwin, 269 N.C. 744, 153 S.E.2d 473 (1967); Moore v. Hartford Fire Ins. Co., 270 N.C. 532, 155 S.E.2d 128 (1967).

Cited in Lichtenberger v. American Motorists Ins. Co., 7 N.C. App. 269, 172 S.E.2d 284 (1970); State v. Herald, 10 N.C. App. 263, 178 S.E.2d 120 (1970); Dildy v. Southeastern Fire Ins. Co., 13 N.C. App. 66, 185 S.E.2d 272 (1971).

§ 20-279.6. Further exceptions to requirement of security. — The requirements as to security and suspension in G.S. 20-279.5 shall not apply:

(1) To the operator or the owner of a motor vehicle involved in an accident wherein no injury or damage was caused to the person or property of anyone other than such operator or owner;

(2) To the operator or the owner of a motor vehicle legally parked at the time of the accident;

(3) To the owner of a motor vehicle if at the time of the accident the vehicle was being operated without his permission, express or implied, or was

parked by a person who had been operating such motor vehicle without such permission;

(4) If, prior to the date that the Commissioner would otherwise suspend the license or the nonresident's operating privilege under G.S. 20-279.5, there shall be filed with the Commissioner evidence satisfactory to him that the person who would otherwise have to file security has been released from liability or been finally adjudicated not to be liable or has executed a duly acknowledged written agreement providing for the payment of an agreed amount, in installments or otherwise, with respect to all claims for injuries or damages resulting from the accident;

(5) If, prior to the date that the Commissioner would otherwise suspend the license or the nonresident's operating privilege under G.S. 20-279.5, there shall be filed with the Commissioner evidence satisfactory to him that the person who would otherwise be required to file security has in any manner settled the claims of the other persons involved in the accident and if the Commissioner determines that, considering the circumstances of the accident and the settlement, the purposes of this Article and of protection of operators and owners of other motor vehicles are best accomplished by not requiring the posting of security or the suspension of the license. For the purpose of administering this subdivision, the Commissioner may consider a settlement made by an insurance company as the equivalent of a settlement made directly by the insured; nor

(6) If, prior to the date that the Commissioner would otherwise suspend the license or the nonresident's operating privilege under G.S. 20-279.5, there shall be filed with the Commissioner evidence satisfactory to him that another person involved in the accident has been convicted by a court of competent jurisdiction of a crime involving the operation of a motor vehicle at the time of the accident, and if the Commissioner in his discretion determines, after considering the circumstances of the accident or the nature and the circumstances of the crime, that the purpose of this Article and of protection of operators and owners of other motor vehicles are best accomplished by not requiring the posting of security or the suspension of the license. (1953, c. 1300, s. 6; 1955, c. 1152, ss. 9, 10.)

§ 20-279.6A. Minors. — In determining whether or not any of the exceptions set forth in G.S. 20-279.6 have been satisfied, in the case of accidents involving minors, the Commissioner may accept, for the purpose of this Article only, as valid releases on account of claims for injuries to minors or damage to the property of minors releases which have been executed by the parent of the minor having custody of the minor or by the guardian of the minor if there be one. In the case of an emancipated minor, the Commissioner may accept a release signed by or a settlement agreed upon by the minor without the approval of the parents of the minor. If in the opinion of the Commissioner the circumstances of the accident, the nature and extent of the injuries or damage, or any other circumstances make it advisable for the best protection of the interest of the minor, the Commissioner may decline to accept such releases or settlements and may require the approval of the superior court. (1955, c. 1152, s. 11.)

§ 20-279.7. Duration of suspension. — The license and nonresident's operating privilege suspended as provided in G.S. 20-279.5 shall remain so suspended and shall not be renewed nor shall any such license be issued to such person until:

(1) Such person shall deposit or there shall be deposited on his behalf the security required under G.S. 20-279.5;

(2) One year shall have elapsed following the date of such suspension and evidence satisfactory to the Commissioner has been filed with him that during such period no action for damages arising out of the accident has been instituted; or

(3) Evidence satisfactory to the Commissioner has been filed with him of a release from liability, or a final adjudication of nonliability, or a duly acknowledged written agreement, in accordance with subdivision (4) of G.S. 20-279.6 or a settlement accepted by the Commissioner as provided in subdivision (5) of G.S. 20-279.6, or a conviction accepted by the Commissioner as provided in subdivision (6) of G.S. 20-279.6; provided, however, in the event there shall be any default in the payment of any installment or sum under any duly acknowledged written agreement, then, upon notice of such default, the Commissioner shall forthwith suspend the license or nonresident's operating privilege of such person defaulting which shall not be restored unless and until:

a. Such person deposits and thereafter maintains security as required under G.S. 20-279.5 in such amount as the Commissioner may then determine; or

b. One year shall have elapsed following the date when such security was required and during such period no action upon such agreement has been instituted in a court in this State. (1953, c. 1300, s. 7; 1955, c. 1152, s. 12.)

Applied in Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971).

§ 20-279.8. Application to nonresidents, unlicensed drivers, unregistered motor vehicles and accidents in other states. — (a) In case the operator or the owner of a motor vehicle involved in an accident within this State has no license, or is a nonresident, he shall not be allowed a license until he has complied with the requirements of this Article to the same extent that it would be necessary if, at the time of the accident, he had held a license.

(b) When a nonresident's operating privilege is suspended pursuant to G.S. 20-279.5 or 20-279.7, the Commissioner shall transmit a certified copy of the record of such action to the official in charge of the issuance of licenses in the state in which such nonresident resides, if the law of such other state provides for action in relation thereto similar to that provided for in subsection (c) of this section.

(c) Upon receipt of such certification that the operating privilege of a resident of this State has been suspended or revoked in any such other state pursuant to a law providing for its suspension or revocation for failure to deposit security for the payment of judgments arising out of a motor vehicle accident, under circumstances which would require the Commissioner to suspend a nonresident's operating privilege had the accident occurred in this State the Commissioner shall suspend the license of such resident. Such suspension shall continue until such resident furnishes evidence of his compliance with the law of such other state relating to the deposit of such security. (1953, c. 1300, s. 8.)

§ 20-279.9. Form and amount of security. — The security required under this Article shall be in such form and in such amount as the Commissioner may require but in no case in excess of the limits specified in G.S. 20-279.5 in reference to the acceptable limits of a policy or bond. The person depositing security shall specify in writing the person or persons on whose behalf the deposit is made and, at any time while such deposit is in the custody of the Commissioner or State Treasurer, the person depositing it may, in writing, amend the specification of the person or persons on whose behalf the deposit is made to include an

additional person or persons; provided, however, that a single deposit of security shall be applicable only on behalf of persons required to furnish security because of the same accident.

The Commissioner may reduce the amount of security ordered in any case if, in his judgment, the amount ordered is excessive. In case the security originally ordered has been deposited the excess deposited over the reduced amount ordered shall be returned to the depositor or his personal representative forthwith, notwithstanding the provisions of G.S. 20-279.10. (1953, c. 1300, s. 9.)

§ 20-279.10. Custody, disposition and return of security; escheat. — (a) Security deposited in compliance with the requirements of this Article shall be placed by the Commissioner in the custody of the State Treasurer and shall be applicable only to the payment of a judgment or judgments rendered against the person or persons on whose behalf the deposit was made, for damages arising out of the accident in question in an action at law, begun not later than one year after the date of such accident, or within one year after the date of deposit of any security under subdivision (3) of G.S. 20-279.7, or to the payment in settlement, agreed to by the depositor, of a claim or claims arising out of such accident. Such deposit or any balance thereof shall be returned to the depositor or his personal representative when evidence satisfactory to the Commissioner has been filed with him that there has been a release from liability, or a final adjudication of nonliability, or a duly acknowledged agreement, in accordance with subdivision (4) of G.S. 20-279.6, or a settlement accepted by the Commissioner as provided in subdivision (5) of G.S. 20-279.6, or a conviction accepted by the Commissioner as provided in subdivision (6) of G.S. 20-279.6, or whenever, after the expiration of one (1) year from the date of the accident, or from the date of deposit of any security under subdivision (3) of G.S. 20-279.7, whichever is later, the Commissioner shall be given reasonable evidence that there is no such action pending and no judgment rendered in such action left unpaid.

(b) One year from the deposit of any security under the terms of this Article, the Commissioner shall notify the depositor thereof by registered mail addressed to his last known address that the depositor is entitled to a refund of the security upon giving reasonable evidence that no action at law for damages arising out of the accident in question is pending or that no judgment rendered in any such action remains unpaid. If, at the end of three years from the date of deposit, no claim therefor has been received, the Division shall notify the depositor thereof by registered mail and shall cause a notice to be posted at the courthouse door of the county in which is located the last known address of the depositor for a period of 60 days. Such notice shall contain the name of the depositor, his last known address, the date, amount and nature of the deposit, and shall state the conditions under which the deposit will be refunded. If, at the end of two years from the date of posting of such notice, no claim for the deposit has been received, the Commissioner shall certify such fact together with the facts of notice to the State Treasurer and the Treasurer shall turn such deposit over to the University of North Carolina as an escheat. (1953, c. 1300, s. 10; 1955, c. 1152, s. 13; 1967, c. 1227; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the second sentence of subsection (b).

§ 20-279.11. Matters not to be evidence in civil suits. — Neither the report required by G.S. 20-279.4, the action taken by the Commissioner pursuant to this Article, the findings, if any, of the Commissioner upon which such action is based, or the security filed as provided in this Article shall be referred to in any

way, nor be any evidence of the negligence or due care of either party, at the trial of any action at law to recover damages. (1953, c. 1300, s. 11.)

§ 20-279.12. Courts to report nonpayment of judgments. — Whenever any person fails within 60 days to satisfy any judgment, upon the written request of the judgment creditor or his attorney it shall be the duty of the clerk of the court, or of the judge of a court which has no clerk, in which any such judgment is rendered within this State, to forward to the Commissioner immediately after the expiration of said 60 days, a certified copy of such judgment.

If the defendant named in any certified copy of a judgment reported to the Commissioner is a nonresident, the Commissioner shall transmit a certified copy of the judgment to the official in charge of the issuance of licenses and registration certificates of the state of which the defendant is a resident. (1953, c. 1300, s. 12.)

§ 20-279.13. Suspension for nonpayment of judgment; exceptions. — (a) The Commissioner, upon the receipt of a certified copy of a judgment, which has remained unsatisfied for a period of 60 days, shall forthwith suspend the license and any nonresident's operating privilege of any person against whom such judgment was rendered, except as hereinafter otherwise provided in this section and in G.S. 20-279.16.

(b) The Commissioner shall not, however, revoke or suspend the license of an owner, operator or chauffeur if the insurance carried by him was in a company which was authorized to transact business in this State and which subsequent to an accident involving the owner or operator and prior to settlement of the claim therefor went into liquidation, so that the owner, operator, or chauffeur is thereby unable to satisfy the judgment arising out of the accident.

(c) If the judgment creditor consents in writing, in such form as the Commissioner may prescribe, that the judgment debtor be allowed license or nonresident's operating privilege, the same may be allowed by the Commissioner, in his discretion, for six months from the date of such consent and thereafter until such consent is revoked in writing notwithstanding default in the payment of such judgment, or of any installments thereof prescribed in G.S. 20-279.16. (1953, c. 1300, s. 13; 1965, c. 926, s. 1; 1969, c. 186, s. 4.)

Applicability of Subsection (a). — The mandatory provisions of subsection (a) are not applicable to unsatisfied judgments based on debt and/or conversion of a motor vehicle and damages resulting therefrom. Opinion of Attorney General to Mr. Charles Hensley, 44 N.C.A.G. 250 (1975).

Satisfaction of Judgment by Joint Tort-Feasor May Not Satisfy Judgment for Other Tort-Feasor for Driver License Suspension Purposes. — See opinion of Attorney General to Mr. Donald N. Freeman, Supervisor, Department of Motor Vehicles, 41 N.C.A.G. 99 (1970).

Second Judgment upon Expiration of Ten Years after First Judgment Not Grounds for Continued Suspension of License. — See opinion of Attorney General to Mr. Donald N. Freeman, Supervisor, Department of Motor Vehicles, 40 N.C.A.G. 99 (1970).

Cited in Hunnicutt v. Shelby Mut. Ins. Co., 255 N.C. 515, 122 S.E.2d 74 (1961).

§ 20-279.14. Suspension to continue until judgments satisfied. — Such license and nonresident's operating privilege shall remain so suspended and shall not be renewed, nor shall any such license be thereafter issued in the name of such person, including any such person not previously licensed, unless and until every such judgment:

(1) Is stayed, or
(2) Is satisfied in full, or
(3) Is subject to the exemptions stated in G.S. 20-279.13 or G.S. 20-279.16, or
(4) Is barred from enforcement by the statute of limitations pursuant to G.S. 1-47,

(5) Is discharged in bankruptcy. (1953, c. 1300, s. 14; 1969, c. 186, s. 5; 1975, c. 301.)

Editor's Note. — The 1975 amendment rewrote the section, which was formerly not divided into numbered subdivisions. The only changes of substance were the deletion of "to the extent hereinafter provided" preceding "subject to the exemptions" in the provision now contained in subdivision (3), the addition of subdivision (4), and the substitution of subdivision (5) for the former second paragraph of the section, which provided that a discharge in bankruptcy should not relieve the debtor from the requirements of this Article.

Effect of § 20-279.36. — This section shall not apply with respect to any accident or judgment arising therefrom, or violation of the motor vehicle laws of this State, occurring prior to the effective date of this section, under the provisions of § 20-279.36. Justice v. Scheidt, 252 N.C. 361, 113 S.E.2d 709 (1960).

Satisfaction of Judgment by Joint Tort-Feasor May Not Satisfy Judgment for Other Tort-Feasor for Driver License Suspension Purposes. — See opinion of Attorney General to Mr. Freeman, Department of Motor Vehicles, 40 N.C.A.G. 99 (1970).

§ 20-279.15. Payment sufficient to satisfy requirements. — In addition to other methods of satisfaction provided by law, judgments herein referred to shall, for the purpose of this Article, be deemed satisfied:

(1) When fifteen thousand dollars ($15,000) has been credited upon any judgment or judgments rendered in excess of that amount because of bodily injury to or death of one person as the result of any one accident; or

(2) When, subject to such limit of fifteen thousand dollars ($15,000) because of bodily injury to or death of one person, the sum of thirty thousand dollars ($30,000) has been credited upon any judgment or judgments rendered in excess of that amount because of bodily injury to or death of two or more persons as the result of any one accident; or

(3) When five thousand dollars ($5,000) has been credited upon any judgment or judgments rendered in excess of that amount because of injury to or destruction of property of others as a result of any one accident;

Provided, however, payments made in settlement of any claims because of bodily injury, death or property damage arising from a motor vehicle accident shall be credited in reduction of the amounts provided for in this section. (1953, c. 1300, s. 15; 1963, c. 1238; 1967, c. 277, s. 3; 1973, c. 745, s. 3; c. 889.)

§ 20-279.16. Installment payment of judgments; default. — (a) A judgment debtor upon due notice to the judgment creditor may apply to the court in which such judgment was rendered for the privilege of paying such judgment in installments and the court, in its discretion and without prejudice to any other legal remedies which the judgment creditor may have, may so order and fix the amounts and times of payment of the installments.

(b) The Commissioner shall not suspend a license or a nonresident's operating privilege, and shall restore any license or nonresident's operating privilege suspended following nonpayment of a judgment, when the judgment debtor obtains such an order permitting the payment of such judgment in installments, and while the payment of any said installment is not in default.

(c) In the event the judgment debtor fails to pay any installment as specified by such order, then upon notice of such default, the Commissioner shall forthwith suspend the license or nonresident's operating privilege of the judgment debtor until such judgment is satisfied, as provided in this Article. (1953, c. 1300, s. 16; 1969, c. 186, s. 6.)

§ 20-279.17: Repealed by Session Laws 1967, c. 866.

§ 20-279.18. Alternate methods of giving proof. — Proof of financial responsibility when required under this Article with respect to a motor vehicle or with respect to a person who is not the owner of a motor vehicle may be given by filing:

(1) A certificate of insurance as provided in G.S. 20-279.19 or 20-279.20; or

(2) A bond as provided in G.S. 20-279.24; or

(3) A certificate of deposit of money or securities as provided in G.S. 20-279.25; or

(4) A certificate of self-insurance, as provided in G.S. 20-279.33, supplemented by an agreement by the self-insurer that, with respect to accidents occurring while the certificate is in force, he will pay the same judgments and in the same amounts that an insurer would have been obligated to pay under an owner's motor vehicle liability policy if it had issued such a policy to said self-insurer. (1953, c. 1300, s. 18.)

Cited in Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

§ 20-279.19. Certificate of insurance as proof. — Proof of financial responsibility may be furnished by filing with the Commissioner the written certificate of any insurance carrier duly authorized to do business in this State certifying that there is in effect a motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. Such certificate shall give the effective date of such motor vehicle liability policy, which date shall be the same as the effective date of the certificate, and shall designate by explicit description or by appropriate reference all motor vehicles covered thereby, unless the policy is issued to a person who is not the owner of a motor vehicle. The Commissioner may require that certificates filed pursuant to this section be on a form approved by the Commissioner. (1953, c. 1300, s. 19; 1955, c. 1152, s. 16.)

Filing Does Not Estop Insurer from Denying Coverage. — The filing, as required by this section, does not estop an insurance carrier from thereafter denying coverage under the policy. Seaford v. Nationwide Mut. Ins. Co., 253 N.C. 719, 117 S.E.2d 733 (1961).

Cited in Faizan v. Grain Dealers Mut. Ins. Co., 254 N.C. 47, 118 S.E.2d 303 (1961); Harrelson v. State Farm Mut. Auto. Ins. Co., 272 N.C. 603, 158 S.E.2d 812 (1968); Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co., 283 N.C. 87, 194 S.E.2d 834 (1973); Bailey v. Nationwide Mut. Ins. Co., 19 N.C. App. 168, 198 S.E.2d 246 (1973).

§ 20-279.20. Certificate furnished by nonresident as proof. — (a) The nonresident owner of a motor vehicle not registered in this State may give proof of financial responsibility by filing with the Commissioner a written certificate or certificates of an insurance carrier authorized to transact business in the state in which the motor vehicle or motor vehicles described in such certificate is registered, or if such nonresident does not own a motor vehicle, then in the state in which the insured resides, provided such certificate otherwise conforms to the provisions of this Article, and the Commissioner shall accept the same upon condition that said insurance carrier complies with the following provisions with respect to the policies so certified:

(1) Said insurance carrier shall execute a power of attorney authorizing the Commissioner to accept service on its behalf of notice or process in any action arising out of a motor vehicle accident in this State; and

(2) Said insurance carrier shall agree in writing that such policies shall be deemed to conform with the laws of this State relating to the terms of motor vehicle liability policies issued herein.

(b) If any insurance carrier not authorized to transact business in this State, which has qualified to furnish proof of financial responsibility, defaults in any said undertakings or agreements, the Commissioner shall not thereafter accept as proof any certificate of said carrier whether theretofore filed or thereafter tendered as proof, so long as such default continues.

(c) The Commissioner may require that certificates and powers filed pursuant to this section be on forms approved by the Commissioner. (1953, c. 1300, s. 20; 1955, c. 1152, s. 17.)

Cited in Faizan v. Grain Dealers Mut. Ins. Co., 254 N.C. 47, 118 S.E.2d 303 (1961); Bailey v. Nationwide Mut. Ins. Co., 19 N.C. App. 168, 198 S.E.2d 246 (1973).

§ 20-279.21. "Motor vehicle liability policy" defined. — (a) A "motor vehicle liability policy" as said term is used in this Article shall mean an owner's or an operator's policy of liability insurance, certified as provided in G.S. 20-279.19 or 20-279.20 as proof of financial responsibility, and issued, except as otherwise provided in G.S. 20-279.20, by an insurance carrier duly authorized to transact business in this State, to or for the benefit of the person named therein as insured.

(b) Such owner's policy of liability insurance:

(1) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted;

(2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, or any other persons in lawful possession, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to each such motor vehicle, as follows: fifteen thousand dollars ($15,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, thirty thousand dollars ($30,000) because of bodily injury to or death of two or more persons in any one accident, and five thousand dollars ($5,000) because of injury to or destruction of property of others in any one accident; and

(3) No policy of bodily injury liability insurance, covering liability arising out of the ownership, maintenance, or use of any motor vehicle, shall be delivered or issued for delivery in this State with respect to any motor vehicle registered or principally garaged in this State unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in subsection (c) of G.S. 20-279.5, under provisions filed with and approved by the Commissioner of Insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom; and provided that an insured shall be entitled to secure increased limits coverage of fifteen thousand dollars ($15,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, thirty thousand dollars ($30,000) because of bodily injury to or death of two or more persons in any one accident if the policy of such insured carries liability limits of equal or greater amounts for the protection of third persons. Such provisions shall include coverage for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor

vehicles because of injury to or destruction of the property of such insured, with a limit in the aggregate for all insureds in any one accident of five thousand dollars ($5,000) and subject, for each insured, to an exclusion of the first one hundred dollars ($100.00) of such damages. Such provision shall further provide that a written statement by the liability insurer, whose name appears on the certification of financial responsibility made by the owner of any vehicle involved in an accident with the insured, that such other motor vehicle was not covered by insurance at the time of the accident with the insured shall operate as a prima facie presumption that the operator of such other motor vehicle was uninsured at the time of the accident with the insured for the purposes of recovery under this provision of the insured's liability insurance policy. The coverage required under this section shall not be applicable where any insured named in the policy shall reject the coverage.

In addition to the above requirements relating to uninsured motorist insurance, every policy of bodily injury liability insurance covering liability arising out of the ownership, maintenance or use of any motor vehicle, which policy is delivered or issued for delivery in this State, shall be subject to the following provisions which need not be contained therein.

a. A provision that the insurer shall be bound by a final judgment taken by the insured against an uninsured motorist if the insurer has been served with copy of summons, complaint or other process in the action against the uninsured motorist by registered or certified mail, return receipt requested, or in any manner provided by law; provided however, that the determination of whether a motorist is uninsured may be decided only by an action against the insurer alone. The insurer, upon being served as herein provided, shall be a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name. The insurer, upon being served with copy of summons, complaint or other pleading, shall have the time allowed by statute in which to answer, demur or otherwise plead (whether such pleading is verified or not) to the summons, complaint or other process served upon it. The consent of the insurer shall not be required for the initiation of suit by the insured against the uninsured motorist: Provided, however, no action shall be initiated by the insured until 60 days following the posting of notice to the insurer at the address shown on the policy or after personal delivery of such notice to the insurer or its agent setting forth the belief of the insured that the prospective defendant or defendants are uninsured motorists. No default judgment shall be entered when the insurer has timely filed an answer or other pleading as required by law.

b. Where the insured, under the uninsured motorist coverage, claims that he has sustained bodily injury as the result of collision between motor vehicles and asserts that the identity of the operator or owner of a vehicle (other than a vehicle in which the insured is a passenger) cannot be ascertained, the insured may institute an action directly against the insurer: Provided, in such event, the insured, or someone in his behalf, shall report the accident within 24 hours or as soon thereafter as may be practicable, to a police officer, peace officer, other judicial officer, or to the Commissioner of Motor Vehicles. The insured shall also

within a reasonable time give notice to the insurer of his injury, the extent thereof, and shall set forth in such notice the time, date and place of such injury. Thereafter, on forms to be mailed by the insurer within 15 days following receipt of the notice of the accident to the insurer, the insured shall furnish to insurer such further reasonable information concerning the accident and the injury as the insurer shall request. If such forms are not so furnished within 15 days, the insured shall be deemed to have complied with the requirements for furnishing information to the insurer. Suit may not be instituted against the insurer in less than 60 days from the posting of the first notice of such injury or accident to the insurer at the address shown on the policy or after personal delivery of such notice to the insurer or its agent.

Provided under this section the term "uninsured motor vehicle" shall include, but not be limited to, an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability within the limits specified therein because of insolvency.

An insurer's insolvency protection shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motorist coverage is in effect where the liability insurer of the tort-feasor becomes insolvent within three years after such an accident. Nothing herein shall be construed to prevent any insurer from affording insolvency protection under terms and conditions more favorable to the insured than is provided herein.

In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement for judgment resulting from the exercise of any limits of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer.

For the purpose of this section, an "uninsured motor vehicle" shall be a motor vehicle as to which there is no bodily injury liability insurance and property damage liability insurance in at least the amounts specified in subsection (c) of G.S. 20-279.5, or there is such insurance but the insurance company writing the same denies coverage thereunder, or has become bankrupt, or there is no bond or deposit of money or securities as provided in G.S. 20-279.24 or 20-279.25 in lieu of such bodily injury and property damage liability insurance, or the owner of such motor vehicle has not qualified as a self-insurer under the provisions of G.S. 20-279.33, or a vehicle that is not subject to the provisions of the Motor Vehicle Safety and Financial Responsibility Act; but the term "uninsured motor vehicle" shall not include:

a. A motor vehicle owned by the named insured;
b. A motor vehicle which is owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law;
c. A motor vehicle which is owned by the United States of America, Canada, a state, or any agency of any of the foregoing (excluding, however, political subdivisions thereof);
d. A land motor vehicle or trailer, if operated on rails or crawler-treads or while located for use as a residence or premises and not as a vehicle; or
e. A farm-type tractor or equipment designed for use principally off public roads, except while actually upon public roads.

For purposes of this section "persons insured" means the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies and a guest in such motor vehicle to which the policy applies or the personal representative of any of the above or any other person or persons in lawful possession of such motor vehicle.

(c) Such operator's policy of liability insurance shall insure the person named as insured therein against loss from the liability imposed upon him by law for damages arising out of the use by him of any motor vehicle not owned by him, and within 30 days following the date of its delivery to him of any motor vehicle owned by him, within the same territorial limits and subject to the same limits of liability as are set forth above with respect to an owner's policy of liability insurance.

(d) Such motor vehicle liability policy shall state the name and address of the named insured, the coverage afforded by the policy, the premium charged therefor, the policy period and the limits of liability, and shall contain an agreement or be endorsed that insurance is provided thereunder in accordance with the coverage defined in this Article as respects bodily injury and death or property damage, or both, and is subject to all the provisions of this Article.

(e) Such motor vehicle liability policy need not insure against loss from any liability for which benefits are in whole or in part either payable or required to be provided under any workmen's compensation law nor any liability for damage to property owned by, rented to, in charge of or transported by the insured.

(f) Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

(1) Except as hereinafter provided, the liability of the insurance carrier with respect to the insurance required by this Article shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be canceled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy. As to policies issued to insureds in this State under the assigned risk plan or through the North Carolina Motor Vehicle Reinsurance Facility, a default judgment taken against such an insured shall not be used as a basis for obtaining judgment against the insurer unless counsel for the plaintiff has forwarded to the insurer, or to one of its agents, by registered or certified mail with return receipt requested, or served by any other method of service provided by law, a copy of summons, complaint, or other pleadings, filed in the action. The return receipt shall, upon its return to plaintiff's counsel, be filed with the clerk of court wherein the action is pending against the insured and shall be admissible in evidence as proof of notice to the insurer. The refusal of insurer or its agent to accept delivery of the registered mail, as provided in this section, shall not affect the validity of such notice and any insurer or agent of an insurer refusing to accept such registered mail shall be charged with the knowledge of the contents of such notice. When notice has been sent to an agent of the insurer such notice shall be notice to the insurer. The word "agent" as used in this subsection shall include, but shall not be limited to, any person designated by the insurer as its agent for the service of process, any person duly licensed by the insurer in the State as insurance agent, any general agent of the company in the State of North Carolina, and any employee of the company in a managerial or other responsible position,

or the North Carolina Commissioner of Insurance; provided, where the return receipt is signed by an employee of the insurer or an employee of an agent for the insurer, shall be deemed for the purposes of this subsection to have been received. The term "agent" as used in this subsection shall not include a producer of record or broker, who forwards an application for insurance to the assigned risk bureau. The Commissioner of Motor Vehicles and the North Carolina assigned risk bureau shall, upon request made, furnish to the plaintiff or his counsel the identity and address of the insurance carrier as shown upon the records of the Division or the bureau, and whether the policy is an assigned risk policy. Neither the Division of Motor Vehicles nor the assigned risk bureau shall be subject to suit by reason of a mistake made as to the identity of the carrier and its address in response to a request made for such information.

The insurer, upon receipt of summons, complaint or other process, shall be entitled, upon its motion, to intervene in the suit against its insured as a party defendant and to defend the same in the name of its insured. In the event of such intervention by an insurer it shall become a named party defendant. The insurer shall have 30 days from the signing of the return receipt acknowledging receipt of the summons, complaint or other pleading in which to file a motion to intervene, along with any responsive pleading, whether verified or not, which it may deem necessary to protect its interest: Provided, the court having jurisdiction over the matter may, upon motion duly made, extend the time for the filing of responsive pleading or continue the trial of the matter for the purpose of affording the insurer a reasonable time in which to file responsive pleading or defend the action. If, after receiving copy of the summons, complaint or other pleading, the insurer elects not to defend the action, if coverage is in fact provided by the policy, the insurer shall be bound to the extent of its policy limits to the judgment taken by default against the insured, and noncooperation of the insured shall not be a defense.

If the plaintiff initiating an action against the insured has complied with the provisions of this subsection, then, in such event, the insurer may not cancel or annul the policy as to such liability and the defense of noncooperation shall not be available to the insurer: Provided, however, nothing in this section shall be construed as depriving an insurer of its defenses that the policy was not in force at the time in question, that the operator was not an "insured" under policy provisions, or that the policy had been lawfully canceled at the time of the accident giving rise to the cause of action.

Provided further that the provisions of this subdivision shall not apply when the insured has delivered a copy of the summons, complaint or other pleadings served on him to his insurance carrier within the time provided by law for filing answer, demurrer or other pleadings.

(2) The satisfaction by the insured of a judgment for such injury or damage shall not be a condition precedent to the right or duty of the insurance carrier to make payment on account of such injury or damage;

(3) The insurance carrier shall have the right to settle any claim covered by the policy, and if such settlement is made in good faith, the amount thereof shall be deductible from the limits of liability specified in subdivision (2) of subsection (b) of this section;

(4) The policy, the written application therefor, if any, and any rider or endorsement which does not conflict with the provisions of the Article shall constitute the entire contract between the parties.

(g) Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this Article. With respect to a policy which grants such excess or additional coverage the term "motor vehicle liability policy" shall apply only to that part of the coverage which is required by this section.

(h) Any motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for any payment the insurance carrier would not have been obligated to make under the terms of the policy except for the provisions of this Article.

(i) Any motor vehicle liability policy may provide for the prorating of the insurance thereunder with other valid and collectible insurance.

(j) The requirements for a motor vehicle liability policy may be fulfilled by the policies of one or more insurance carriers which policies together meet such requirements.

(k) Any binder issued pending the issuance of a motor vehicle liability policy shall be deemed to fulfill the requirements for such a policy. (1953, c. 1300, s. 21; 1955, c. 1355; 1961, c. 640; 1965, c. 156; c. 674, s. 1; c. 898; 1967, c. 277, s. 4; c. 854; c. 1159, s. 1; c. 1162, s. 1; c. 1186, s. 1; c. 1246, s. 1; 1971, c. 1205, s. 2; 1973, c. 745, s. 4; 1975, c. 326, ss. 1, 2; c. 716, s. 5; c. 866, ss. 1-4.

I. General Consideration.
II. The Omnibus Clause.
III. Uninsured Motorist Coverage.

I. GENERAL CONSIDERATION.

Editor's Note. — The first 1975 amendment inserted "by registered or certified mail, return receipt requested, or" near the middle of the first sentence of paragraph (3)a of subsection (b), and substituted "by certified or registered mail with return receipt requested or served by any other method of service provided by law" for "by registered mail with return receipt requested" near the end of the second sentence of subdivision (1) of subsection (f).

The second 1975 amendment, effective July 1, 1975, substituted "Division" for "Department" in two places in subdivision (1) of subsection (f).

The third 1975 amendment added the last paragraph in subsection (b), deleted "and with respect to policies of motor vehicle liability insurance written under the North Carolina assigned risk plan" following "Except as hereinafter provided" at the beginning of subdivision (1) of subsection (f), rewrote the second sentence of that subdivision by inserting "or through the North Carolina Motor Vehicle Reinsurance Facility" and substituting "such an insured" for "an assigned risk" near the beginning of the sentence and inserting "or certified" near the end of the sentence. The amendment also deleted "assigned risk" preceding "insurer has delivered" in the last paragraph of subdivision (1) of subsection (f).

In the second sentence of subdivision (1) of subsection (f) in the section as set out above, the editors have combined the first and third 1975 amendments by inserting "or served by any other method of service provided by law" pursuant to Session Laws 1975, c. 326, in the sentence as rewritten by Session Laws 1975, c. 866.

For note on automobile liability policies, see 35 N.C.L. Rev. 313 (1957). For note on permissive user under the omnibus clause, see 41 N.C.L. Rev. 232 (1963). For note on liability of insurer without notice, see 41 N.C.L. Rev. 853 (1963). For note on insurer's liability for injuries intentionally inflicted by insured by use of automobile, see 43 N.C.L. Rev. 436 (1965). For note on liability of insurer beyond policy limits, see 47 N.C.L. Rev. 453 (1969).

The manifest purpose of this Article was to provide protection, within the required limits, to persons injured or damaged by the negligent operation of a motor vehicle; and, in respect of a "motor vehicle liability policy," to provide such protection notwithstanding violations of policy provisions by the owner subsequent to accidents on which such injured parties base their claims. Nixon v. Liberty Mut. Ins. Co., 255 N.C. 106, 120 S.E.2d 430 (1961), quoting Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960); Lane v. Iowa Mut. Ins. Co., 258 N.C. 318, 128 S.E.2d 398 (1962); Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967).

The primary purpose of this Article is to compensate the innocent victims of financially irresponsible motorists. Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co., 283 N.C. 87, 194 S.E.2d 834 (1973).

The primary purpose of compulsory motor vehicle liability insurance is to compensate innocent victims who have been injured by financially irresponsible motorists. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967); Strickland v. Hughes, 273 N.C. 481, 160 S.E.2d 313 (1968).

A compulsory motor vehicle insurance act is a remedial statute and will be liberally construed so that the beneficial purpose intended by its enactment by the General Assembly may be accomplished. Moore v. Hartford Fire Ins. Co., 270 N.C. 532, 155 S.E.2d 128 (1967).

This statute was enacted as remedial legislation and is to be liberally construed to effectuate its purpose. Lichtenberger v. American Motorists Ins. Co., 7 N.C. App. 269, 172 S.E.2d 284 (1970).

This section was enacted as remedial legislation and is to be liberally construed to effectuate its purpose, that being to provide, within fixed limits, some financial recompense to innocent persons who receive bodily injury or property damage, and to the dependents of those who lose their lives through the wrongful conduct of an uninsured motorist who cannot be made to respond in damages. Hendricks v. United States Fid. & Guar. Co., 5 N.C. App. 181, 167 S.E.2d 876 (1969).

Obligations Imposed by Article. — The Motor Vehicle Financial Responsibility Act obliges a motorist either to post security or to carry liability insurance, not accident insurance, to indemnify all persons who might be injured by the insured's car. Moore v. Young, 263 N.C. 483, 139 S.E.2d 704 (1965).

The Motor Vehicle Financial Responsibility Act obliges a motorist either to post security or to carry liability insurance, not accident insurance, to indemnify all persons who might be injured by the insured's car. McKinney v. Morrow, 18 N.C. App. 282, 196 S.E.2d 585 (1973).

Policies Are Mandatory. — In this State, all insurance policies covering loss from liability arising out of the ownership, maintenance, or use of a motor vehicle are, to the extent required by this section, mandatory. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

In North Carolina today all insurance policies covering loss from liability arising out of the ownership, maintenance, or use of a motor vehicle are, to the extent required by this section, mandatory. Moore v. Hartford Fire Ins. Co., 270 N.C. 532, 155 S.E.2d 128 (1967).

Except as to Excess over Compulsory Coverage. — All insurance policies which insure in excess of the compulsory coverage of this section are voluntary policies to the extent of the excess. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

Coverage furnished an insured which is in addition to the mandatory statutory requirements, and is therefore voluntary, is not subject to the requirements of this section. Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co., 283 N.C. 87, 194 S.E.2d 834 (1973).

The provisions of this section are written into every policy as a matter of law. In case a provision of the policy conflicts with a provision of the statute favorable to the insured, the provision of the statute controls. As a consequence, an insurance company cannot avoid liability on a policy of insurance issued pursuant to a statute by omitting from the policy provisions favorable to the insured, which are required by the statute. Lichtenberger v. American Motorists Ins. Co., 7 N.C. App. 269, 172 S.E.2d 284 (1970).

The provisions of a statute applicable to insurance policies are a part of the policy to the same extent as if therein written, and when the terms of the policy conflict with statutory provisions favorable to the insured, the provisions of the statute will prevail. Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co., 283 N.C. 87, 194 S.E.2d 834 (1973).

Exclusionary Provisions Contravening Article Are Void. — If an exclusionary provision of an assigned risk policy contravenes this Article, it is void. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

The public policy embodied by the Financial Responsibility Act controls over an exclusionary provision in a policy issued pursuant to the act. Allstate Ins. Co. v. Webb, 10 N.C. App. 672, 179 S.E.2d 803 (1971); Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co., 283 N.C. 87, 194 S.E.2d 834 (1973).

There is nothing in this Article which authorizes the insurance company to exclude by the terms of its policy liability of the operator of an automobile if it is an automobile owned by a member of his household, and such a clause in the policy being repugnant to and in conflict with the provisions of this Article is void and of no effect. Indiana Lumbermens Mut. Ins. Co. v. Parton, 147 F. Supp. 887 (M.D.N.C. 1957).

Provision of an owner's automobile liability policy excluding from coverage an owned automobile while used "in the automobile business" by any person other than the named insured and certain other persons is repugnant to the mandatory requirements of the Motor Vehicle and Financial Responsibility Act and is, therefore, invalid. Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co., 283 N.C. 87, 194 S.E.2d 834 (1973).

Construction of Policy. — An assigned risk policy providing no coverage in excess of the statutory requirement must be construed in connection with the public policy which the

Motor Vehicle Safety and Financial Responsibility Act embodies. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

Insurable Interest Is Essential to Validity of Contract. — It is a fixed rule of insurance law that an insurable interest on the part of the person taking out the policy is essential to the validity and enforceability of the insurance contract. Rea v. Hardware Mut. Cas. Co., 15 N.C. App. 620, 190 S.E.2d 708 (1972).

Who Has Insurable Interest. — A person has an insurable interest in the subject matter insured where he has such a relation or connection with, or concern in, such subject matter that he will derive pecuniary benefit or advantage from its preservation, or will suffer pecuniary loss or damage from its destruction, termination, or injury by the happening of the event insured against. Rea v. Hardware Mut. Cas. Co., 15 N.C. App. 620, 190 S.E.2d 708 (1972).

Where the general superintendent of the company used an automobile in the business of the insured as its employee and the decedent, an officer, director and owner of 98% of the stock of the insured, used the automobile in the business of the insured, applying the general principles of law to the facts, the company had an insurable interest in the automobile. Rea v. Hardware Mut. Cas. Co., 15 N.C. App. 620, 190 S.E.2d 708 (1972).

Article Provides for Issuance of Owner's Policy and Operator's Policy. — This Article provides for motor vehicle insurance carriers to issue two types of motor vehicle liability policies. One is an owner's policy, which insures the holder against legal liability for injuries to others arising out of the ownership, use or operation of a motor vehicle owned by him; and the other is an operator's policy, which insures the holder against legal liability for injuries to others arising out of the use by him of a motor vehicle not owned by him. Woodruff v. State Farm Mut. Auto. Ins. Co., 260 N.C. 723, 133 S.E.2d 704 (1963).

And whether policy insures owner as an owner or as an operator depends on intent of parties. That intent must be ascertained from the language used in the written contract. Lofquist v. Allstate Ins. Co., 263 N.C. 615, 140 S.E.2d 12 (1965).

Distinction between Owner's Policy and Operator's Policy. — The distinction between an owner's policy of liability insurance and an operator's policy of liability insurance, the required provisions of each being set forth in this section, is pointed out in Howell v. Travelers Indem. Co., 237 N.C. 227, 74 S.E.2d 610 (1953), and Lofquist v. Allstate Ins. Co., 263 N.C. 615, 140 S.E.2d 12 (1965). Clemmons v. Nationwide Mut. Ins. Co., 267 N.C. 495, 148 S.E.2d 640 (1966).

Coverage of Owner's Policy Limited to Vehicle Described. — An owner's policy does not protect against liability resulting from the use of a motor vehicle not described in the policy. Lofquist v. Allstate Ins. Co., 263 N.C. 615, 140 S.E.2d 12 (1965).

As Is Coverage of Owner's Assigned Risk Policy. — This Article does not require an owner's assigned risk policy to cover any liability except that growing out of the operation of the motor vehicle described in the policy. Woodruff v. State Farm Mut. Auto. Ins. Co., 260 N.C. 723, 133 S.E.2d 704 (1963); Clemmons v. Nationwide Mut. Ins. Co., 267 N.C. 495, 148 S.E.2d 640 (1966).

An owner's policy issued pursuant to the assigned risk statute of this State obligates the insurer to pay any liability the insured becomes liable to pay by reason of the operation of the automobile described in the policy up to the limit of $5,000. Woodruff v. State Farm Mut. Auto. Ins. Co., 260 N.C. 723, 133 S.E.2d 704 (1963).

There is no insurance separate and distinct from the ownership of the car because an owner's motor vehicle liability policy is a contract between the insurance company and the owner. Younts v. State Farm Mut. Auto. Ins. Co., 281 N.C. 582, 189 S.E.2d 137 (1972).

Coverage in a policy with respect to the use of other automobiles is in addition to the coverage required by this Article. Woodruff v. State Farm Mut. Auto. Ins. Co., 260 N.C. 723, 133 S.E.2d 704 (1963).

An assigned risk policy of automobile insurance specifying the vehicle covered by the policy does not cover another vehicle owned by insured in the absence of a provision in the policy for extension of coverage or approval by insurer of a change in the vehicle covered. Miller v. New Amsterdam Cas. Co., 245 N.C. 526, 96 S.E.2d 860 (1957), decided under repealed § 20-227, which covered the same subject matter as this section.

Where an assigned risk policy of automobile liability insurance provided for the payment of additional premium for application of the policy to a newly acquired vehicle, and insurer, upon notification that insured had traded in the vehicle covered for another, advised insured that it would issue endorsement covering the second vehicle upon payment of additional premium in a stipulated amount, and there was no evidence that the additional premium was ever paid or the endorsement issued under the Motor Vehicle Safety and Financial Responsibility Act of 1947, the policy did not cover loss inflicted in the operation of the second vehicle, nor was insurer estopped from denying liability by reason of its failure to return the unearned premium on the original policy or its failure to cancel it. Miller v. New Amsterdam Cas. Co., 245 N.C. 526, 96 S.E.2d 860 (1957).

Policy Covering Only One of Two Vehicles Owned by Insured. — For a case applying the

Motor Vehicle Safety and Financial Responsibility Act of 1947, where an insurance company issued an owner's policy of liability insurance upon an assigned risk covering only one of the two vehicles owned by insured, and the insurer was held not liable for damages caused during insured's operation of the other vehicle owned by him, see Graham v. Iowa Nat'l Mut. Ins. Co., 240 N.C. 458, 82 S.E.2d 381 (1954).

Assigned Risk Policy Does Not Cover Replacement Vehicle Owned by Person Other Than Named Insured. — Nothing in the statute requires any carrier to extend the coverage of an assigned risk policy to a replacement vehicle owned by and registered to a person other than the original named insured owner of the vehicle originally described and insured. Beasley v. Hartford Accident & Indem. Co., 11 N.C. App. 34, 180 S.E.2d 381, aff'd, 280 N.C. 177, 184 S.E.2d 841 (1971).

Transfer of Title to Vehicle. — The Responsibility Act makes no requirement that insurance, in case of transfer of title, follow the vehicle. Underwood v. National Grange Mut. Liab. Co., 258 N.C. 211, 128 S.E.2d 577 (1962).

Newly Acquired Vehicle. — If the policy was an owner's policy, defendant was not required to provide automatic insurance for a newly acquired motor vehicle. Lofquist v. Allstate Ins. Co., 263 N.C. 615, 140 S.E.2d 12 (1965).

The statutory requirement for automatic insurance for 30 days for a motor vehicle acquired by an "operator" is as much a part of the policy as if expressly written therein. Lofquist v. Allstate Ins. Co., 263 N.C. 615, 140 S.E.2d 12 (1965).

"Accident". — The word "accident" as used in this section with reference to compulsory insurance is used in the popular sense and means any unfortunate occurrence causing injury for which the insured is liable. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

Injuries Intentionally Inflicted Are Covered. — Injuries intentionally inflicted by the use of an automobile are within the coverage of a motor vehicle liability policy as defined by this section. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

The provisions of this section extend coverage to include liability for injuries intentionally inflicted by the use of an automobile. Allstate Ins. Co. v. Webb, 10 N.C. App. 672, 179 S.E.2d 803 (1971).

As Victim's Rights Are Not Derived through Insured. — The victim's rights against the insurer are not derived through the insured as in the case of voluntary insurance, but are statutory and become absolute, under subsection (f)(1), of this section on the occurrence of an injury covered by the policy. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

The purpose of compulsory liability insurance is not, like that of ordinary insurance, to save harmless the tort-feasor himself; therefore, there is no reason why the victim's right to recover from the insurance carrier should depend upon whether the conduct of its insured was intentional or negligent. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

But Insurer May Recover from Insured Amount Paid for Intentional Injuries. — Where, but for the provisions of this section, the insurer would not have been liable under its policy for injury intentionally inflicted by the use of an automobile, it could recover from the insured the amount paid to a claimant for such injury, and also the amount of its expenses. Allstate Ins. Co. v. Webb, 10 N.C. App. 672, 179 S.E.2d 803 (1971).

Negligently Self-Inflicted Injury Not Compensable. — This section was not intended to compensate an insured for injury and damage negligently inflicted upon himself. Strickland v. Hughes, 273 N.C. 481, 160 S.E.2d 313 (1968).

That each driver in a two-car collision would recover from the other's insurance carrier was not in the legislative contemplation when the legislature passed this Article. Moore v. Young, 263 N.C. 483, 139 S.E.2d 704 (1965); McKinney v. Morrow, 18 N.C. App. 282, 196 S.E.2d 585 (1973).

Victim's Right to Recover Is Statutory. — Under the Motor Vehicle and Financial Responsibility Act the victim's right to recover against the insurer is not derived through the insured, as in cases of voluntary insurance; his right to recover is statutory. Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co., 283 N.C. 87, 194 S.E.2d 834 (1973).

And becomes absolute upon occurrence of an injury covered by the policy. Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co., 283 N.C. 87, 194 S.E.2d 834 (1973).

Under subsection (f)(1) of this section, if insured becomes legally obligated for the payment of damages on account of a collision, insurer's liability becomes absolute as of the date of the collision if the policy is then valid and in force, and subsequent violations of policy provisions by the insured cannot affect the liability of insurer to a person injured in such collision as the result of insured's negligence, although insured may be liable to insurer for damages resulting to insurer as the result of breach of the policy provision. Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960).

Under this section insurer's liability (within the limits of the compulsory coverage) for the payment of the damages for which insured was "legally obligated" became absolute when the injured party's car was damaged, at which time the policy issued by insurer to insured was in full

force and effect. Lane v. Iowa Mut. Ins. Co., 258 N.C. 318, 128 S.E.2d 398 (1962).

Cause of Action Arises at Time of Collision. — The provisions of subsection (f)(1) of this section support the statement of law that any cause of action which a plaintiff may acquire against defendant as a result of a collision arises at the time of the collision, and any right which he may claim against defendant under the laws of this State and under the uninsured motorists insurance coverage of the policy must be determined by the facts existing at the time of the collision. Hardin v. American Mut. Fire Ins. Co., 261 N.C. 67, 134 S.E.2d 142 (1964).

Liability under Assigned Risk Policy Becomes Absolute When Injury or Damage Occurs. — As provided in subsection (f)(1) of this section liability becomes absolute when a plaintiff's injury and damage occur, notwithstanding subsequent violations by the insured under an assigned risk policy of his obligations to the insurance company under the policy provisions. Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967), decided under this section as it stood before the 1967 amendments thereto.

And Insurer Is Deprived of Defenses Otherwise Available under Standard Policy Provisions. — Subsection (f)(1) of this section, as interpreted and applied by the Supreme Court, deprives the insurer under an assigned risk policy of the defenses otherwise available under its standard policy provisions. Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967), decided under this section as it stood before the 1967 amendments thereto.

And This Provision Does Not Violate State or Federal Constitution. — Subsection (f)(1) of this section, when applied to an assigned risk policy issued in compliance with the plan set forth in § 20-279.34 and regulations pursuant thereto, does not deprive an insurance company of its property without due process of law and otherwise than by the law of the land in contravention of the Fourteenth Amendment to the Constitution of the United States and N.C. Const., Art. I, §§ 1 and 19. Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967), decided under this section as it stood before the 1967 amendments thereto.

Effect of Issuance of FS-1. — By the issuance of an FS-1 an insurer represents that it has issued and there is in effect an owner's motor vehicle liability policy. Harris v. Nationwide Mut. Ins. Co., 261 N.C. 499, 135 S.E.2d 209 (1964).

By the issuance of an FS-1, the insurer represents that everything requisite for a binding insurance policy has been performed, including payment, or satisfactory arrangement for payment, of premium. Once the FS-1 has been issued, nonpayment of premium, nothing else appearing, is no defense in a suit by a third party beneficiary against insurer. Harris v. Nationwide Mut. Ins. Co., 261 N.C. 499, 135 S.E.2d 209 (1964).

As between insurer and insured, the issuance by insurer of Form FS-1 stating thereon that insurance was effective, does not estop insurer from denying that the policy was in force or that notice of the accident was given as required by the policy. Harris v. Nationwide Mut. Ins. Co., 261 N.C. 499, 135 S.E.2d 209 (1964).

Policy Violations. — Under subsection (f)(1) of this section, policy violations do not defeat or avoid the policy in respect of a plaintiff's right to recover from defendant insurer the amount of the judgment establishing insured's legal liability to plaintiff. Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960).

As to the compulsory coverage provided by a motor vehicle liability policy as defined in this section, issued as proof of financial responsibility as defined in § 20-279.1, subsection (f)(1) of this section provides explicitly that "no violation of said policy shall defeat or void said policy." Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960); Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967).

Under subsection (f)(1) of this section, insured's failure to comply with policy provisions as to notice of accident and of suit did not defeat the injured party's right to recover from the insurer the amount of a judgment by which insured's legal obligation to the injured party was finally determined. Lane v. Iowa Mut. Ins. Co., 258 N.C. 318, 128 S.E.2d 398 (1962).

No violation of the provisions of an owner's policy as an assigned risk will void the policy where the liability thereunder has been incurred by reason of the insured's operation of the automobile described in the policy. Woodruff v. State Farm Mut. Auto. Ins. Co., 260 N.C. 723, 133 S.E.2d 704 (1963).

Subsection (f) provides that except with respect to liability insurance written under the assigned risk plan, the liability of the insurance carrier shall to the extent of coverage required by the Article become absolute when the injury or damage covered by motor vehicle liability occurs, and no violation of said policy shall defeat or void said policy. Beasley v. Hartford Accident & Indem. Co., 11 N.C. App. 34, 180 S.E.2d 381, aff'd, 280 N.C. 177, 184 S.E.2d 841 (1971).

"Other Insurance" Provision Held Valid. — A provision in a liability policy excluding coverage if the accident in question is covered by other insurance does not contravene the North Carolina Financial Responsibility Law. Allstate Ins. Co. v. Shelby Mut. Ins. Co., 269 N.C. 341, 152 S.E.2d 436 (1967), commented on in 46 N.C.L. Rev. 433 (1968); Government Employees Ins. Co. v. Lumbermens Mut. Cas. Co., 269 N.C. 354, 152 S.E.2d 445 (1967).

"Other Insurance" Clauses Contrary to Statutory Amount of Coverage Not Permitted. — See below, analysis line III, "Uninsured Motorist Coverage."

When Notice to Insurer Not Required under Subsection (f)(1). — Plaintiff was not required to give the insurer the registered notice required by subsection (f)(1) because the insured was not an "assigned risk insured" under the statute. To hold otherwise would require every plaintiff to send copy of summons and complaint by registered mail to the carrier of the liability insurance of the owner of the vehicle involved in every accident resulting in litigation to avoid the pitfall of the possibility of the vehicle involved being a replacement vehicle registered in a different name than the applicant for assignment of risk. This was obviously not intended by the General Assembly. Beasley v. Hartford Accident & Indem. Co., 11 N.C. App. 34, 180 S.E.2d 381, aff'd, 280 N.C. 177, 184 S.E.2d 841 (1971).

Burden on Plaintiff to Prove Defendant Was Insured. — In order for the plaintiff to recover on the policy, the burden is on plaintiff to allege and prove that the defendant was insured under the policy on the date of the accident in which plaintiff was injured. Younts v. State Farm Mut. Auto. Ins. Co., 281 N.C. 582, 189 S.E.2d 137 (1972).

Settlement of Claims by Insurer. — This section, which contains a provision expressly authorizing insurance companies to make settlement with claimants, is not any indication that prior to its effective date liability insurers were prohibited from settling with some of several claimants for the protection of their insured. Alford v. Textile Ins. Co., 248 N.C. 224, 103 S.E.2d 8 (1958).

A provision in a liability policy that insurer might negotiate and settle any claim or suit was not proscribed or rendered void under repealed § 20-227 as it stood in 1947. Alford v. Textile Ins. Co., 248 N.C. 224, 103 S.E.2d 8 (1958).

A liability insurance carrier may settle part of multiple claims arising from the negligence of its insured, even though such settlements result in preference by exhausting the fund to which an injured party whose claim has not been settled might otherwise look for payment, provided the insurer acts in good faith and not arbitrarily, and the burden is upon a claimant whose claim is not paid in full because of prior payment made by insurer in settlements of other claims, to allege and prove bad faith on the part of the insurer. Alford v. Textile Ins. Co., 248 N.C. 224, 103 S.E.2d 8 (1958), decided under repealed § 20-227.

Where an insurance carrier makes a settlement in good faith, such settlement is binding on the insured as between him and the insurer, but such settlement is not binding as between the insured and a third party where the settlement was made without the knowledge or consent of the insured or over his protest, unless the insured in the meantime has ratified such settlement. Bradford v. Kelly, 260 N.C. 382, 132 S.E.2d 886 (1963).

A payment by insurer in settlement of the claim of one motorist against insured motorist, solely for the purpose of terminating the liability of insurer and reserving the insured motorist's rights, does not preclude the insured motorist from thereafter maintaining an action against the other. Gamble v. Stutts, 262 N.C. 276, 136 S.E.2d 688 (1964).

The duty of the insurer in the exercise of its contract right to settle a pending liability claim or suit is to act diligently and in good faith in effecting settlements within policy limits and, if necessary to accomplish that purpose, to pay the full amount of the policy. Coca-Cola Bottling Co. v. Maryland Cas. Co., 325 F. Supp. 204 (W.D.N.C. 1971).

Every claim has some settlement value, but the existence of issues for the jury rather than the certainty of nonsuit does not demonstrate bad faith or even lack of due care if the insurer fails to settle. Coca-Cola Bottling Co. v. Maryland Cas. Co., 325 F. Supp. 204 (W.D.N.C. 1971).

Although the insurer may be unreasonable in not settling as seen in retrospect, it is liable for recovery beyond its policy limits only if it acts with wrongful or fraudulent purpose or with lack of good faith; an honest mistake of judgment is not actionable. Coca-Cola Bottling Co. v. Maryland Cas. Co., 325 F. Supp. 204 (W.D.N.C. 1971).

Insurance counsel do not have to be omniscient, and their opinions, whether they support or cast doubt on the action of the insurer in not settling, do not determine the issue of liability above policy limits. Coca-Cola Bottling Co. v. Maryland Cas. Co., 325 F. Supp. 204 (W.D.N.C. 1971).

Provision for Compulsory Arbitration Conflicts with Statute. — A provision in an insurance policy, in effect, ousting the jurisdiction of the court to judicially determine liability and damages and providing for compulsory arbitration between the insured and the company, if they do not agree, conflicts with the beneficent purposes of the uninsured motorist statute favorable to the insured, and the provision of the statute controls. Wright v. Fid. & Cas. Co., 270 N.C. 577, 155 S.E.2d 100 (1967).

Action by Insured against Other Motorist after Settlement. — See Bradford v. Kelly, 260 N.C. 382, 132 S.E.2d 886 (1963).

Refusal of Insurer to Defend. — Where a liability insurer denies liability for a claim asserted against the insured and unjustifiably refuses to defend an action therefor, the insured is released from a provision of the policy against

settlement of claims without the insurer's consent, and from a provision making the liability of the insurer dependent on the obtaining of a judgment against the insured; and that under such circumstances, the insured may make a reasonable compromise or settlement in good faith without losing his right to recover on the policy. Nixon v. Liberty Mut. Ins. Co., 255 N.C. 106, 120 S.E.2d 430 (1961).

If insured in a liability policy gives timely notice of a suit against him within the coverage of the liability policy, and insurer refuses to defend such suit, insured is entitled to recover of insurer the amount he is reasonably required to spend by virtue of the failure of insurer to defend the suit. Harris v. Nationwide Mut. Ins. Co., 261 N.C. 499, 135 S.E.2d 209 (1964).

Counterclaim against Insured under Subsection (h). — In insured's action against insurer to recover for sums expended in defending a suit against insured within the coverage of the policy, insured's allegations of the payment of a sum to insurer's agent under agreement for the issuance of a binder do not relate to liability imposed by the Financial Responsibility Act, and therefore furnish no basis for a counterclaim against insured under subsection (h) of this section. Harris v. Nationwide Mut. Ins. Co., 261 N.C. 499, 135 S.E.2d 209 (1964).

In Absence of Statutory Provision, Liability Measured by Terms of Policy. — In the absence of any provision in the Financial Responsibility Act broadening the liability of the insurer, such liability must be measured by the terms of its policy as written. Underwood v. National Grange Mut. Liab. Co., 258 N.C. 211, 128 S.E.2d 577 (1962); Younts v. State Farm Mut. Auto. Ins. Co., 281 N.C. 582, 189 S.E.2d 137 (1972).

Liability on Voluntary Policy Must Accrue under Provisions in Contract. — The insurer under a voluntary policy is liable only if its liability accrues under the provisions set out in the contract of insurance between defendant and its insured. Younts v. State Farm Mut. Auto. Ins. Co., 281 N.C. 582, 189 S.E.2d 137 (1972).

And Injured Party Has No Greater Rights against Insurer than Has Insured. — With reference to an owner's policy of insurance, unless the action be based on policy provisions required by this section, an injured party who obtains a judgment against the insured has no greater rights against the insurer than those of the insured. Clemmons v. Nationwide Mut. Ins. Co., 267 N.C. 495, 148 S.E.2d 640 (1966).

Compliance with Voluntary Policy Provisions Is Condition Precedent to Recovery. — Where coverage in a policy is in addition to the coverage required by the Motor Vehicle Safety and Financial Responsibility Act, provisions requiring that an insured give notice of an accident, and requiring the insured's cooperation in defense of any action against him are binding and enforceable. Moreover, compliance with such policy provisions is a condition precedent to recovery, with the burden of proof on the insured to show compliance, where the policy provides, "No action shall lie against the Company unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this policy," or words of like import. Clemmons v. Nationwide Mut. Ins. Co., 267 N.C. 495, 148 S.E.2d 640 (1966).

The failure of insured under an assigned risk policy to give notice of an accident occurring while he was driving an automobile other than the one named in the policy precludes recovery by the insured or by the injured third person against insurer, even though the policy contains additional coverage, if insured is driving another vehicle, since such additional coverage is not required by this Article, and therefore the provisions of this Article are not applicable thereto. Woodruff v. State Farm Mut. Auto. Ins. Co., 260 N.C. 723, 133 S.E.2d 704 (1963).

Hence, Failure to Forward Suit Papers Relieves Insurer of Liability. — While no decision of the Supreme Court involving a policy provision, "If claim is made or suit is brought against the Insured, he shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative," has come to the court's attention, decisions in other jurisdictions hold this is an unambiguous, reasonable and valid stipulation, and that, unless the insured or his judgment creditor can show compliance by the insured with this policy requirement, the insurer is relieved of liability. Clemmons v. Nationwide Mut. Ins. Co., 267 N.C. 495, 148 S.E.2d 640 (1966).

Unless Insurer Loses Right to Defeat Recovery by Waiver or Estoppel. — An automobile liability insurer may, by waiver or estoppel, lose its right to defeat a recovery under a liability policy because of the insured's failure to comply with the policy provision as to the forwarding of suit papers. Clemmons v. Nationwide Mut. Ins. Co., 267 N.C. 495, 148 S.E.2d 640 (1966).

The essential elements of a waiver are: (1) The existence, at the time of the alleged waiver, of a right, advantage or benefit; (2) the knowledge, actual or constructive, of the existence thereof; and (3) an intention to relinquish such right, advantage or benefit. Clemmons v. Nationwide Mut. Ins. Co., 267 N.C. 495, 148 S.E.2d 640 (1966).

For other decisions under former statute, see Howell v. Travelers Indem. Co., 237 N.C. 227, 74 S.E.2d 610 (1953); Russell v. Lumbermen's Mut. Cas. Co., 237 N.C. 220, 74 S.E.2d 615 (1953); Sanders v. Chavis, 243 N.C. 380, 90 S.E.2d 749 (1956); Sanders v. Travelers Indem. Co., 144 F. Supp. 742 (M.D.N.C. 1956);

Lynn v. Farm Bureau Mut. Auto. Ins. Co., 264 F.2d 921 (4th Cir. 1959).

Applied in Daniels v. Nationwide Mut. Ins. Co., 258 N.C. 660, 129 S.E.2d 314 (1963); Manning v. State Farm Mut. Auto. Ins. Co., 243 F. Supp. 619 (W.D.N.C. 1965); Abernethey v. Utica Mut. Ins. Co., 373 F.2d 565 (4th Cir. 1967); Beasley v. Hartford Accident & Indem. Co., 280 N.C. 177, 184 S.E.2d 841 (1971); McKinney v. Morrow, 18 N.C. App. 282, 196 S.E.2d 585 (1973); Nationwide Mut. Ins. Co. v. Chantos, 21 N.C. App. 129, 203 S.E.2d 421 (1974).

Quoted in Fidelity & Cas. Co. v. Jackson, 297 F.2d 230 (4th Cir. 1961); Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

Cited in Taylor v. Green, 242 N.C. 156, 87 S.E.2d 11 (1955); Muncie v. Travelers Ins. Co., 253 N.C. 74, 116 S.E.2d 474 (1960); Faizan v. Grain Dealers Mut. Ins. Co., 254 N.C. 47, 118 S.E.2d 303 (1961); Aldridge v. State, 4 N.C. App. 297, 166 S.E.2d 485 (1969); In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

II. THE OMNIBUS CLAUSE.

Editor's Note. — For note entitled "Liability of Insurers under the Omnibus Clause to Protect Emergency Drivers — The North Carolina Situation," see 48 N.C.L. Rev. 984 (1970).

Construction of Provision Requiring "Omnibus Clause". — Statutes requiring the insertion in automobile liability policies of the "omnibus clause," extending the provisions of the policy to persons using the automobile with the express or implied permission of the named insured, reflect a clear-cut policy to protect the public. They should be construed and applied so as to carry out this policy. Chatfield v. Farm Bureau Mut. Auto. Ins. Co., 208 F.2d 250 (4th Cir. 1953), decided under repealed § 20-227, which covered the same subject matter as this section.

In subsection (b)(2) the legislature intended no more radical coverage than is expressed in the moderate rule of construction, i.e., coverage shall include use with permission, express or implied. Hawley v. Indemnity Ins. Co. of N. America, 257 N.C. 381, 126 S.E.2d 161 (1962).

The omnibus clause has been interpreted by the Supreme Court of North Carolina according to the "moderate" rule rather than the "hell and high-water" rule, as recommended in 41 N.C.L. Rev. 232 (1963). Bailey v. General Ins. Co. of America, Inc., 265 N.C. 675, 144 S.E.2d 898 (1965).

An omnibus clause should be construed liberally in favor of the insured and in accordance with the policy of the clause to protect the public. Fidelity & Cas. Co. v. North Carolina Farm Bureau Mut. Ins. Co., 16 N.C. App. 194, 192 S.E.2d 113 (1972).

Ambiguity in a policy which requires interpretation as to whether the policy provisions impose liability requires construction in favor of coverage and against the company. Fidelity & Cas. Co. v. North Carolina Farm Bureau Mut. Ins. Co., 16 N.C. App. 194, 192 S.E.2d 113 (1972).

In construing an omnibus clause, an injury cannot be said to arise out of the use of an automobile if it was directly caused by some independent act or intervening cause wholly disassociated from, independent of, and remote from the use of the automobile. Fidelity & Cas. Co. v. North Carolina Farm Bureau Mut. Ins. Co., 16 N.C. App. 194, 192 S.E.2d 113 (1972).

Permission is an essential element of "lawful possession" as used in subsection (b)(2). Jernigan v. State Farm Mut. Auto. Ins. Co., 16 N.C. App. 46, 190 S.E.2d 866 (1972).

Liberal Construction in Interpreting Scope of Permission. — The 1967 amendment, adding the words "any other person in lawful possession," signifies that the legislature favors adoption of a liberal rule of construction in applying and interpreting the scope of permission under the omnibus clause. Jernigan v. State Farm Mut. Auto. Ins. Co., 16 N.C. App. 46, 190 S.E.2d 866 (1972).

The legislature favors adoption of a liberal rule of construction in applying the coverage under the omnibus clause. Packer v. Travelers Ins. Co., 28 N.C. App. 365, 221 S.E.2d 707 (1976).

It was the necessity of proof of permission that the 1967 amendment to subsection (b)(2) was designed to obviate. Although lawful possession by the operator may be shown by evidence of permission granted to the operator to take the vehicle in the first instance, the plaintiff is not required to show more than lawful possession at the time of the accident. Packer v. Travelers Ins. Co., 28 N.C. App. 365, 221 S.E.2d 707 (1976).

When lawful possession is shown, further proof is not required that the operator had the owner's permission to drive on the very trip and occasion of a collision. Packer v. Travelers Ins. Co., 28 N.C. App. 365, 221 S.E.2d 707 (1976).

Permission May Be Expressed or Inferred. — The owner's permission for the use of the insured vehicle may be expressed or, under certain circumstances, it may be inferred. Bailey v. General Ins. Co. of America, Inc., 265 N.C. 675, 144 S.E.2d 898 (1965).

Permission may be either express or implied. Nationwide Mut. Ins. Co. v. Fireman's Fund Ins. Co., 279 N.C. 240, 182 S.E.2d 571 (1971).

Express Permission. — Where express permission to use the insured vehicle is relied upon it must be on an affirmative character, directly and distinctly stated, clear and outspoken, and not merely implied or left to inference. Hawley v. Indemnity Ins. Co. of N. America, 257 N.C. 381, 126 S.E.2d 161 (1962); Bailey v. General Ins. Co. of America, Inc., 265 N.C. 675, 144 S.E.2d 898 (1965).

Implied permission to use the insured vehicle involves an inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or lack of objection under circumstances signifying assent. Hawley v. Indemnity Ins. Co. of N. America, 257 N.C. 381, 126 S.E.2d 161 (1962); Bailey v. General Ins. Co. of America, Inc., 265 N.C. 675, 144 S.E.2d 898 (1965).

Implied permission may be a product of the present or past conduct of the insured. It is not confined alone to affirmative action, and is usually shown by usage and practice of the parties over a sufficient period of time prior to the day on which the insured car was being used. Nationwide Mut. Ins. Co. v. Fireman's Fund Ins. Co., 279 N.C. 240, 182 S.E.2d 571 (1971).

Implied permission may be established by a showing of a course of conduct or relationship between the parties, including lack of objection to the use by the permittee which signifies acquiescence or consent of the injured. Nationwide Mut. Ins. Co. v. Fireman's Fund Ins. Co., 279 N.C. 240, 182 S.E.2d 571 (1971).

The relationship between the owner and the user, such as kinship, social ties, and the purpose of the use, all have bearing on the critical question of the owner's implied permission for the actual use. Bailey v. General Ins. Co. of America, Inc., 265 N.C. 675, 144 S.E.2d 898 (1965).

A permission to use an automobile may be implied, and strong social relationships and ties between the owner and the bailee are relevant upon the question of the extent of such implied permission. Wilson v. Hartford Accident & Indem. Co., 272 N.C. 183, 158 S.E.2d 1 (1967).

"Permission" is something apart from a general state of mind. Underwood v. National Grange Mut. Liab. Co., 258 N.C. 211, 128 S.E.2d 577 (1962).

A general or comprehensive permission is much more readily to be assumed where the use of the insured motor vehicle is for social or nonbusiness purposes than where the relationship of master and servant exists and the usage of the vehicle is for business purposes. Hawley v. Indemnity Ins. Co. of N. America, 257 N.C. 381, 126 S.E.2d 161 (1962).

It does not seem reasonable to assume that parties to an insurance contract covering a vehicle used in business contemplate an indiscriminate use for the social and separate business purpose of employees of named insured unless permission, express or implied, is given for such additional uses. Hawley v. Indemnity Ins. Co. of N. America, 257 N.C. 381, 126 S.E.2d 161 (1962).

"Permission" Connotes Power to Grant or Withhold It. — Permission to drive a car, within the meaning of the omnibus coverage clause, connotes the power to grant or withhold it. Rea v. Hardware Mut. Cas. Co., 15 N.C. App. 620, 190 S.E.2d 708 (1972).

In order for one's use and operation of an automobile to be within the meaning of the omnibus coverage clause requiring the permission of the named insured, the latter must, as a general rule, own the insured vehicle or have such an interest in it that he is entitled to the possession and control of the vehicle and in a position to give permission. Rea v. Hardware Mut. Cas. Co., 15 N.C. App. 620, 190 S.E.2d 708 (1972).

Who May Grant Permission. — In order to grant permission, as the word "permission" is used in the omnibus clause of a policy, there must be such ownership or control of the automobile as to confer the legal right to give or withhold assent. Underwood v. National Grange Mut. Liab. Co., 258 N.C. 211, 128 S.E.2d 577 (1962).

Ordinarily, one permittee within the coverage of a liability policy does not have authority to select another permittee without specific authority from the named insured. Bailey v. General Ins. Co. of America, Inc., 265 N.C. 675, 144 S.E.2d 898 (1965).

Compliance with the requirements of this section necessitates coverage of all who use the insured vehicle with the permission, express or implied, of the named insured. Whether the permission be expressly granted or impliedly conferred, it must originate in the language or the conduct of the named insured or of someone having authority to bind him or it in that respect. Hawley v. Indemnity Ins. Co. of N. America, 257 N.C. 381, 126 S.E.2d 161 (1962).

A person, driving only with the permission of a permittee, is not considered as using the automobile with either the express or implied permission of the owner so as to create omnibus clause coverage. Nationwide Mut. Ins. Co. v. Chantos, 25 N.C. App. 482, 214 S.E.2d 438 (1975).

Where the original permittee gives the defendant express permission, this makes him a person in "lawful possession" under subdivision (b)(2). Nationwide Mut. Ins. Co. v. Chantos, 25 N.C. App. 482, 214 S.E.2d 438 (1975).

Permission expressly granted by the original permittee is sufficient for purposes of the statute to place the second permittee in lawful possession. Nationwide Mut. Ins. Co. v. Chantos, 25 N.C. App. 482, 214 S.E.2d 438 (1975).

Extending Coverage to Second Permittee. — Regardless of the liberality of the rule of construction applied, permission of the named insured or of the original permittee is essential to extend coverage to a second permittee. Jernigan v. State Farm Mut. Auto. Ins. Co., 16 N.C. App. 46, 190 S.E.2d 866 (1972).

Bailee's Use Must Be within Scope of Permission. — Under the omnibus clause, the coverage of a policy extends to the liability of a bailee of the automobile for an accident only

where the bailee's use of the vehicle at the time of the accident is within the scope of the permission granted to him, the burden being upon the plaintiff to show that such use was within the scope of the permission. Wilson v. Hartford Accident & Indem. Co., 272 N.C. 183, 158 S.E.2d 1 (1967).

When the bailee deviates in a material respect from the grant of permission, his use of the vehicle, while such deviation continues, is not a permitted use within the meaning of the omnibus clause of a policy. Wilson v. Hartford Accident & Indem. Co., 272 N.C. 183, 158 S.E.2d 1 (1967).

Express Limitations Not Overcome by Proof of Friendly Relations. — Proof of friendly relations, which might otherwise imply permission, cannot overcome the effect of a limitation as to time, purpose or locality expressly imposed by the owner upon the bailee at the time of the delivery of the automobile to the bailee by the owner on the occasion in question. Wilson v. Hartford Accident & Indem. Co., 272 N.C. 183, 158 S.E.2d 1 (1967).

Violation of Permission by Carrying Guests in Vehicle. — Where the violation of permission consists merely of carrying guests in the vehicle, and the employee's use of the vehicle is otherwise permitted, the fact alone that the employee permitted riders on the vehicle will not serve to annul the permission of the employer so as to take the employee out of the protection of the omnibus clause. Hawley v. Indemnity Ins. Co. of N. America, 257 N.C. 381, 126 S.E.2d 161 (1962).

Plaintiff Has Burden of Showing Permission. — Plaintiff has the burden of showing that there was permission to use the vehicle. Hawley v. Indemnity Ins. Co. of N. America, 257 N.C. 381, 126 S.E.2d 161 (1962).

Use Held without Permission. — Where a prospective purchaser was permitted to drive a dealer's vehicle seven miles to the purchaser's home to show it to his wife and was to return the vehicle within two and one-half hours, but he actually drove 70 miles to another municipality and had an accident resulting in plaintiff's injury more than 20 hours after he should have returned the vehicle, the court held the purchaser's use at time of accident was without permission of owner. Fehl v. Aetna Cas. & Sur. Co., 260 N.C. 440, 133 S.E.2d 68 (1963).

If the named insured has sold the vehicle, its subsequent use by the buyer is by virtue of the latter's ownership and his right to control it and not by virtue of the permission of the named insured seller. Underwood v. National Grange Mut. Liab. Co., 258 N.C. 211, 128 S.E.2d 577 (1962).

Lawful Possession Submitted to Jury. — Plaintiff, once having offered evidence tending to show lawful possession of the truck by a driver, was entitled to have the issue of lawful possession submitted to the jury. Packer v. Travelers Ins. Co., 28 N.C. App. 365, 221 S.E.2d 707 (1976).

III. UNINSURED MOTORIST COVERAGE.

Editor's Note. — For note on the statutory definition of an "uninsured motor vehicle" when the liability insurer is insolvent or denies coverage, see 45 N.C.L. Rev. 551 (1967).

Purpose of Uninsured Motorist Provisions. — Subdivision (3) of subsection (b) of this section was enacted so as to include protection against uninsured motorists. Moore v. Hartford Fire Ins. Co., 270 N.C. 532, 155 S.E.2d 128 (1967); Wright v. Fidelity & Cas. Co., 270 N.C. 577, 155 S.E.2d 100 (1967).

The purpose of the uninsured motorist statute was to provide, within fixed limits, some financial recompense to innocent persons who receive bodily injury or property damage, and to the dependents of those who lose their lives through the wrongful conduct of an uninsured motorist who cannot be made to respond in damages. Moore v. Hartford Fire Ins. Co., 270 N.C. 532, 155 S.E.2d 128 (1967); Lichtenberger v. American Motorists Ins. Co., 7 N.C. App. 269, 172 S.E.2d 284 (1970).

Uninsured motorist coverage is intended, within fixed limits, to provide financial recompense to innocent persons who receive injuries and the dependents of those who are killed, through the wrongful conduct of motorists who, because they are uninsured and not financially responsible, cannot be made to respond in damages. Wright v. Fidelity & Cas. Co., 270 N.C. 577, 155 S.E.2d 100 (1967).

Uninsured motorist coverage is designed to close the gaps inherent in motor vehicle financial responsibility and compulsory insurance legislation. Wright v. Fidelity & Cas. Co., 270 N.C. 577, 155 S.E.2d 100 (1967).

The uninsured motorist statute was enacted by the General Assembly as a result of public concern over the increasingly important problem arising from property damage, personal injury, and death inflicted by motorists who are uninsured and financially irresponsible. Moore v. Hartford Fire Ins. Co., 270 N.C. 532, 155 S.E.2d 128 (1967); Lichtenberger v. American Motorists Ins. Co., 7 N.C. App. 269, 172 S.E.2d 284 (1970).

Subdivision (3) of subsection (b) of this section provides for a limited type of compulsory automobile liability coverage against uninsured motorists. Moore v. Hartford Fire Ins. Co., 270 N.C. 532, 155 S.E.2d 128 (1967).

Policy to Include Certain Provisions. — A close reading of subsections (b)(3)a and (b)(3)b indicates that they provide for the inclusion of certain provisions in the policy, namely, that the insurer shall be bound by a final judgment against the uninsured motorist, under certain conditions, and that suit may be against the

insurer directly in case of injury from collision with an unidentifiable motorist. Hendricks v. United States Fid. & Guar. Co., 5 N.C. App. 181, 167 S.E.2d 876 (1969).

Construction of Uninsured Motorists Coverage. — In determining whether the injury arose out of the "ownership, maintenance, or use" of the motor vehicle, the same rules of construction apply in construing uninsured motorists coverage as apply in construing a standard liability insurance policy. Williams v. Nationwide Mut. Ins. Co., 269 N.C. 235, 152 S.E.2d 102 (1967).

The term "uninsured vehicle," when used in an uninsured motorist's endorsement, must be interpreted in the light of the fact that such endorsement is designed to protect the insured, and any operator of the insured's car with the insured's consent, against injury caused by the negligence of uninsured or unknown motorists. Buck v. United States Fid. & Guar. Co., 265 N.C. 285, 144 S.E.2d 34 (1965).

Subsection (b)(3) of this section is to be considered in conjunction with the principle that the provisions of this section enter into and form a part of the policy. Lichtenberger v. American Motorists Ins. Co., 7 N.C. App. 269, 172 S.E.2d 284 (1970).

In the absence of rejection, this section writes uninsured motorists coverage into every policy of automobile liability insurance although the policy may not indicate the coverage on its face. Lichtenberger v. American Motorists Ins. Co., 7 N.C. App. 269, 172 S.E.2d 284 (1970).

And Coverage Is Provided Although Not Requested by Insured. — A policy issued under subsection (b)(3) of this section is substantially different from a "voluntary" policy. Where the provisions of the statute enter into and form a part of the policy, the coverage is provided although the insured has never requested that coverage. Lichtenberger v. American Motorists Ins. Co., 7 N.C. App. 269, 172 S.E.2d 284 (1970).

But Coverage Does Not Apply If Named Insured Rejects It. — Compulsory uninsured motorist coverage as required by subsection (b)(3) of this section does not apply where the insured named in the policy rejects the coverage. Lichtenberger v. American Motorists Ins. Co., 7 N.C. App. 269, 172 S.E.2d 284 (1970).

Burden of Proving Rejection of Coverage. — The delivery or issuance of a motor vehicle liability policy carries with it as a matter of law the requisite uninsured motorist liability, unless it is shown that the statutory coverage is rendered inapplicable by a rejection. As is true with cancellation or termination, the burden of proving the defense of rejection shifts to the defendant. Lichtenberger v. American Motorists Ins. Co., 7 N.C. App. 269, 172 S.E.2d 284 (1970).

Acceptance of Policy without Uninsured Motorist Provisions Does Not Operate as Rejection. — If the insurer cannot avoid liability on a policy of insurance issued pursuant to this statute by omitting from the policy provisions favorable to the insured, then neither can the insured's acceptance of the policy alone operate as a rejection of the coverage written into it by statute. Lichtenberger v. American Motorists Ins. Co., 7 N.C. App. 269, 172 S.E.2d 284 (1970).

Coverage Not Restricted to Injury or Damage Occurring in This State. — It appears from subdivision (3) of subsection (b) of this section that the General Assembly clearly intended that automobile liability insurance policies delivered or issued for delivery in this State and covering motor vehicles registered or principally garaged in this State will provide protection, within certain limits, to insureds who are legally entitled to recover damages for bodily injury from owners or operators of uninsured motor vehicles. The section does not restrict the coverage to injury or damage occurring in this State. Dildy v. Southeastern Fire Ins. Co., 13 N.C. App. 66, 185 S.E.2d 272 (1971).

"Arising Out of". — Where a policy provision speaks of liability "arising out of the ownership, maintenance or use" of a motor vehicle, the words "arising out of" are not words of narrow and specific limitation but are broad, general, and comprehensive terms affecting broad coverage. They are intended to, and do, afford protection to the insured against liability imposed upon him for all damages caused by acts done in connection with or arising out of such use. Fidelity & Cas. Co. v. North Carolina Farm Bureau Mut. Ins. Co., 16 N.C. App. 194, 192 S.E.2d 113 (1972).

The words "arising out of" are words of much broader significance than "caused by." They are ordinarily understood to mean "originating from," "having its origin in," "growing out of," or "flowing from," or in short, "incident to," or "having connection with" the use of the automobile. Fidelity & Cas. Co. v. North Carolina Farm Bureau Mut. Ins. Co., 16 N.C. App. 194, 192 S.E.2d 113 (1972).

The terms "ownership, maintenance and use" should not be treated as mere surplusage. They were placed in the policy in order to cover situations distinct and separate from any other term. Williams v. Nationwide Mut. Ins. Co., 269 N.C. 235, 152 S.E.2d 102 (1967); Fidelity & Cas. Co. v. North Carolina Farm Bureau Mut. Ins. Co., 16 N.C. App. 194, 192 S.E.2d 113 (1972).

The "use" of a vehicle includes its loading and unloading and all persons actively engaged in the loading and unloading with the permission of the named insured are additional insureds under policy omnibus clauses. Fidelity & Cas. Co. v. North Carolina Farm Bureau Mut. Ins. Co., 16 N.C. App. 194, 192 S.E.2d 113 (1972).

When a policy is silent on the point, loading and unloading is using an insured motor vehicle within the terms of the omnibus insurance clause, which insures against loss arising out of the ownership, maintenance and use of a motor vehicle. Fidelity & Cas. Co. v. North Carolina Farm Bureau Mut. Ins. Co., 16 N.C. App. 194, 192 S.E.2d 113 (1972).

Making Repairs. — In an action on the uninsured motorists clause of an automobile insurance policy, where the allegations were to the effect that plaintiff, while underneath the uninsured vehicle, raised on blocks, making repairs, was injured when the owner removed a front wheel and the car fell or rolled upon plaintiff, it was held that repairs are a necessary incident to maintenance, and the allegations brought plaintiff within the coverage of the policy. Williams v. Nationwide Mut. Ins. Co., 269 N.C. 235, 152 S.E.2d 102 (1967).

Vehicle "Uninsured" Unless Policy Covers Liability of Person Using It. — An automobile on which an automobile liability insurance policy has been issued is uninsured within the meaning of an uninsured motorists endorsement, unless such policy covers the liability of the person using it and inflicting injury on the occasion of the collision or mishap. Buck v. United States Fid. & Guar. Co., 265 N.C. 285, 144 S.E.2d 34 (1965).

Vehicle Insured in Another State. — In an action on the uninsured motorist clause in a collision policy, evidence that the vehicle causing the loss was insured in another state, where it was registered and licensed, by a company authorized to do business in that state but not in North Carolina, was insufficient to carry the burden of proving the allegation that the vehicle was an uninsured automobile. Rice v. Aetna Cas. & Sur. Co., 267 N.C. 421, 148 S.E.2d 223 (1966).

Insolvency of Insurer of Vehicle Causing Loss. — Prior to the first 1965 amendment, which added the present third paragraph of subsection (b)(3), in an action on the uninsured vehicle clause in a collision policy, evidence that the vehicle causing the loss was insured in another state, where it was registered and licensed, and that subsequent to the collision the insurer was placed in receivership because of its insolvency, and that a claim was filed with the insurer's receiver, was insufficient to carry the burden of proving that the vehicle causing the injury was an uninsured motor vehicle. Rice v. Aetna Cas. & Sur. Co., 267 N.C. 421, 148 S.E.2d 223 (1966).

What Must Be Shown under Uninsured Motorist Endorsement. — The insured, in order to be entitled to the benefits of the uninsured motorist endorsement, must show (1) he is legally entitled to recover damages, (2) from the owner or operator of an uninsured automobile, (3) because of bodily injury, (4) caused by accident, and (5) arising out of the ownership, maintenance, or use of the uninsured automobile. Williams v. Nationwide Mut. Ins. Co., 269 N.C. 235, 152 S.E.2d 102 (1967).

Action under Uninsured Motorist Policy Is One for Tort. — Despite the contractual relation between plaintiff insured and defendant insurer, an action under an uninsured vehicle policy is actually one for the tort allegedly committed by the uninsured motorist. Brown v. Lumbermens Mut. Cas. Co., 285 N.C. 313, 204 S.E.2d 829 (1974).

Two-Year Statute of Limitations Applies. — In an action for wrongful death under an uninsured motor vehicle policy the court held that plaintiff should not have three years to sue the insurance company under § 1-52, the statute of limitations on actions on contracts when he had only two years in which to sue the individual primarily liable, by reason of § 1-53, the statute of limitations applicable to tort claims. Brown v. Lumbermens Mut. Cas. Co., 285 N.C. 313, 204 S.E.2d 829 (1974).

Right to Recover Is Derivative and Conditional. — Plaintiff's right to recover against his intestate's insurer under the uninsured motorist endorsement is derivative and conditional. Brown v. Lumbermens Mut. Cas. Co., 285 N.C. 313, 204 S.E.2d 829 (1974).

Unless a plaintiff is "legally entitled to recover damages" for the wrongful death of his intestate from the uninsured motorist, the contract upon which he sues precludes him from recovering against the insurance company. Brown v. Lumbermens Mut. Cas. Co., 285 N.C. 313, 204 S.E.2d 829 (1974).

Any defense available to the uninsured tort-feasor should be available to the insurer. Brown v. Lumbermens Mut. Cas. Co., 285 N.C. 313, 204 S.E.2d 829 (1974).

Extent of Insurer's Liability Limited to Amount of Damages Recoverable in Court of Law. — When defendant to an action under an uninsured vehicle policy undertook "to pay all sums which the insured or his legal representatives shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom ..." it assumed liability only for damages for which plaintiff could recover judgment in a court of law in an action against the uninsured motorist. Brown v. Lumbermens Mut. Cas. Co., 285 N.C. 313, 204 S.E.2d 829 (1974).

Subsection (b)(3) of this section is designed to protect the insured as to his actual loss within the statutory limit of $5,000 (now $15,000) for one person, but it was not intended by the General Assembly that an insured shall receive more from such coverage than his actual loss, although he is the beneficiary under multiple policies issued pursuant to the statute.

Moore v. Hartford Fire Ins. Co., 270 N.C. 532, 155 S.E.2d 128 (1967).

"Other Insurance" Clauses Contrary to Statutory Amount of Coverage Not Permitted. — Subdivision (3) of subsection (b) of this section does not permit "other insurance" clauses in the policy which are contrary to the statutory limited amount of coverage. Moore v. Hartford Fire Ins. Co., 270 N.C. 532, 155 S.E.2d 128 (1967).

Provision That Uninsured Motorist Clause Shall Constitute Only Excess Coverage Violates Statute. — A policy provision that its uninsured motorist clause should constitute only excess insurance over any other similar insurance available to the injured person, is contrary to the statutory provisions of subdivision (3) of subsection (b) of this section. Moore v. Hartford Fire Ins. Co., 270 N.C. 532, 155 S.E.2d 128 (1967).

Insured Is Not Limited to One $15,000 Recovery Where He Is Beneficiary of More Than One Policy. — This section does not limit an insured only to one $5,000 (now $15,000) recovery under uninsured motorist coverage where his loss for bodily injury or death is greater than the statutory limit and he is the beneficiary of more than one policy issued under subdivision (3) of subsection (b). Moore v. Hartford Fire Ins. Co., 270 N.C. 532, 155 S.E.2d 128 (1967).

Institution of Action against Hit-and-Run Driver May Not Be Made Condition Precedent to Recovery under Policy. — In many cases it is impossible to determine the identity of a hit-and-run driver. To hold that the institution of an action by the insured against a hit-and-run driver, and to recover damages from him for his tort, is a condition precedent to the insurer's liability under uninsured motorist coverage, would in most such cases defeat insurer's liability against uninsured motorist coverage. Wright v. Fidelity & Cas. Co., 270 N.C. 577, 155 S.E.2d 100 (1967).

Provision Requiring Joinder as Party Defendant of Person Allegedly Responsible for Damage to Insured Held Void. — The provision of an automobile liability policy which required the insured, in an action against the insurer, to join as a party defendant the person or organization allegedly responsible for the damage to the insured, was held void as a violation of § 58-31 where the party defendant was a nonresident uninsured motorist and not amenable to the jurisdiction of this State. Dildy v. Southeastern Fire Ins. Co., 13 N.C. App. 66, 185 S.E.2d 272 (1971).

No Conflict between Statute and Policy Requirement. — There is no conflict between the term "hit-and-run motor vehicle," as used in the statute relating to uninsured or hit-and-run motor vehicle coverage, and a policy requirement of "physical contact of such automobile" with the insured or with an automobile occupied by the insured. Hendricks v. United States Fid. & Guar. Co., 5 N.C. App. 181, 167 S.E.2d 876 (1969).

§ 20-279.22. Notice of cancellation or termination of certified policy. — When an insurance carrier has certified a motor vehicle liability policy under G.S. 20-279.19 or a policy under G.S. 20-279.20, the insurance so certified shall not be canceled or terminated until at least 20 days after a notice of cancellation or termination of the insurance so certified shall be filed in the office of the Commissioner, except that such a policy subsequently procured and certified shall, on the effective date of its certification, terminate the insurance previously certified with respect to any motor vehicle designated in both certificates. (1953, c. 1300, s. 22.)

This section applies only to certified assigned risk policies issued under the Motor Vehicle Safety and Responsibility Act of 1953. Nationwide Mut. Ins. Co. v. Davis, 7 N.C. App. 152, 171 S.E.2d 601 (1970); Bailey v. Nationwide Mut. Ins. Co., 19 N.C. App. 168, 198 S.E.2d 246 (1973).

It has no application to policies issued under the Vehicle Financial Responsibility Act of 1957. Faizan v. Grain Dealers Mut. Ins. Co., 254 N.C. 47, 118 S.E.2d 303 (1961); Harrelson v. State Farm Mut. Auto. Ins. Co., 272 N.C. 603, 158 S.E.2d 812 (1968); Bailey v. Nationwide Mut. Ins. Co., 19 N.C. App. 168, 198 S.E.2d 246 (1973).

Statutes Control Policy Provisions as to Cancellation. — The provisions of this Article and Article 13 of this Chapter, liberally construed to effectuate the legislative policy, control any provision written into a policy which otherwise would give an insurance company a greater right to cancel than is provided by the statute. Harrelson v. State Farm Mut. Auto. Ins. Co., 272 N.C. 603, 158 S.E.2d 812 (1968).

Right of carrier to cancel policy issued under assigned risk plan is subject to the provisions of Article 13 of this Chapter as so implemented by the provisions of this Article incorporated by reference therein. Harrelson v. State Farm Mut. Auto. Ins. Co., 272 N.C. 603, 158 S.E.2d 812 (1968).

Notice Is Required Whether Coverage Is Terminated by Insured or by Insurer. — Under the provisions of the Motor Vehicle Safety and Responsibility Act of 1953 it is incumbent upon

the insurer to give the statutory notice of cancellation irrespective of whether the insurance coverage is terminated through acts of the insured or the insurer. Nationwide Mut. Ins. Co. v. Davis, 7 N.C. App. 152, 171 S.E.2d 601 (1970).

§ 20-279.23. Article not to affect other policies. — (a) This Article shall not be held to apply to or affect policies of automobile insurance against liability which may now or hereafter be required by any other law of this State, and such policies, if they contain an agreement or are endorsed to conform to the requirements of this Article, may be certified as proof of financial responsibility under this Article.

(b) This Article shall not be held to apply to or affect policies insuring solely the insured named in the policy against liability resulting from the maintenance or use by persons in the insured's employ or on his behalf of motor vehicles not owned by the insured. (1953, c. 1300, s. 23.)

§ 20-279.24. Bond as proof. — (a) Proof of financial responsibility may be furnished by filing with the Commissioner the bond of a surety company duly authorized to transact business in the State or a bond with at least two individual sureties each owning real estate within this State, and together having equities in such real estate over and above any encumbrances thereon equal in value to at least twice the amount of such bond, which real estate shall be scheduled in the bond which shall be approved by the clerk of the superior court of the county wherein the real estate is situated. Such bond shall be conditioned for payments in amounts and under the same circumstances as would be required in a motor vehicle liability policy, and shall not be cancellable except after 20 days' written notice to the Commissioner. A certificate of the county tax supervisor or person performing the duties of the tax supervisor, showing the assessed valuation of each tract or parcel of real estate for tax purposes shall accompany a bond with individual sureties and, upon acceptance and approval by the Commissioner, the execution of such bond shall be proved before the clerk of the superior court of the county or counties wherein the land or any part thereof lies, and such bond shall be recorded in the office of the register of deeds of such county or counties. Such bond shall constitute a lien upon the real estate therein described from and after filing for recordation to the same extent as in the case of ordinary mortgages and shall be regarded as the equivalent of a mortgage or deed of trust. In the event of default in the terms of the bond the Commissioner may foreclose the lien thereof by making public sale upon publishing notice thereof as provided by subsection (b) of G.S. 45-21.17; provided, that any such sale shall be subject to the provisions for upset or increased bids and resales and the procedure therefor as set out in Part 2 of Article 2A of Chapter 45 of the General Statutes. The proceeds of such sale shall be applied by the Commissioner toward the discharge of liability upon the bond, any excess to be paid over to the surety whose property was sold. The Commissioner shall have power to so sell as much of the property of either or both sureties described in the bond as shall be deemed necessary to discharge the liability under the bond, and shall not be required to apportion or prorate the liability as between sureties.

If any surety is a married person, his or her spouse shall be required to execute the bond, but only for the purpose of releasing any dower or curtesy interest in the property described in the bond, and the signing of such bond shall constitute a conveyance of dower or curtesy interest, as well as the homestead exemption of the surety, for the purpose of the bond, and the execution of the bond shall be duly acknowledged as in the case of deeds of conveyance. The Commissioner may require a certificate of title of a duly licensed attorney which shall show all liens and encumbrances with respect to each parcel of real estate described in the bond and, if any parcel of such real estate has buildings or other improvements thereon, the Commissioner may, in his discretion, require the filing with him of a policy or policies of fire and other hazard insurance, with

loss clauses payable to the Commissioner as his interest may appear. All costs and expenses in connection with furnishing such bond and the registration thereof, and the certificate of title, insurance and other necessary items of expense shall be borne by the principal obligor under the bond, except that the costs of foreclosure may be paid from the proceeds of sale.

(b) If such a judgment, rendered against the principal on such bond shall not be satisfied within 60 days after it has become final, the judgment creditor may, for his own use and benefit and at his sole expense, bring an action or actions in the name of the State against the company or persons executing such bond, including an action or proceeding to foreclose any lien that may exist upon the real estate of a person who has executed such bond. (1953, c. 1300, s. 24.)

§ 20-279.25. Money or securities as proof. — (a) Proof of financial responsibility may be evidenced by the certificate of the State Treasurer that the person named therein has deposited with him forty-five thousand dollars ($45,000) in cash, or securities such as may legally be purchased by savings banks or for trust funds of a market value of forty-five thousand dollars ($45,000). The State Treasurer shall not accept any such deposit and issue a certificate therefor and the Commissioner shall not accept such certificate unless accompanied by evidence that there are no unsatisfied judgments of any character against the depositor in the county where the depositor resides.

(b) Such deposit shall be held by the State Treasurer to satisfy, in accordance with the provisions of this Article, any execution on a judgment issued against such person making the deposit for damages, including damages for care and loss of services because of bodily injury to or death of any person, or for damages because of injury to or destruction of property, including the loss of use thereof, resulting from the ownership, maintenance, use or operation of a motor vehicle after such deposit was made. Money or securities so deposited shall not be subject to attachment, garnishment, or execution unless such attachment, garnishment, or execution shall arise out of a suit for damages as aforesaid. (1953, c. 1300, s. 25; 1965, c. 358, s. 1; 1967, c. 277, s. 5; 1973, c. 745, s. 5.)

§ 20-279.26. Owner may give proof for others. — Whenever any person required to give proof of financial responsibility hereunder is or later becomes an operator in the employ of any owner, or is or later becomes a member of the immediate family or household of the owner, the Commissioner shall accept proof given by such owner in lieu of proof by such other person to permit such other person to operate a motor vehicle for which the owner has given proof as herein provided. The Commissioner shall designate the restrictions imposed by this section on the face of such person's license. (1953, c. 1300, s. 26.)

§ 20-279.27. Substitution of proof. — The Commissioner shall consent to the cancellation of any bond or certificate of insurance or the Commissioner shall direct and the State Treasurer shall return any money or securities to the person entitled thereto upon the substitution and acceptance of other adequate proof of financial responsibility pursuant to this Article. (1953, c. 1300, s. 27.)

§ 20-279.28. Other proof may be required. — Whenever any proof of financial responsibility filed under the provisions of this Article no longer fulfills the purposes for which required, the Commissioner shall for the purpose of this Article, require other proof as required by this Article, or whenever it appears that proof filed to cover any motor vehicle owned by a person does not cover all motor vehicles registered in the name of such person, the Commissioner shall require proof covering all such motor vehicles. The Commissioner shall suspend the license or the nonresident's operating privilege pending the filing of such other proof. (1953, c. 1300, s. 28.)

§ 20-279.29. Duration of proof; when proof may be canceled or returned. — The Commissioner shall upon request consent to the immediate cancellation of any bond or certificate of insurance, or the Commissioner shall direct and the State Treasurer shall return to the person entitled thereto any money or securities deposited pursuant to this Article as proof of financial responsibility, or the Commissioner shall waive the requirement of filing proof, in any of the following events:

(1) At any time after two years from the date such proof was required when, during the two-year period preceding the request, the Commissioner has not received record of a conviction or a forfeiture of bail which would require or permit the suspension or revocation of the license, registration or nonresident's operating privilege of the person by or for whom such proof was furnished; or

(2) In the event of the death of the person on whose behalf such proof was filed or the permanent incapacity of such person to operate a motor vehicle; or

(3) In the event the person who has given proof surrenders his license to the Commissioner.

Provided, however, that the Commissioner shall not consent to the cancellation of any bond or the return of any money or securities in the event any action for damages upon a liability covered by such proof is then pending or any judgment upon any such liability is then unsatisfied or in the event the person who has filed such bond or deposited such money or securities, has, within one year immediately preceding such request, been involved as an operator or owner in any motor vehicle accident resulting in injury or damage to the person or property of others. An affidavit of the applicant as to the nonexistence of such facts, or that he has been released from all of his liability, or has been finally adjudicated not to be liable, for such injury or damage, shall be sufficient evidence thereof in the absence of evidence to the contrary in the records of the Commissioner.

Whenever any person whose proof has been canceled or returned under subdivision (3) of this section applies for a license within a period of two years from the date proof was originally required, any such application shall be refused unless the applicant shall reestablish such proof for the remainder of such two-year period. (1953, c. 1300, s. 29.)

§ 20-279.30. Surrender of license. — Any person whose license shall have been suspended as herein provided, or whose policy of insurance or bond, when required under this Article, shall have been canceled or terminated, or who shall neglect to furnish other proof upon request of the Commissioner shall immediately return his license to the Commissioner. If any person shall fail to return to the Commissioner the license as provided herein, the Commissioner shall forthwith direct any peace officer to secure possession thereof and to return the same to the Commissioner. (1953, c. 1300, s. 30.)

§ 20-279.31. Other violations; penalties. — (a) Failure to report an accident as required in G.S. 20-279.4 shall be punished by a fine not in excess of twenty-five dollars ($25.00) and in the event of injury or damage to the person or property of another in such accident, the Commissioner shall suspend the license of the person failing to make such report, or the nonresident's operating privilege of such person, until such report has been filed and for such further period not to exceed 30 days as the Commissioner may fix.

(b) Any person who gives information required in a report or otherwise as provided for in G.S. 20-279.4 knowing or having reason to believe that such information is false, or who shall forge or, without authority, sign any evidence of proof of financial responsibility, or who files or offers for filing any such evidence of proof knowing or having reason to believe that it is forged or signed

without authority, shall be fined not more than one thousand dollars ($1,000) or imprisoned for not more than one year, or both.

(c) Any person willfully failing to return license as required in G.S. 20-279.30 shall be fined not more than five hundred dollars ($500.00) or imprisoned not to exceed 30 days, or both.

(d) Any person who shall violate any provision of this Article for which no penalty is otherwise provided shall be fined not more than five hundred dollars ($500.00) or imprisoned not more than 90 days, or both. (1953, c. 1300, s. 31.)

Cited in Lane v. Iowa Mut. Ins. Co., 258 N.C. 318, 128 S.E.2d 398 (1962).

§ 20-279.32. Exceptions. — This Article, except its provisions as to the filing of proof of financial responsibility by a common carrier and its drivers and chauffeurs, does not apply to any vehicle operated under a permit or certificate of convenience or necessity issued by the North Carolina Utilities Commission, or by the Interstate Commerce Commission, if public liability and property damage insurance for the protection of the public is required to be carried upon it. This Article does not apply to any motor vehicle owned by the State of North Carolina, nor does it apply to the operator of a vehicle owned by the State of North Carolina who becomes involved in an accident while operating the state-owned vehicle if the Commissioner determines that the vehicle at the time of the accident was probably being operated in the course of the operator's employment as an employee or officer of the State. This Article does not apply to the operator of a vehicle owned by a political subdivision of the State of North Carolina who becomes involved in an accident while operating such vehicle if the Commissioner determines that the vehicle at the time of the accident was probably being operated in the course of the operator's employment as an employee or officer of the subdivision providing that the Commissioner finds that the political subdivision has waived any immunity it has with respect to such accidents and has in force an insurance policy or other method of satisfying claims which may arise out of the accident. This Article does not apply to any motor vehicle owned by the federal government, nor does it apply to the operator of a motor vehicle owned by the federal government who becomes involved in an accident while operating the government-owned vehicle if the Commissioner determines that the vehicle at the time of the accident was probably being operated in the course of the operator's employment as an employee or officer of the federal government. (1953, c. 1300, s. 32; 1955, c. 1152, s. 19.)

§ 20-279.32A. Exception of school bus drivers. — The provisions of this Article shall not apply to school bus drivers with respect to accidents or collisions in which they are involved while operating school buses in the course of their employment. (1955, c. 1282.)

§ 20-279.33. Self-insurers. — (a) Any person in whose name more than 25 motor vehicles are registered may qualify as a self-insurer by obtaining a certificate of self-insurance issued by the Commissioner as provided in subsection (b) of this section. For the purpose of this Article, the State of North Carolina shall be considered a self-insurer.

(b) The Commissioner may, in his discretion, upon the application of such a person, issue a certificate of self-insurance when he is satisfied that such person is possessed and will continue to be possessed of ability to pay judgments obtained against such person.

(c) Upon not less than five days' notice and a hearing pursuant to such notice, the Commissioner may upon reasonable grounds cancel a certificate of self-insurance. Failure to pay any judgment within 30 days after such judgment

shall have become final shall constitute a reasonable ground for the cancellation of a certificate of self-insurance. (1953, c. 1300, s. 33.)

§ 20-279.34. North Carolina Automobile Insurance Plan. — The Commissioner of Insurance shall develop a revised assigned risk plan to be denominated "The North Carolina Automobile Insurance Plan" as follows:

(1) The Commissioner of Insurance, after consultation with representatives of the insurance carriers licensed to write motor vehicle liability insurance in this State, shall consider such reasonable plans and procedures for providing the coverage and coverage limits as specified in subdivision (4) of this section as such insurance carriers may submit to him for the equitable apportionment among such insurance carriers of those applicants for motor vehicle liability insurance on motor vehicles registered or principally garaged in this State who are unable to secure such insurance through ordinary means. Such plans and procedures shall further provide for a reasonable method of allowing each insurance carrier a credit due to writing coverage limits in excess of those required to meet the minimum requirements for a motor vehicle liability policy as defined by G.S. 20-279.21.

(2) Upon approval by the Commissioner of Insurance of any such plans and procedures thus submitted, all insurance carriers licensed to write motor vehicle liability insurance in this State, as a prerequisite to further engaging in writing such insurance in this State, shall formally subscribe to, and participate in, such plans and procedures so submitted.

(3) In the event the Commissioner of Insurance, in the exercise of his discretion, does not approve any plan so submitted, or should no such plan be submitted, then the Commissioner of Insurance shall formulate and put into effect reasonable plans and procedures providing coverage and coverage limits as specified in subdivision (4) of this section for the apportionment among such insurance carriers of all such applications for motor vehicle liability insurance on motor vehicles registered or principally garaged in this State submitted to him in accordance with the provisions of this section by persons desiring coverage pursuant to the provisions of this section. Such plans and procedures shall further provide for a reasonable method of allowing each insurance carrier a credit due to writing coverage limits in excess of those required to meet the minimum requirements for a motor vehicle liability policy as defined by G.S. 20-279.21.

(4) Should no such plan be submitted by the insurance carriers and approved by the Commissioner of Insurance, then as a prerequisite to further engaging in the selling of motor vehicle liability insurance in this State, every insurance carrier licensed to write motor vehicle liability insurance in this State shall formally subscribe to and participate in the plans and procedures formulated by the Commissioner of Insurance as provided by subdivision (3) of this section, and every such insurance carrier shall accept any and all risks on motor vehicles registered or principally garaged in this State assigned to it by the Commissioner of Insurance under such plan and shall upon payment of a proper premium issue a policy covering the same, such policy to meet the minimum requirements for a motor vehicle liability policy as defined by G.S. 20-279.21, and at the option of the applicant, coverage and coverage limits may be obtained through the assigned risk plan of up to but not more than twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident, and subject to said limit for one person, to limits of up to but not more than fifty thousand dollars ($50,000) because of

bodily injury to or death of two or more persons in any one accident and up to but not more than a limit of ten thousand dollars ($10,000), without any deductible therefrom, because of injury to or destruction of property of others in any one accident. In addition, at the option of the applicant, at a coverage limit not to exceed five hundred dollars ($500.00) insurance coverage for the payment of medical expenses shall be available under the plan to the same extent and manner and subject to the same conditions and exclusions as such insurance coverage is being currently written voluntarily outside the plan as a part of insurance policies affording the coverages required by G.S. 20-279.21.

In addition, at the option of the applicant, uninsured motorist coverage as defined in G.S. 20-279.21 [shall be available under the plan.]

(5) Any such assigned risk plan adopted or approved by the Commissioner shall provide that every person who has been unable to obtain a motor vehicle liability insurance policy through ordinary methods or every person who desires to obtain coverage under the provisions of this section on motor vehicles registered or principally garaged in this State shall have the right to apply to the Commissioner of Insurance or the person designated under the plan to have his risk assigned to an insurance carrier licensed to write, and writing motor vehicle liability insurance in this State, and the insurance carrier shall issue a motor vehicle liability policy which will meet the minimum requirements for a motor vehicle liability policy defined by G.S. 20-279.21 and at the option of the applicant provides additional coverage and coverage limits as specified in this section. In such instance where application is made to the Commissioner of Insurance or the person designated under the plan, to have a risk assigned to an insurance carrier, it shall be deemed that the applicant desires coverage under this section, and the Commissioner of Insurance or the person designated under the plan shall upon receipt of such application immediately assign the risk to an insurance carrier, which carrier shall be required, as a prerequisite to the further engaging in selling motor vehicle liability insurance in this State, to issue a motor vehicle liability policy which will meet at least the minimum requirements for a motor vehicle liability policy as defined by G.S. 20-279.21, and at the option of the applicant provides additional coverage and coverage limits as specified in this section.

Any such assigned risk plan adopted or approved by the Commission shall establish reasonable plans and procedures for decreasing the number of persons obtaining insurance through the North Carolina Automobile Insurance Plan by an equitable method of allowing credit as business written through the Plan for business composed of persons insured through the Plan, which such carriers will write voluntarily outside the Plan.

(6) The Commissioner of Insurance shall establish, or cause to be established, such rate classifications, rating schedules, rates, rules and regulations to be used by insurance carriers issuing assigned risk motor vehicle liability policies in accordance with this Article as appear to him to be proper; provided the Commissioner of Insurance is authorized but not required to establish rates for assigned risk liability policies which are higher than approved manual rates; and in the case of assigned risk policies issued in excess of the minimum limits the Commissioner may establish higher rates or a surcharge adequate to cover the costs of underwriting such excess limits.

In the establishment of rate classification, rating schedules, rates, rules and regulations, the Commissioner of Insurance shall be guided by such principles and practices as have been established under his

statutory authority to regulate motor vehicle liability insurance rates, and he may act in conformity with his statutory discretionary authority in such matters, and may in his discretion assign to the North Carolina automobile rate administrative office, or other State bureau or agency any of the administrative duties imposed upon him by this Article.

(7) The Commissioner of Insurance or the person designated in the plan adopted or approved by the Commissioner is empowered, after reviewing all information pertaining to the applicant or policyholder available from the records of the Division of Motor Vehicles and after determining that the applicant's license to operate a motor vehicle has been suspended and continues to be suspended or has been revoked and the revocation remains in effect:

a. To refuse to assign an application;

b. To approve the rejection of an application by an insurance carrier;

c. To approve the cancellation of any motor vehicle liability insurance policy written through the plan by an insurance carrier; or

d. To refuse to approve the renewal or the reassignment of an expiring policy.

Otherwise, nonrenewal or cancellation of insurance under the provisions of this section shall be exercised only in the event of nonpayment of premiums.

(8) The Commissioner of Insurance shall not be held liable for any act, or omission, in connection with the administration of the duties imposed upon him by the provisions of this Article, except upon proof of actual malfeasance.

(9) The provisions of this section relevant to assignment of risks shall be available to nonresidents who desire to obtain motor vehicle liability insurance with respect only to motor vehicles registered and principally garaged in this State.

(10) The provisions of this section shall apply to vehicles operated by a county or municipality as an ambulance service or as a rescue squad, and the assigned risk plan shall provide for the assignment of policies on such vehicles. (1953, c. 1300, s. 34; 1963, c. 1208, ss. 1, 2; 1967, c. 277, s. 6; c. 1155; 1969, c. 744, s. 2; 1971, c. 1205, s. 3; 1975, c. 716, s. 5.)

Cross Reference. — See § 20-279.21 and the note thereto.

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the introductory paragraph of subdivision (7).

Section Restricts Right to Cancel. — The right of an insurer to cancel policies issued under the assigned risk plan is restricted by this section. Griffin v. Hartford Accident & Indem. Co., 264 N.C. 212, 141 S.E.2d 300 (1965).

Liberal Construction. — Interpreting this section liberally, in order to accomplish the legislative purpose of maintenance of financial responsibility throughout the period of registration of the vehicle, it is construed to mean that, notwithstanding provisions in the policy, an insurance carrier may cancel an assigned risk policy, issued to fulfil the requirements of either this Article or Article 13 of this Chapter, only when it is shown both that (1) there has been a nonpayment of premium or a suspension of the driver's license of the insured, and (2) the Commissioner of Insurance has approved the cancellation, which he may apparently do by the issuance of general rules and regulations with reference thereto. Harrelson v. State Farm Mut. Auto. Ins. Co., 272 N.C. 603, 158 S.E.2d 812 (1968).

Insurance Carriers Required to Subscribe to and Participate in Assigned Risk Plan. — All insurance carriers, as a prerequisite to engaging and writing motor vehicle insurance in this State, must subscribe to, and participate in, the plans and procedures constituting the assigned risk plan. Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967).

And This Requirement Does Not Constitute Denial of Due Process. — The fact that an insurance company is required to issue assigned risk motor vehicle liability policies as a condition of transacting liability insurance business in North Carolina does not constitute a denial of due process in violation of State and federal constitutional provisions. Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967); Beasley v. Hartford Accident & Indem. Co., 11 N.C. App. 34, 180 S.E.2d 381, aff'd, 280 N.C. 177, 184 S.E.2d 841 (1971).

Purpose of Assigned Risk Plan. — The assigned risk plan authorized by this section is for the equitable apportionment among insurance carriers licensed to write motor vehicle insurance in this State of those applicants for motor vehicle liability policies who are required to file proof of financial responsibility under this Article but who are unable to secure such insurance through ordinary methods. Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967).

This section is incorporated by reference into the Financial Responsibility Act of 1957 by § 20-314. Harrelson v. State Farm Mut. Auto. Ins. Co., 272 N.C. 603, 158 S.E.2d 812 (1968).

Act Must Be Read into Policy and Construed Liberally. — A policy having been issued pursuant to the assigned risk plan and for the purpose of fulfilling the requirement of the Financial Responsibility Act of 1957 (§ 20-309 et seq.), the provisions of that act, relative to the cancellation of such policies, must be read into this policy and construed liberally so as to effectuate the purpose of the act. Harrelson v. State Farm Mut. Auto. Ins. Co., 272 N.C. 603, 158 S.E.2d 812 (1968); Grant v. State Farm Mut. Auto. Ins. Co., 1 N.C. App. 76, 159 S.E.2d 368 (1968).

Assigned risk insurance is compulsory both as to the insurer and the insured, made so by law. Grant v. State Farm Mut. Auto. Ins. Co., 1 N.C. App. 76, 159 S.E.2d 368 (1968).

Insurance supplied by a policy issued under the assigned risk plan is compulsory both as to the insured owner and as to the insurance carrier. Harrelson v. State Farm Mut. Auto. Ins. Co., 272 N.C. 603, 158 S.E.2d 812 (1968).

To avoid liability to a third party beneficiary of an assigned risk automobile insurance policy, the insurer must allege and prove cancellation and termination of the policy in accordance with the applicable statutes. Grant v. State Farm Mut. Auto. Ins. Co., 1 N.C. App. 76, 159 S.E.2d 368 (1968).

Coverage Not Extended to Replacement Vehicle Owned by Person Other Than Named Insured. — Nothing in the statute requires any carrier to extend the coverage of an assigned risk policy to a replacement vehicle owned by and registered to a person other than the original named insured owner of the vehicle originally described and insured. Beasley v. Hartford Accident & Indem. Co., 11 N.C. App. 34, 180 S.E.2d 381, aff'd, 280 N.C. 177, 184 S.E.2d 841 (1971).

Nonpayment of Fee for Filing Form SR-22. — The failure of an insured under the assigned risk plan to pay his insurer a fee for filing a certificate of financial responsibility (Form SR-22) with the Department of Motor Vehicles is not a nonpayment of premium within the purview of this section for which the insurer may cancel a policy of automobile liability insurance. Harrelson v. State Farm Mut. Auto. Ins. Co., 272 N.C. 603, 158 S.E.2d 812 (1968).

Applied in Beasley v. Hartford Accident & Indem. Co., 280 N.C. 177, 184 S.E.2d 841 (1971).

Cited in Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960); Faizan v. Grain Dealers Mut. Ins. Co., 254 N.C. 47, 118 S.E.2d 303 (1961); Nixon v. Liberty Mut. Ins. Co., 258 N.C. 41, 127 S.E.2d 892 (1962); Underwood v. National Grange Mut. Liab. Co., 258 N.C. 211, 128 S.E.2d 577 (1962); Lane v. Iowa Mut. Ins. Co., 258 N.C. 318, 128 S.E.2d 398 (1962); Daniels v. Nationwide Mut. Ins. Co., 258 N.C. 660, 129 S.E.2d 314 (1963); Strickland v. Hughes, 273 N.C. 481, 160 S.E.2d 313 (1968); Perkins v. American Mut. Fire Ins. Co., 274 N.C. 134, 161 S.E.2d 536 (1968); Hartford Accident & Indem. Co. v. Ingram, 290 N.C. 457, 226 S.E.2d 498 (1976).

§ 20-279.35. Supplemental to motor vehicle laws; repeal of laws in conflict. — This Article shall in no respect be considered as a repeal of any of the motor vehicle laws of this State but shall be construed as supplemental thereto.

The "Motor Vehicle Safety and Responsibility Act" enacted by the 1947 Session of the General Assembly, being Chapter 1006 of the Session Laws of 1947 (G.S. 20-224 to 20-279), is hereby repealed except with respect to any accident or violation of the motor vehicle laws of this State occurring prior to January 1, 1954, or with respect to any judgment arising from such accident or violation, and as to such accidents, violations or judgments Chapter 1006 of the Session Laws of 1947 shall remain in full force and effect. Except as herein stated, all laws and clauses of laws in conflict with this Article are hereby repealed. (1953, c. 1300, s. 35.)

Applied in Miller v. New Amsterdam Cas. Co., 245 N.C. 526, 96 S.E.2d 860 (1957).

Quoted in Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960).

Cited in Graham v. Iowa Nat. Mut. Ins. Co., 240 N.C. 458, 82 S.E.2d 381 (1954).

§ 20-279.36. Past application of Article. — This Article shall not apply with respect to any accident, or judgment arising therefrom, or violation of the motor vehicle laws of this State, occurring prior to January 1, 1954. (1953, c. 1300, s. 37.)

Applied in Justice v. Scheidt, 252 N.C. 361, 113 S.E.2d 709 (1960).

Quoted in Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960).

§ 20-279.37. Article not to prevent other process. — Nothing in this Article shall be construed as preventing the plaintiff in any action at law from relying for relief upon the other processes provided by law. (1953, c. 1300, s. 38.)

§ 20-279.38. Uniformity of interpretation. — This Article shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those states which enact it. (1953, c. 1300, s. 39.)

§ 20-279.39. Title of Article. — This Article may be cited as the "Motor Vehicle Safety-Responsibility Act of 1953." (1953, c. 1300, s. 41.)

ARTICLE 10.

Financial Responsibility of Taxicab Operators.

§ 20-280. Filing proof of financial responsibility with governing board of municipality or county. — (a) Within 30 days after March 27, 1951, every person, firm or corporation engaging in the business of operating a taxicab or taxicabs within a municipality shall file with the governing board of the municipality in which such business is operated proof of financial responsibility as hereinafter defined.

No governing board of a municipality shall hereafter issue any certificate of convenience and necessity, franchise, license, permit or other privilege or authority to any person, firm or corporation authorizing such person, firm or corporation to engage in the business of operating a taxicab or taxicabs within the municipality unless such person, firm or corporation first files with said governing board proof of financial responsibility as hereinafter defined.

Within 30 days after the ratification of this section, every person, firm or corporation engaging in the business of operating a taxicab or taxicabs without the corporate limits of a municipality or municipalities, shall file with the board of county commissioners of the county in which such business is operated proof of financial responsibility as hereinafter defined.

No person, firm or corporation shall hereafter engage in the business of operating a taxicab or taxicabs without the corporate limits of a municipality or municipalities in any county unless such person, firm or corporation first files with the board of county commissioners of the county in which such business is operated proof of financial responsibility as hereinafter defined.

(b) As used in this section "proof of financial responsibility" shall mean a certificate of any insurance carrier duly authorized to do business in the State of North Carolina certifying that there is in effect a policy of liability insurance insuring the owner and operator of the taxicab business, his agents and employees while in the performance of their duties against loss from any liability imposed by law for damages including damages for care and loss of services because of bodily injury to or death of any person and injury to or destruction of property caused by accident and arising out of the ownership, use or operation of such taxicab or taxicabs, subject to limits (exclusive of interests and costs) with respect to each such motor vehicle as follows: fifteen thousand dollars ($15,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, thirty thousand dollars ($30,000)

because of bodily injury to or death of two or more persons in any one accident, and five thousand dollars ($5,000) because of injury to or destruction of property of others in any one accident.

(c) Every person, firm or corporation who engages in the taxicab business and who is a member of or participates in any trust fund or sinking fund, which said trust fund or sinking fund is for the sole purpose of paying claims, damages or judgments against persons, firms or corporations engaging in the taxicab business and which trust fund or sinking fund is approved by the governing body of any city or municipality with a population of over 50,000, shall be deemed a compliance with the financial responsibility provisions of this section.

Provided, however, that in the case of operators of 15 or more taxicabs, the limits (exclusive of interests and costs), with respect to each such motor vehicle shall be as follows: ten thousand dollars ($10,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, twenty thousand dollars ($20,000) because of bodily injury to or death of two or more persons in any one accident, and one thousand dollars ($1,000) because of injury to or destruction of property of others in any one accident. (1951, c. 406; 1965, c. 350, s. 1; 1967, c. 277, s. 7; 1973, c. 745, s. 6.)

Local Modification. — Durham: 1953, c. 597.

Editor's Note. — For brief comment on this section, see 29 N.C.L. Rev. 402.

Cited in Perrell v. Beaty Serv. Co., 248 N.C. 153, 102 S.E.2d 785 (1958).

ARTICLE 11.

Liability Insurance Required of Persons Engaged in Renting Motor Vehicles.

§ 20-281. Liability insurance prerequisite to engaging in business; coverage of policy. — From and after July 1, 1953, it shall be unlawful for any person, firm or corporation to engage in the business of renting or leasing motor vehicles to the public for operation by the rentee or lessee unless such person, firm or corporation has secured insurance for his own liability and that of his rentee or lessee, in such an amount as is hereinafter provided, from an insurance company duly licensed to sell motor vehicle liability insurance in this State. Each such motor vehicle leased or rented must be covered by a policy of liability insurance insuring the owner and rentee or lessee and their agents and employees while in the performance of their duties against loss from any liability imposed by law for damages including damages for care and loss of services because of bodily injury to or death of any person and injury to or destruction of property caused by accident arising out of the operation of such motor vehicle, subject to the following minimum limits: fifteen thousand dollars ($15,000) because of bodily injury to or death of one person in any one accident, and thirty thousand dollars ($30,000) because of bodily injury to or death of two or more persons in any one accident, and five thousand dollars ($5,000) because of injury to or destruction of property of others in any one accident. Provided, however, that nothing in this Article shall prevent such operators from qualifying as self-insurers under terms and conditions to be prepared and prescribed by the Commissioner of Motor Vehicles or by giving bond with personal or corporate surety, as now provided by G.S. 20-279.24, in lieu of securing the insurance policy hereinbefore provided for. (1953, c. 1017, s. 1; 1955, c. 1296; 1965, c. 349, s. 1; 1967, c. 277, s. 8; 1973, c. 745, s. 7.)

Cross Reference. — As to registration fees for U-Drive-It passenger vehicles, see § 20-87(2).

This section did not extend insurance coverage to the driver of a rented vehicle where there was neither evidence nor a finding that the driver at any time was a rentee or a lessee or an agent or employee of the owner of the vehicle. Iowa Nat'l Mut. Ins. Co. v. Broughton, 283 N.C. 309, 196 S.E.2d 243 (1973).

§ 20-282. Cooperation in enforcement of Article. — The provisions of this Article shall be enforced by the Commissioner of Motor Vehicles in cooperation with the Commissioner of Insurance, the North Carolina Automobile Rate Administrative Office and with all law-enforcement officers and agents and other agencies of the State and the political subdivisions thereof. (1953, c. 1017, s. 2.)

§ 20-283. Compliance with Article prerequisite to issuance of license plates. — No license plates shall be issued by the Division of Motor Vehicles to operate a motor vehicle, for lease or rent for operation by the rentee or lessee, until the applicant for such license plates demonstrates to the Commissioner of Motor Vehicles that he has complied with the provisions of this Article. (1953, c. 1017, s. 3; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" near the beginning of the section.

§ 20-284. Violation a misdemeanor. — Any person, firm or corporation violating the provisions of this Article shall be guilty of a misdemeanor and shall be punished by fine or imprisonment, or both, in the discretion of the court. (1953, c. 1017, s. 4.)

ARTICLE 12.

Motor Vehicle Dealers and Manufacturers Licensing Law.

§ 20-285. Regulation of motor vehicle distribution in public interest. — The General Assembly finds and declares that the distribution of motor vehicles in the State of North Carolina vitally affects the general economy of the State and the public interest and public welfare, and in the exercise of its police power, it is necessary to regulate and license motor vehicle manufacturers, distributors, dealers, salesmen, and their representatives doing business in North Carolina, in order to prevent frauds, impositions and other abuses upon its citizens. (1955, c. 1243, s. 1.)

§ 20-286. Definitions. — Unless the context otherwise requires, the following words and terms, for the purpose of this Article, shall have the following meanings:

(1), (2) Repealed by Session Laws 1973, c. 1330, s. 39.

(3) "Distributor" and "wholesaler" mean a person, resident or nonresident of this State, who sells or distributes motor vehicles to motor vehicle dealers in this State, or who maintains a distributor representative in this State.

(4) "Distributor branch" means a branch office maintained by a distributor or wholesaler, for the sale of motor vehicles to motor vehicle dealers, or for directing or supervising its representatives in this State.

(5) "Distributor representative" means a person employed by a distributor or wholesaler, or by a distributor branch, for the purpose of making or promoting the sale of motor vehicles dealt in by it, or for supervising or contacting its dealers, prospective dealers, or representatives in this State.

(6) "Established place of business" means a salesroom containing at least 96 square feet of floor space in a permanent enclosed building; said salesroom shall have displayed thereon or immediately adjacent thereto a sign, in block letters not less than three inches in height on contrasting background, clearly and distinctly designating the trade

name of the business at which a permanent business of bartering, trading and selling motor vehicles will be carried on as such in good faith and at which place of business shall be kept and maintained the books, records and files as the Division may require necessary to conduct the business at such place. Provided, however, the minimum area requirement provided for in this subdivision is not applicable to any established place of business lawfully in existence and duly licensed on or before January 1, 1978.

(7) "Factory branch" means a branch office, maintained for the sale of motor vehicles to motor vehicle dealers, or for directing or supervising its representatives in this State.

(8) "Factory representative" means a person employed by a person who manufactures or assembles motor vehicles, or by a factory branch, for the purpose of making or promoting the sale of its motor vehicles, or for supervising or contacting its dealers, prospective dealers or representatives in this State.

(9) Repealed by Session Laws 1973, c. 1330, s. 39.

(10) "Motor vehicle" means any motor propelled vehicle, trailer or semitrailer, required to be registered under the laws of this State.

a. "New motor vehicle" means a motor vehicle which has never been the subject of a sale other than between new motor vehicle dealers, or between manufacturer and dealer of the same franchise.

b. "Used motor vehicle" means a motor vehicle other than described in paragraph (10)a above.

(11) "Motor vehicle dealer" and "dealer" mean any person, firm, association, or corporation engaged in the business of selling, soliciting, or advertising the sale of motor vehicles.

The term "motor vehicle dealer" or "dealer" does not include:

a. Receivers, trustees, administrators, executors, guardians, or other persons appointed by or acting under the judgment or order of any court; or

b. Public officers while performing their official duties; or

c. Persons disposing of motor vehicles acquired for their own use and actually so used, when the same shall have been so acquired and used in good faith and not for the purpose of avoiding the provisions of this Article; or

d. Persons, firms or corporations who shall sell motor vehicles as an incident to their principal business but who are not engaged primarily in the selling of motor vehicles. This category includes finance companies who shall sell repossessed motor vehicles and insurance companies who sell motor vehicles to which they have taken title as an incident of payments made under policies of insurance and who do not maintain a used car lot or building with one or more employed motor vehicle salesmen.

e. Persons, firms or corporations manufacturing, distributing or selling trailers and semitrailers weighing not more than 750 pounds and carrying not more than 1500 pound load.

(12) "Motor vehicle salesman" or "salesman" means any person who is employed as a salesman by, or has an agreement with, a motor vehicle dealer, to sell or exchange motor vehicles.

(13) "New motor vehicle dealer" means a motor vehicle dealer who buys, sells or exchanges, or offers or attempts to negotiate a sale or exchange of an interest in, or who is engaged, wholly or in part, in the business of selling, new or new and used motor vehicles.

(14) Repealed by Session Laws 1973, c. 1330, s. 39.

(15) "Retail installment sale" means and includes every sale of one or more motor vehicles to a buyer for his use and not for resale, in which the price thereof is payable in one or more installments over a period of time and in which the seller has either retained title to the goods or has taken or retained a security interest in the goods under form of contract designated either as a conditional sale, bailment lease, chattel mortgage or otherwise.

(16) "Used motor vehicle dealer" means a motor vehicle dealer who buys, sells or exchanges, or offers or attempts to negotiate a sale or exchange of an interest in, or who is engaged, wholly or in part, in the business of selling, used motor vehicles only. (1955, c. 1243, s. 2; 1967, c. 1126, s. 1; c. 1173; 1973, c. 1330, s. 39; 1977, c. 560, s. 1.)

Cross Reference. — For definitions applicable throughout this Chapter, see § 20-4.01.

Editor's Note. — The 1977 amendment in the first sentence of subdivision (6), substituted "96 square feet" for "64 square feet," deleted "or structure" following "permanent enclosed building," inserted "in block letters not less than three inches in height on contrasting background" and "as the Division may require," and deleted "and shall not mean tents, temporary stands or other temporary quarters, nor permanent quarters occupied pursuant to any temporary arangement, devoted principally to the business of a motor vehicle dealer, as herein defined" from the end. The amendment also added the second sentence of subdivision (6).

§ 20-287. Licenses required. — It shall be unlawful for any new motor vehicle dealer, used motor vehicle dealer, motor vehicle salesman, manufacturer, factory branch, distributor branch, factory or distributor representative, to engage in business as such in this State without first obtaining a license as provided in this Article. If any motor vehicle dealer acts as a motor vehicle salesman, he shall obtain a motor vehicle salesman's license in addition to a motor vehicle dealer's license. A salesman may have only one license, and such license shall show the name of the dealer or dealers employing him. A manufacturer or a factory branch or distributor or distributor branch, licensed as such, may also operate as a motor vehicle dealer without additional license. (1955, c. 1243, s. 3.)

§ 20-288. Application for license; information required and considered; expiration of license; supplemental license; bond. — (a) Application for license shall be made to the Division at such time, in such form, and contain such information as the Division shall require, and shall be accompanied by the required fee.

(b) The Division shall require in such application, or otherwise, information relating to matters set forth in G.S. 20-294 as grounds for the refusing of licenses, and to other pertinent matter commensurate with the safeguarding of the public interest, all of which shall be considered by the Division in determining the fitness of the applicant to engage in the business for which he seeks a license.

(c) All licenses that are granted shall expire unless sooner revoked or suspended, on June 30 of the year following date of issue.

(d) Supplemental licenses shall be issued for each place of business, operated or proposed to be operated by the licensee, that is not contiguous to other premises for which a license is issued.

(e) Each applicant approved by the Division for license as a motor vehicle dealer, manufacturer, distributor branch, or factory branch shall furnish a corporate surety bond or cash bond or fixed value equivalent thereof in the principal sum of fifteen thousand dollars ($15,000) and an additional principal sum of five thousand dollars ($5,000) for each additional place of business within this State at which motor vehicles are sold. Each application for a license or a renewal of a license shall be accompanied by a list of locations at which the

applicant engages in the business of selling motor vehicles in this State. A corporate surety bond shall be approved by the Commissioner as to form and shall be conditioned that the obligor will faithfully conform to and abide by the provisions of this Article. A cash bond or fixed value equivalent thereof shall be approved by the Commissioner as to form and terms of deposits as will secure the ultimate beneficiaries of the bond; and such bond shall not be available for delivery to any person contrary to the rules of the Commissioner. Any purchaser of a motor vehicle who shall have suffered any loss or damage by any act of a motor vehicle dealer that constitutes a violation of this Article shall have the right to institute an action to recover against such motor vehicle dealer and the surety. Every licensee against whom such action is instituted shall notify the Commissioner of the action within 10 days after process is served on the licensee. A corporate surety bond shall remain in force and effect and may not be cancelled by the surety unless the motor vehicle dealer, manufacturer, distributor branch, or factory branch has terminated the operations of its business nor unless its license has been denied, suspended, or revoked under G.S. 20-294. Such cancellation may be had only upon 30 days' written notice to the Commissioner and shall not affect any liability incurred or accrued prior to the termination of such 30-day period. (1955, c. 1243, s. 4; 1975, c. 716, s. 5; 1977, c. 560, s. 2.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout subsections (a) and (b).

The 1977 amendment added subsection (e).

§ 20-289. License fees. — (a) The license fee for each fiscal year, or part thereof, shall be as follows:

(1) For motor vehicle dealers, distributors, and wholesalers, twenty-one dollars ($21.00) for each principal place of business, plus five dollars ($5.00) for a supplementary license for each car lot not immediately adjacent thereto.

(2) For manufacturers, fifty dollars ($50.00), and for each factory branch in this State, thirty dollars ($30.00).

(3) For motor vehicle salesmen, three dollars and fifty cents ($3.50).

(4) For factory representatives, or distributor branch representatives, four dollars ($4.00).

(5) Manufacturers, wholesalers, and distributors may operate as a motor vehicle dealer, without any additional fee or license.

(b) The fees and licenses collected under this section shall be placed in the Highway Fund. Provided, that nothing contained in this section or in any other section of this Article shall be construed as exempting any person of any license, tax or fee imposed by any other provision of the law. (1955, c. 1243, s. 5; 1969, c. 593; 1977, c. 802, s. 8.)

Editor's Note. — The 1977 amendment substituted "Highway Fund" for " 'Dealers'-Manufacturers' License Fund' and shall be used under the direction and supervision of the assistant director of the budget for the administration of this Article" at the end of the first sentence of subsection (b).

§ 20-290. Licenses to specify places of business; display of license and list of salesmen; advertising. — (a) The licenses of new motor vehicle dealers, used motor vehicle dealers, manufacturers, factory branches, distributors, and distributor branches shall specify the location of each place of business or branch or other location occupied or to be occupied by the licensee in conducting his business as such, and the license or supplementary license issued therefor shall be conspicuously displayed on each of such premises. In the event any such

location is changed, the Division shall endorse the change of location on the license, without charge.

(b) Each dealer shall keep a current list of his licensed salesmen, showing names, addresses, and serial numbers of their licenses, posted in a conspicuous place in each place of business.

(c) Whenever any licensee places an advertisement in any newspaper or publication, the type and serial number of license shall appear therein. (1955, c. 1243, s. 6; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the second sentence of subsection (a).

§ 20-291. Salesman, etc., to carry license and display on request; license to name employer. — Every salesman, factory representative and distributor representative shall carry his license when engaged in his business, and shall display the same upon request. The licensee shall name his employer, and in the event of a change of employer, he shall immediately mail his license to the Division, which shall endorse such change on the license without charge. (1955, c. 1243, s. 7; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the second sentence.

§ 20-292. Use of unimproved lots and premises. — A licensed motor vehicle dealer may use vacant lots and premises for the sale and display of motor vehicles: Provided, that if such lots and premises are not immediately adjacent to the dealer's established place of business, a supplementary license shall be obtained for each lot or premises. (1955, c. 1243, s. 8.)

§ 20-293. Only licensed dealer entitled to dealer's registration plates. — No motor vehicle dealer, unless licensed under this Article shall be entitled to receive or use any dealer's registration plates under the provisions of the motor vehicle laws of this State providing for the issuance of such plates. (1955, c. 1243, s. 9.)

§ 20-294. Grounds for denying, suspending or revoking licenses. — A license may be denied, suspended or revoked on any one or more of the following grounds:

(1) Material misstatement in application for license.

(2) Willful and intentional failure to comply with any provision of this Article or the willful and intentional violation of G.S. 20-52.1, 20-75, 20-79, 20-82, 20-108, 20-109 or rescission and cancellation of dealer's license and dealer's plates under G.S. 20-110(e) or 20-110(f) or any lawful rule or regulation promulgated by the Division under this Article.

(3) Being a motor vehicle dealer, failure to have an established place of business as defined in this Article.

(4) Willfully defrauding any retail buyer, to the buyer's damage, or any other person in the conduct of the licensee's business.

(5) Employment of fraudulent devices, methods or practices in connection with compliance with the requirements under the laws of this State with respect to the retaking of motor vehicles under retail installment contracts and the redemption and resale of such motor vehicles.

(6) Having used unfair methods of competition or unfair deceptive acts or practices.
(7) Knowingly advertising by any means, any assertion, representation or statement of fact which is untrue, misleading or deceptive in any particular relating to the conduct of the business licensed or for which a license is sought.
(8) Knowingly advertising a used motor vehicle for sale as a new motor vehicle.
(9) Conviction of an offense set forth under G.S. 20-105, 20-106, 20-106.1 or 20-112 while holding such a license or within five years next preceding the date of filing the application. (1955, c. 1243, s. 10; 1963, c. 1102; 1967, c. 1126, s. 2; 1975, c. 716, s. 5; 1977, c. 560, s. 3.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subdivision (2).

The 1977 amendment inserted "G.S. 20-79" in subdivision (2).

Section 20-105, referred to in this section, was repealed by Session Laws 1975, c. 1330, s. 39. For present provisions covering the same subject matter, see § 14-72.2.

Price Prohibited by Subdivision (6). — Subdivision (6) prohibits a licensed motor vehicle dealer from advertising, publishing, or representing a price which does not include all charges which constitute the total price to the retail customer, except the North Carolina sales tax. Opinion of Attorney General to Mr. Gonzalie Rivers, License and Theft Division, Department of Motor Vehicles, 43 N.C.A.G. 135 (1973).

§ 20-295. Time to act upon applications; refusal of license; notice; hearing. — The Division shall act upon all applications for a license within 30 days after receipt thereof, by either granting or refusing the same. Any applicant denied a license shall, upon his written request filed within 30 days, be given a hearing at such time and place as determined by the Commissioner, or person designated by him. All such hearings shall be public and shall be held with reasonable promptness. Any applicant denied a license for failure to comply with the definition of an established place of business, as defined in this Article, may not, nor shall anyone else apply for a license for such premises, for which a license was denied, until the expiration of 60 days from the date of the rejection of such application. (1955, c. 1243, s. 11; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" near the beginning of the first sentence.

§ 20-296. Notice and hearing upon denial, suspension, revocation or refusal to renew license. — No license shall be suspended or revoked or denied, or renewal thereof refused, until a written notice of the complaint made has been furnished to the licensee against whom the same is directed, and a hearing thereon has been had before the Commissioner, or a person designated by him. At least 10 days' written notice of the time and place of such hearing shall be given to the licensee by registered mail to his last known address as shown on his license or other record of information in possession of the Division. At any such hearing, the licensee shall have the right to be heard personally or by counsel. After hearing, the Division shall have power to suspend, revoke or refuse to renew the license in question. Immediate notice of any such action shall be given to the licensee in the manner herein provided in the case of notices of hearing. (1955, c. 1243, s. 12; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the second and fourth sentences.

§ 20-297. Inspection of records, etc. — The Division may inspect the pertinent books, records, letters and contracts of a licensee relating to any written complaint made to him against such licensee. (1955, c. 1243, s. 13; 1975, c. 716, s. 5.)

Editor's Note. The 1975 amendment substituted "Division" for "Department" near the beginning of the section.

§ 20-298. Insurance. — It shall be unlawful for any dealer or salesman or any employee of any dealer, to coerce or offer anything of value to any purchaser of a motor vehicle to provide any type of insurance coverage on said motor vehicle. No dealer, salesman or representative of either shall accept any policy as collateral on any vehicle sold by him to secure an interest in such vehicle in any company not qualified under the insurance laws of this State: Provided, nothing in this Article shall prevent a dealer or his representative from requiring adequate insurance coverage on a motor vehicle which is the subject of an installment sale. (1955, c. 1243, s. 14.)

§ 20-299. Acts of officers, directors, partners, salesmen and other representatives. — (a) If a licensee is a copartnership or a corporation, it shall be sufficient cause for the denial, suspension or revocation of a license that any officer, director or partner of the copartnership or corporation has committed any act or omitted any duty which would be cause for refusing, suspending or revoking a license to such party as an individual. Each licensee shall be responsible for the acts of any or all of his salesmen while acting as his agent.

(b) Every licensee who is a manufacturer or a factory branch shall be responsible for the acts of any or all of its agents and representatives while acting in the conduct of said licensee's business whether or not such licensee approved, authorized, or had knowledge of such acts. (1955, c. 1243, s. 15; 1973, c. 559.)

§ 20-300. Appeals from actions of Commissioner. — Appeals from actions of the Commissioner shall be governed by the provisions of Chapter 150A of the General Statutes. (1955, c. 1243, s. 16; 1973, c. 1331, s. 3.)

Applied in Smith's Cycles, Inc. v. Alexander, 27 N.C. App. 382, 219 S.E.2d 282 (1975).

Cited in State ex rel. North Carolina Util. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965).

§ 20-301. Powers of Commissioner. — (a) The Commissioner shall promote the interests of the retail buyer of motor vehicles.

(b) The Commissioner shall have power to prevent unfair methods of competition and unfair or deceptive acts or practices.

(c) The Commissioner shall have the power in hearings arising under this Article to determine the place where they shall be held; to subpoena witnesses; to take depositions of witnesses; and to administer oaths.

(d) The Commissioner may, whenever he shall believe from evidence submitted to him that any person has been or is violating any provision of this Article, in addition to any other remedy bring an action in the name of the State against such person and any other persons concerned or in any way participating in, or about to participate in practices or acts so in violation, to enjoin such persons and such other persons from continuing the same. (1955, c. 1243, s. 17.)

§ 20-302. Rules and regulations. — The Commissioner may make such rules and regulations, not inconsistent with the provisions of this Article, as he shall deem necessary or proper for the effective administration and enforcement of this Article, provided that a copy of such rules and regulations shall be mailed to each motor vehicle dealer licensee 30 days prior to the effective date of such rules and regulations. (1955, c. 1243, s. 18.)

§ 20-303. Installment sales to be evidenced by written instrument; statement to be delivered to buyer. — (a) Every retail installment sale shall be evidenced by an instrument in writing, which shall contain all the agreements of the parties and shall be signed by the buyer.

(b) Prior to or about the time of the delivery of the motor vehicle, the seller shall deliver to the buyer a written statement describing clearly the motor vehicle sold to the buyer, the cash sale price thereof, the cash paid down by the buyer, the amount credited the buyer for any trade-in and a description of the motor vehicle traded, the amount of the finance charge, the amount of any other charge specifying its purpose, the net balance due from the buyer, the terms of the payment of such net balance and a summary of any insurance protection to be effected. (1955, c. 1243, s. 19.)

§ 20-304. Coercion of retail dealer by manufacturer or distributor in connection with installment sales contract prohibited. — (a) It shall be unlawful for any manufacturer, wholesaler or distributor, or any officer, agent or representative of either, to coerce, or attempt to coerce, any retail motor vehicle dealer or prospective retail motor vehicle dealer in this State to sell, assign or transfer any retail installment sales contract, obtained by such dealer in connection with the sale by him in this State of motor vehicles manufactured or sold by such manufacturer, wholesaler, or distributor, to a specified finance company or class of such companies, or to any other specified persons, by any of the acts or means hereinafter set forth, namely:

(1) By any statement, suggestion, promise or threat that such manufacturer, wholesaler, or distributor will in any manner benefit or injure such dealer, whether such statement, suggestion, threat or promise is expressed or implied, or made directly or indirectly,

(2) By any act that will benefit or injure such dealer,

(3) By any contract, or any expressed or implied offer of contract, made directly or indirectly to such dealer, for handling motor vehicles, on the condition that such dealer sell, assign or transfer his retail installment sales contract thereon, in this State, to a specified finance company or class of such companies, or to any other specified person,

(4) By any expressed or implied statement or representation, made directly or indirectly, that such dealer is under any obligation whatsoever to sell, assign or transfer any of his retail sales contracts, in this State, on motor vehicles manufactured or sold by such manufacturer, wholesaler, or distributor to such finance company, or class of companies, or other specified person, because of any relationship or affiliation between such manufacturer, wholesaler, or distributor and such finance company or companies or such other specified person or persons.

(b) Any such statements, threats, promises, acts, contracts, or offers of contracts, when the effect thereof may be to lessen or eliminate competition, or tend to create a monopoly, are declared unfair trade practices and unfair methods of competition and against the public policy of this State, are unlawful and are hereby prohibited. (1955, c. 1243, s. 20.)

§ 20-305. Coercing dealer to accept commodities not ordered; threatening to cancel franchise; preventing transfer of ownership; granting additional franchises; terminating franchises without good cause; preventing family succession. — It shall be unlawful for any manufacturer, factory branch, distributor, or distributor branch, or any field representative, officer, agent, or any representative whatsoever of any of them:

(1) To coerce, or attempt to coerce any dealer to accept delivery of any motor vehicle or vehicles, parts or accessories therefor, or any other commodities, which shall not have been ordered by such dealer;

(2) To coerce, or attempt to coerce any dealer to enter into any agreement with such manufacturer, factory branch, distributor, or distributor branch, or representative thereof, or do any other act unfair to such dealer, by threatening to cancel any franchise existing between such manufacturer, factory branch, distributor, distributor branch, or representative thereof, and such dealer;

(3) Unfairly without due regard to the equities of the dealer, and without just provocation, to cancel the franchise of such dealer;

Cross Reference. — For provisions relative to repeal of subdivision (3), see Editor's note at end of section.

(4) Notwithstanding the terms of any franchise agreement, to prevent or refuse to approve the sale or transfer of the ownership of a dealership by the sale of the business, stock transfer, or otherwise, or the transfer, sale or assignment of a dealer franchise, or a change in the executive management or principal operator of the dealership, if the Commissioner has determined, if requested in writing by the dealer within 30 days after receipt of an objection to the proposed sale, transfer or change, and after a hearing on the matter, that the failure to permit or honor such sale, transfer, assignment, or change is unreasonable under the circumstances; provided, however, that no franchise may be sold or assigned or transferred unless (i) the franchisor has been given at least 30 days' prior written notice as to the identity, financial ability and qualifications of the proposed transferee, and (ii) the sale or transfer of the franchise and business will not involve, without the franchisor's consent, a relocation of the business;

(5) To grant an additional franchise for a particular line-make of motor vehicle in a trade area already served by a dealer or dealers in that line-make unless the franchisor first advised in writing such other dealers in the line-make in the trade area; provided that no such additional franchise may be established in the trade area if the Commissioner has determined, if requested by any party within 30 days after receipt of the franchisor's notice of intention to establish the additional franchise, and after a hearing on the matter, that there is reasonable evidence that after the grant of the new franchise, the market will not support all of the dealerships in that line-make in the trade area; trade areas are those areas specified in the franchise agreement or determined by the Motor Vehicle Dealers' Advisory Board;

(6) Notwithstanding the terms of any franchise agreement to terminate, cancel, or refuse to renew the franchise of any dealer, without good cause, and unless (i) the dealer and the Commissioner have received written notice of the franchisor's intentions at least 60 days prior to the effective date of such termination, cancellation, or the expiration

date of the franchise, setting forth the specific grounds for such action, and (ii) the Commissioner has determined, if requested in writing by the dealer within such 60-day period, and after a hearing on the matter, that there is good cause for the termination, cancellation, or nonrenewal of the franchise, except in the event of fraud, insolvency, closed doors, or failure to function in the ordinary course of business, 15 days' notice shall suffice; provided that in any case where a petition is made to the Commissioner for a determination as to good cause for the termination, cancellation, or nonrenewal of a franchise, the franchise in question shall continue in effect pending the Commissioner's decision; or

(7) Notwithstanding the terms of any franchise agreement, to prevent or refuse to honor the succession to a dealership by a member of the family of a deceased or incapacitated dealer if the Commissioner determines, if requested in writing by such member of the family within 30 days after the death or incapacity of the dealer, and after a hearing on the matter, that the failure to permit or honor such succession is unreasonable under the circumstances; provided, however, that no member of the family may succeed to a franchise unless (i) the franchisor has been given written notice as to the identity, financial ability and qualifications of the member of the family in question, and (ii) the succession to the franchise will not involve, without the franchisor's consent, a relocation of the business. (1955, c. 1243, s. 21; 1973, c. 88, ss. 1, 2.)

Editor's Note. — Session Laws 1973, c. 88, s. 4, provides: "The provisions of this act shall not apply to manufacturers of, or dealers in, mobile or manufactured type housing or recreational trailers."

In view of the above-quoted provision, subdivision (3) of this section, though repealed by the 1973 act, has not been deleted in the section as set out above.

The notice provision contemplates an analysis of relevant market conditions within the trade area at or about the time that the notice of the new dealership is made, not the distant past or future. Smith's Cycles, Inc. v. Alexander, 27 N.C. App. 382, 219 S.E.2d 282 (1975).

Further Notice under Subdivision (5) Required. — Where a motorcycle manufacturer gave plaintiff dealer notice under subdivision (5) of this section of its intention to grant a new motorcycle franchise in plaintiff's trade area on or before September 1, 1973, but the manufacturer did not grant such a franchise by that date, the failure of plaintiff to request a hearing by the Commissioner of Motor Vehicles within 30 days after receipt of such notice did not give the manufacturer the right to grant a new franchise at any time in the future without giving plaintiff further notice under subdivision (5); and where the manufacturer granted a new franchise on October 14, 1974, without giving additional notice to plaintiff, the 30-day time limitation never began to run, and plaintiff properly filed its petition for a hearing on October 19, 1974. Smith's Cycles, Inc. v. Alexander, 27 N.C. App. 382, 219 S.E.2d 282 (1975).

Applied in Smith's Cycles, Inc. v. American Honda Motor Co., 26 N.C. App. 76, 214 S.E.2d 785 (1975).

§ 20-305.1. Automobile dealer warranty obligations. — (a) Each motor vehicle manufacturer, factory branch, distributor or distributor branch, shall specify in writing to each of its motor vehicle dealers licensed in this State the dealer's obligations for preparation, delivery and warranty service on its products, the schedule of compensation to be paid such dealers for parts, work, and service in connection with warranty service, and the time allowances for the performance of such work and service. In no event shall such schedule of compensation fail to include reasonable compensation for diagnostic work as well as repair service and labor. Time allowances for the performance of warranty work and service shall be reasonable and adequate for the work to be performed. In the determination of what constitutes reasonable compensation under this section, the factors to be given consideration shall include, among others, the compensation being paid by other manufacturers to their dealers,

the prevailing wage rates being paid by dealers, and the prevailing labor rate being charged by dealers, in the community in which the dealer is doing business.

(b) It is unlawful for any motor vehicle manufacturer, factory branch, distributor, or distributor branch to fail to perform any of its warranty obligations with respect to a motor vehicle, to fail to assume all responsibility for any liability resulting from structural or production defects, or to fail to compensate its motor vehicle dealers licensed in this State for warranty parts, work, and service in accordance with the schedule of compensation provided the dealer pursuant to subsection (a) above, or for legal costs and expenses incurred by such dealers in connection with warranty obligations for which the manufacturer, factory branch, distributor or distributor branch is legally responsible.

(c) In the event there is a dispute between the manufacturer, factory branch, distributor, or distributor branch, and the dealer with respect to any matter referred to in subsections (a) and (b) above, either party may petition the Commissioner in writing, within 30 days after either party has given written notice of the dispute to the other, for a hearing on the subject and the decision of the Commissioner shall be binding on the parties, subject to rights of judicial review and appeal as provided in Chapter 150A of the General Statutes; provided, however, that nothing contained herein shall give the Commissioner any authority as to the content of any manufacturer's or distributor's warranty. (1973, c. 88, s. 3; c. 1331, s. 3.)

§ 20-305.2. Unfair methods of competition. — It is unlawful for any motor vehicle manufacturer, factory branch, distributor, distributor branch, or subsidiary thereof, to own, operate, or control any motor vehicle dealership in a trade area of this State already served by a motor vehicle dealer under a franchise for the same line-make from such manufacturer, factory branch, distributor, or distributor branch, or subsidiary, provided that this section shall not be construed to prohibit (i) the operation by a manufacturer, factory branch, distributor, distributor branch, or subsidiary thereof, of a dealership for a temporary period (not to exceed one year) during the transition from one owner or operator to another, or (ii) the ownership or control of a dealership by a manufacturer, factory branch, distributor, distributor branch, or subsidiary thereof, during a period while such dealership is being sold under a bona fide contract or purchase option to the operator of the dealership, or (iii) the ownership, operation or control of a dealership by a manufacturer, factory branch, distributor, distributor branch, or subsidiary thereof, if such manufacturer, factory branch, distributor, distributor branch, or subsidiary has been engaged in the retail sale of motor vehicles through such dealership for a continuous period of three years prior to March 16, 1973, and if the Commissioner determines, after a hearing on the matter at the request of any party, that there is no independent dealer available in the trade area to own and operate the franchise in a manner consistent with the public interest, or (iv) the ownership, operation, or control of a dealership by a manufacturer, factory branch, distributor, distributor branch, or subsidiary thereof, if the Commissioner determines after a hearing on the matter at the request of any party, that there is no independent dealer available in the trade area to own and operate the franchise in a manner consistent with the public interest.

Trade area is that area specified in the franchise agreement or determined by the Motor Vehicle Dealers' Advisory Board. Provided, this section shall not apply to manufacturers or distributors of trailers or semitrailers. (1973, c. 88, s. 3.)

§ 20-305.3. Hearing notice. — In every case of a hearing before the Commissioner authorized under this Article, the Commissioner shall give reasonable notice of each such hearing to all interested parties, and the

Commissioner's decision shall be binding on the parties, subject to the rights of judicial review and appeal as provided in Chapter 150A of the General Statutes. The costs of such hearings shall be assessed by the Commissioner. (1973, c. 88, s. 3; c. 1331, s. 3.)

§ 20-305.4. Motor Vehicle Dealers' Advisory Board. — (a) The Motor Vehicle Dealers' Advisory Board shall consist of six members; three of which shall be appointed by the Speaker of the House of Representatives, and three of which shall be appointed by the Lieutenant Governor to consult with and advise the Commissioner with respect to matters brought before the Commissioner under the provisions of G.S. 20-304 through 20-305.4.

(b) Each member of the Motor Vehicle Dealers' Advisory Board shall be a resident of North Carolina. Three members of the Board shall be franchised dealers in new automobiles or trucks, duly licensed and engaged in business as such in North Carolina, provided that no two of such dealers may be franchised to sell automobiles or trucks manufactured or distributed by the same person or a subsidiary or affiliate of the same person. Three members of the Board shall not be motor vehicle dealers or employees of a motor vehicle dealer.

(c) The Speaker shall appoint two of the dealer members and one of the public members and shall fill any vacancy in said positions and the Lieutenant Governor shall appoint one of the dealer members and two of the public members and shall fill any vacancy in said positions. In making the initial appointments the Speaker shall designate that the two dealer members shall serve for one and three years respectively and the public member shall serve for two years, and in making the initial appointments the Lieutenant Governor shall designate that the dealer member shall serve for two years and the two public members shall serve for one and three years respectively.

(d) Two members of the first Board appointed shall serve for a period of three years, two members of the first Board shall serve for a period of two years, and two members of the first Board shall serve for a period of one year. Subsequent appointments shall be for terms of three years, except appointments to fill vacancies which shall be for the unexpired terms. Members of the Board shall meet at the call of the Commissioner and shall receive as compensation for their services seven dollars ($7.00) for each day actually engaged in the exercise of the duties of the Board and such travel expenses and subsistence allowances as are generally allowed other State commissions and boards. (1973, c. 88, s. 3.)

§ 20-305.5. Sections 20-305, subdivisions (4) through (7), and 20-305.1 to 20-305.4 not applicable to certain manufacturers and dealers. — The provisions of G.S. 20-305(4), (5), (6) and (7) and 20-305.1 to 20-305.4 shall not apply to manufacturers of, or dealers in, mobile or manufactured type housing or recreational trailers. (1973, c. 88, s. 4.)

Cross Reference. — See the Editor's note under § 20-305.

§ 20-306. Unlawful for salesman to sell except for his employer; multiple employment. — It shall be unlawful for any motor vehicle salesman licensed under this Article to sell or exchange or offer or attempt to sell or exchange any motor vehicle other than his own except for the licensed motor vehicle dealer or dealers by whom he is employed, or to offer, transfer or assign, any sale or exchange, that he may have negotiated, to any other dealer or salesman. Salesmen may be employed by more than one dealer provided such multiple employment is clearly indicated on his license. (1955, c. 1243, s. 22.)

§ 20-307. Article applicable to existing and future franchises and contracts. — The provisions of this Article shall be applicable to all franchises and contracts existing between dealers and manufacturers, factory branches,

and distributors at the time of its ratification, and to all such future franchises and contracts. (1955, c. 1243, s. 23.)

§ 20-308. Penalties. — Any person violating any of the provisions of this Article shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court. (1955, c. 1243, s. 24.)

ARTICLE 13.

The Vehicle Financial Responsibility Act of 1957.

§ 20-309. Financial responsibility prerequisite to registration; must be maintained throughout registration period. — (a) No self-propelled motor vehicle shall be registered in this State unless the owner at the time of registration has financial responsibility for the operation of such motor vehicle, as provided in this Article, and certifies that he has such financial responsibility. The owner of each motor vehicle registered in this State shall maintain financial responsibility continuously throughout the period of registration.

(b) Financial responsibility shall be a liability insurance policy or a financial security bond or a financial security deposit or by qualification as a self-insurer, as these terms are defined and described in Article 9A, Chapter 20 of the General Statutes of North Carolina, as amended.

(c) When it is certified that financial responsibility is a liability insurance policy, the Commissioner of Motor Vehicles may require that the owner produce records to prove the fact of such insurance, and failure to produce such records shall be prima facie evidence that no financial responsibility exists with regard to the vehicle concerned and the Division of Motor Vehicles shall revoke the owner's registration plate for 60 days. In no case shall any vehicle the registration of which has been revoked for failure to have financial responsibility be reregistered in the name of the registered owner, spouse, or any child of the spouse or any child of such owner, within less than 60 days after the date of receipt of the registration plate by the Division, except that a spouse living separate and apart from the registered owner may reregister such vehicle immediately in such spouse's name. As a condition precedent to the registration of the vehicle, the separated spouse shall furnish the Division his or her affidavit and the affidavit of two other individuals stating that he or she is separated. As a condition precedent to the reregistration of the vehicle, the owner shall pay a restoration fee of fifteen dollars ($15.00) and the appropriate fee for a new registration plate. It shall be the duty of insurance companies, upon request of the Division, to verify the accuracy of any owner's certification. Failure by an insurance company to deny coverage within 20 days may be considered by the Commissioner as acknowledgment that the information as submitted is correct.

(d) When liability insurance with regard to any motor vehicle is terminated by cancellation or failure to renew, or the owner's financial responsibility for the operation of any motor vehicle is otherwise terminated, the owner shall forthwith surrender the registration certificate and plates of the vehicle to the Division of Motor Vehicles unless financial responsibility is maintained in some other manner in compliance with this Article.

(e) Upon termination by cancellation or otherwise of an insurance policy provided in subsection (d), the insurer shall forthwith notify the North Carolina Division of Motor Vehicles of such termination. Where the insurance policy is terminated by the insured, the insurer shall forthwith notify the Division of Motor Vehicles that such insurance policy has been terminated. The Division of Motor Vehicles, upon receiving notice of cancellation or termination of an owner's financial responsibility as required by this Article, shall notify such owner of such cancellation or termination, and such owner shall, to retain the registration plate for the vehicle registered or required to be registered, within

15 days from date of notice given by the Division, certify to the Division that he has financial responsibility effective on or prior to the date of such cancellation or termination. Failure by the owner to certify that he has financial responsibility as herein required shall be prima facie evidence that no financial responsibility exists with regard to the vehicle concerned and, unless the owner's registration plate has been surrendered to the Division of Motor Vehicles by surrender to an agent or representative of the Division of Motor Vehicles and so designated by the Commissioner of Motor Vehicles or depositing the same in the United States mail, addressed to the Division of Motor Vehicles, Raleigh, North Carolina, the Division of Motor Vehicles shall revoke the owner's registration plate for 60 days. In no case shall any vehicle the registration of which has been revoked for failure to have financial responsibility be registered in the name of the registered owner, spouse, or any child of the spouse or any child of such owner, within less than 60 days after the date of receipt of the registration plate by the Division, except that a spouse living separate and apart from the registered owner may reregister such vehicle immediately in such spouse's name. As a condition precedent to the registration of the vehicle, the owner shall pay a restoration fee of fifteen dollars ($15.00) and the appropriate fee for a new registration plate. Any person, firm or corporation failing to give notice of termination as required herein shall be subject to a civil penalty of two hundred dollars ($200.00) to be assessed by the Commissioner of Insurance upon a finding by the Commissioner of Insurance that good cause is not shown for such failure to give notice of termination to the Division of Motor Vehicles.

(f) The fees collected under this section and G.S. 20-311 shall be placed in the Highway Fund. (1957, c. 1393, s. 1; 1959, c. 1277, s. 1; 1963, c. 964, s. 1; 1965, c. 272; c. 1136, ss. 1, 2; 1967, c. 822, ss. 1, 2; c. 857, ss. 1, 2; 1971, c. 477, ss. 1, 2; c. 924; 1975, c. 302; c. 348, ss. 1-3; c. 716, s. 5.)

Cross References. — As to Motor Vehicle Safety and Financial Responsibility Act of 1953, see §§ 20-279.1 to 20-279.39. As to notice of termination of policy required to be given to Commissioner of Motor Vehicles under § 20-310 before its amendment in 1963, see note to § 20-310.

Editor's Note. — The first 1975 amendment rewrote the first sentence of subsection (e), which formerly required 15 days' notice of termination or cancellation prior to the effective date thereof, substituted "forthwith" for "immediately" near the middle of the second sentence of subsection (e), substituted "registered" for "reregistered" in the fifth sentence and "registration" for "reregistration" in the sixth sentence of subsection (e) and added the last sentence of subsection (e).

The second 1975 amendment inserted "a restoration fee of fifteen dollars ($15.00) and" in the fourth sentence of subsection (c) and in the next-to-last sentence of subsection (e) and added subsection (f).

The third 1975 amendment substituted "Division" for "Department" throughout subsections (c), (d) and (e).

For case law survey on insurance, see 41 N.C.L. Rev. 484 (1963).

This Article is a remedial statute and will be liberally construed to carry out its beneficent purpose of providing compensation to those who have been injured by automobiles. Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967).

The manifest purpose of this Article is to provide protection, within the required limits, to persons injured or damaged by the negligent operation of a motor vehicle; and in respect of a motor vehicle liability policy to provide such protection notwithstanding violations of policy provisions by the owner subsequent to accidents on which such injured parties base their claims. To bar recovery from the insurer on account of such policy violations would practically nullify the statute by making the enforcement of the rights of the person intended to be protected dependent upon the acts of the very person who caused the injury. Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960).

The manifest purpose of this Article was to provide protection, within the required limits, to persons injured or damaged by the negligent operation of a motor vehicle. Perkins v. American Mut. Fire Ins. Co., 274 N.C. 134, 161 S.E.2d 536 (1968).

The purpose of this Article is to assure the protection of liability insurance, or other type of established financial responsibility, up to the minimum amount specified in this Article, to persons injured by the negligent operation of a motor vehicle upon the highways of this State. To that end, the act makes it mandatory that the

owner of a registered motor vehicle maintain proof of financial responsibility throughout such registration of the vehicle. This may be done by the owner's obtaining, and maintaining in effect, a policy of automobile liability insurance (§§ 20-279.19, 20-314). To enable an owner so to comply with this requirement of the act, even though he is unable to procure such insurance in the usual way, the act provides that the provisions of the Financial Responsibility Act of 1953, with reference to the assigned risk plan, "shall apply to filing and maintaining proof of financial responsibility required by" the Act of 1957 (§ 20-314). Harrelson v. State Farm Mut. Auto. Ins. Co., 272 N.C. 603, 158 S.E.2d 812 (1968).

The manifest purpose of this Article was to provide protection, within the required limits, to persons injured or damaged by the negligent operation of a motor vehicle, and, in respect of a "motor vehicle liability policy," to provide such protection notwithstanding violations of policy provisions by the owner subsequent to accidents on which such injured parties base their claims. Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967).

The primary purpose of the law requiring compulsory insurance is to furnish at lease partial compensation to innocent victims who have suffered injury and damage as a result of the negligent operation of a motor vehicle upon the public highway. Allstate Ins. Co. v. Hale, 270 N.C. 195, 154 S.E.2d 79 (1967).

It is manifest that the purpose of this Article is to provide protection, within the required limits, to persons injured or damaged by the negligent operation of a motor vehicle. Nationwide Mut. Ins. Co. v. Cotten, 12 N.C. App. 212, 182 S.E.2d 801 (1971).

This Article obliges a motorist either to post security or to carry liability insurance, not accident insurance to indemnify all persons who might be injured by the insured's car. When the legislature passed the act it was not in the legislative contemplation that each driver in a two-car collision would recover from the other's insurance carrier. Moore v. Young, 263 N.C. 483, 485, 139 S.E.2d 704, 706 (1965). McKinney v. Morrow, 18 N.C. App. 282, 196 S.E.2d 585 (1973).

This Article and Article 9A Are to Be Construed in Pari Materia. — The Motor Vehicle Safety and Financial Responsibility Act of 1953 applies to drivers whose licenses have been suspended and relates to the restoration of drivers' licenses, while the Vehicle Financial Responsibility Act of 1957 applies to all motor vehicle owners and relates to the registration of motor vehicles. The two acts are complementary and the latter does not repeal or modify the former, but incorporates portions of the former by reference, and the two acts are to be construed in pari materia so as to harmonize them and give effect to both. Faizan v. Grain Dealers Mut. Ins. Co., 254 N.C. 47, 118 S.E.2d 303 (1961).

This Article requires every owner of a motor vehicle, as a prerequisite to the registration thereof to show proof of financial responsibility in the manner prescribed by Article 9A of this Chapter. Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960); First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965); Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967).

This Article and Article 9A are to be construed together so as to harmonize their provisions and to effectuate the purpose of the legislature. Harrelson v. State Farm Mut. Auto. Ins. Co., 272 N.C. 603, 158 S.E.2d 812 (1968).

The requirements of this section with respect to cancellation must be observed or the attempt at cancellation fails. Allstate Ins. Co. v. Hale, 270 N.C. 195, 154 S.E.2d 79 (1967).

Subsection (e) of this section and § 20-310(a) prescribe the procedure pursuant to which a policy issued for the purpose of complying with the requirements of this Article may be cancelled by the insurance carrier having the right to cancel. In order to cancel such policy, the carrier must comply with these procedural requirements of the statute or the attempt at cancellation fails. Harrelson v. State Farm Mut. Auto. Ins. Co., 272 N.C. 603, 158 S.E.2d 812 (1968).

An insurer may not cancel for nonpayment of premiums without following the provisions of subsection (e) of this section and § 20-310. Nationwide Mut. Ins. Co. v. Davis, 7 N.C. App. 152, 171 S.E.2d 601 (1970).

Effect of Issuance of Certificate by Insurer. — By the issuance of the certificate an insurer represents that it has issued and there is in effect an owner's motor vehicle liability policy. Crisp v. State Farm Mut. Auto. Ins. Co., 256 N.C. 408, 124 S.E.2d 149 (1962).

By the issuance of the certificate the insurer represents that everything requisite for a binding insurance policy has been performed, including payment, or satisfactory arrangement for payment, of premium. Once the certificate has been issued, nonpayment of premium, nothing else appearing, is no defense in a suit by a third party beneficiary against insurer. To avoid liability insurer must allege and prove cancellation and termination of the insurance policy in accordance with the applicable statute, unless it is established by plaintiff's evidence or admissions. Crisp v. State Farm Mut. Auto. Ins. Co., 256 N.C. 408, 124 S.E.2d 149 (1962).

In order to be effective, a purported cancellation must comply with the provisions of subsection (e) of this section and § 20-310(a). Redmon v. United States Fid. & Guar. Co., 21 N.C. App. 704, 206 S.E.2d 298 (1974).

Purpose of Notice Requirement. — The purpose of the notice to the Department (now

Division) is to enable it to recall the registration and license plate issued for the vehicle unless the owner makes other provision for compliance with the Vehicle Financial Responsibility Act. Nationwide Mut. Ins. Co. v. Cotten, 280 N.C. 20, 185 S.E.2d 182 (1971).

The purpose of the requirement of notice to the Department (now Division) of Motor Vehicles is not to provide free insurance to the policyholder who has, by his disregard of the premium notice, demonstrated that he does not intend to pay the renewal premium. Nationwide Mut. Ins. Co. v. Cotten, 280 N.C. 20, 185 S.E.2d 182 (1971).

Notice by Insurer to Insured Is Not Required Where Insured Has Terminated Policy. — Where a policy is terminated or cancelled by an insured, the insurer is not required to give notice of cancellation to the insured. Nationwide Mut. Ins. Co. v. Davis, 7 N.C. App. 152, 171 S.E.2d 601 (1970).

And Failure to Give Notice to Department of Termination by Insured Does Not Affect Validity of Cancellation. — Where the insured terminates a policy issued pursuant to the Vehicle Responsibility Act of 1957, the insurer is required immediately to notify the Department (now Division) of Motor Vehicles, but failure to give such notice does not affect the validity or binding effect of the cancellation. Nationwide Mut. Ins. Co. v. Davis, 7 N.C. App. 152, 171 S.E.2d 601 (1970).

Notice Prior to Cancellation Date Required Only Where Termination by Insurer. — Only where the policy has been terminated by the insurer does subsection (e) of this section require notice to the Department (now Division) of Motor Vehicles prior to the effective date of cancellation. Nationwide Mut. Ins. Co. v. Cotten, 280 N.C. 20, 185 S.E.2d 182 (1971); Bailey v. Nationwide Mut. Ins. Co., 19 N.C. App. 168, 198 S.E.2d 246 (1973).

Subsection (e) of this section requires the insurer to give to the Department (now Division) of Motor Vehicles notice of a termination "by the insurer" prior to the effective date thereof; this has no bearing on the question of what constitutes a termination "by the insured." Nationwide Mut. Ins. Co. v. Cotten, 280 N.C. 20, 185 S.E.2d 182 (1971).

Notice After Termination Required Where Termination Is by Insured. — Where a policy was terminated "by the insured" by his complete ignoring of the offer by the insurer to renew the policy contained in the notice of premium sent by it to the insured and received by him, subsection (e) of this section requires the company to notify the Department (now Division) of Motor Vehicles of the termination of the policy "immediately" and contemplates such notice to the Department (now Division) after the termination. Nationwide Mut. Ins. Co. v. Cotten, 280 N.C. 20, 185 S.E.2d 182 (1971).

Policy Terminated by Insurer and Policy Terminated by Insured Distinguished. — Subsection (e) of this section expressly distinguishes between a policy terminated by the insurer and a policy terminated by the insured, with reference to when the insurer is required to notify the Department (now Division) of Motor Vehicles that the policy has been terminated. Nationwide Mut. Ins. Co. v. Cotten, 280 N.C. 20, 185 S.E.2d 182 (1971); Bailey v. Nationwide Mut. Ins. Co., 19 N.C. App. 168, 198 S.E.2d 246 (1973).

When Policy Is Terminated by Insured. — A policy issued by an insurer to an insured is terminated "by the insured," within the meaning of subsection (e) of this section, by his complete ignoring of the offer by the company to renew the policy contained in the notice of premium sent by it to the insured and received by him. Nationwide Mut. Ins. Co. v. Cotten, 280 N.C. 20, 185 S.E.2d 182 (1971).

When a policy terminates in consequence of the policyholder's rejection of the company's offer to renew the policy contained in a premium notice such termination is deemed a termination "by the insured" and not a termination "by the insurer." Nationwide Mut. Ins. Co. v. Cotten, 280 N.C. 20, 185 S.E.2d 182 (1971).

Termination by Insured Is Not Contingent on Insurer's Giving Notice to Department (now Division). — Where a policy was terminated "by the insured" by his complete ignoring of the offer by the insurer to renew the policy contained in the notice of premium sent by it to the insured and received by him, termination of the policy is not contingent upon the company's giving notice thereof to the Department (now Division) of Motor Vehicles 15 days prior to the effective date of the termination. Nationwide Mut. Ins. Co. v. Cotten, 280 N.C. 20, 185 S.E.2d 182 (1971).

Where the insurance coverage was terminated by action of the insured and not by action of the insurer, none of the amendments which have been adopted to this Article place upon the insurer the obligation to notify the Department (now Division) of Motor Vehicles before termination of insurance coverage on the vehicle can become effective. Bailey v. Nationwide Mut. Ins. Co., 19 N.C. App. 168, 198 S.E.2d 246 (1973).

Thus, Defective Notice or Lack of Notice Does Not Affect Validity of Termination. — Where termination is "by the insured," since the notice to the Department (now Division) of Motor Vehicles is to be given "immediately" after the effective date of the termination, neither a defective notice nor a failure to give notice to the Department (now Division) would affect the validity or binding effect of the termination of the policy. Nationwide Mut. Ins. Co. v. Cotten, 280 N.C. 20, 185 S.E.2d 182 (1971).

Subsection (e) does direct the insurer, in event the insurance policy is terminated by the

insured, to "immediately notify" the Department (now Division) that such insurance "has been terminated," but since such notice can in any event only be given after the effective date of the termination, a failure or delay in giving the notice will not defeat the termination. Bailey v. Nationwide Mut. Ins. Co., 19 N.C. App. 168, 198 S.E.2d 246 (1973).

Nor Does Delayed Notice. — Delayed notice by an insurer of a termination "by the insured" is sufficient to effect a termination of the policy 15 days after it is given to the Department (now Division) of Motor Vehicles. Nationwide Mut. Ins. Co. v. Cotten, 280 N.C. 20, 185 S.E.2d 182 (1971).

Time Gaps in Coverage Permitted. — The Vehicle Financial Responsibility Act of 1957 permits the possibility of time gaps in insurance coverage; that is, short periods in which vehicles are uninsured. Fincher v. Rhyne, 266 N.C. 64, 145 S.E.2d 316 (1965).

Policy Violations a Defense prior to January 1, 1958. — As to accidents occurring prior to the effective date (January 1, 1958) of this Article, policy violations constitute a valid and complete defense as to the insurer. Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960).

Applied in Underwood v. National Grange Mut. Liab. Co., 258 N.C. 211, 128 S.E.2d 577 (1962); Lofquist v. Allstate Ins. Co., 263 N.C. 615, 140 S.E.2d 12 (1965).

Stated in Griffin v. Hartford Accident & Indem. Co., 264 N.C. 212, 141 S.E.2d 300 (1965); Hayes v. Hartford Accident & Indem. Co., 274 N.C. 73, 161 S.E.2d 552 (1968); Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970).

Cited in High Point Sav. & Trust Co. v. King, 253 N.C. 571, 117 S.E.2d 421 (1960); Fidelity & Cas. Co. v. Jackson, 297 F.2d 230 (4th Cir. 1961); Smart Fin. Co. v. Dick, 256 N.C. 669, 124 S.E.2d 862 (1962); Grant v. State Farm Mut. Auto. Ins. Co., 1 N.C. App. 76, 159 S.E.2d 368 (1968); In re Filing by N.C. Auto. Rate Administrative Office, 278 N.C. 302, 108 S.E.2d 155 (1971).

§ 20-309.1. Purchase of automobile insurance by minors. — Any minor 18 years of age or over shall be competent to contract for automobile insurance of any kind, to enter into an agreement to finance such insurance, to execute a power of attorney in connection with such financing, and also to execute a power of attorney in connection with an application for insurance with the assigned risk plan, to the same extent and with the same effect as though he had attained the age of 21 years. (1967, c. 934.)

Quoted in Gastonia Personnel Corp. v. Rogers, 276 N.C. 279, 172 S.E.2d 19 (1970).

§ 20-310. Grounds and procedure for cancellation or nonrenewal of a motor vehicle liability insurance policy; review by Commissioner of Insurance. — (a) As used in this section the following definitions shall apply:

(1) "Policy of automobile insurance" or "policy" means a policy or contract for bodily injury or property damage liability insurance delivered or issued for delivery in this State covering liability arising from the ownership, maintenance or use of any motor vehicle, insuring as the named insured one individual or husband and wife residents of the same household, and under which the insured vehicle therein designated is of the following type only:

a. A four-wheeled automobile or station wagon that is not used as a public or livery conveyance (which terms shall not be construed to include car pools) nor rented to others;

b. Any other four-wheeled motor vehicle with a load capacity of 1500 pounds or less which is not used in the occupation, profession or business of the insured, nor is used as a public or livery conveyance nor rented to others;

"Policy of automobile insurance" or "policy" shall not apply to any policy issued under the North Carolina Automobile Insurance Plan or to any policy insuring more than four motor vehicles, or to any policy covering the operation of a garage, sales agency, repair shop, service station, or public parking place or to any policy providing insurance only on an excess basis, or to any other contract providing insurance to such

named insured even though such contract may incidentally provide insurance with respect to such motor vehicles.

(2) "Renewal" or "to renew" means the issuance and delivery by an insurer of a policy superseding at the end of the policy period a policy previously issued and delivered by the same insurer through the agent who originally placed the policy or his successors or assigns, such renewal policy to provide types and limits of coverage at least equal to those contained in the policy being superseded, or the maximum limits of coverage provided for under G.S. 20-279.34(4), whichever is less, or the issuance and delivery of a certificate or notice extending the term of a policy beyond its policy period or term with types and limits of coverage at least equal to those contained in the policy being extended or the maximum limits of coverage provided for under G.S. 20-279.34(4), whichever is less; provided, however, that any policy with a policy period or term of less than 12 months or any period with no fixed expiration date shall for the purpose of this section be considered as if written for successive policy periods or terms of six months.

(3) "Insurer" means any insurance company, association or exchange authorized to transact the business of automobile insurance in the State of North Carolina.

(b) This section shall apply only to that portion of a policy of automobile insurance providing bodily injury and property damage liability, and uninsured motorists coverage.

(c) No insurer shall cancel or refuse to renew a policy of automobile insurance solely or primarily because of the age, sex, residence, race, color, creed, national origin, ancestry, marital status or lawful occupation (including the military service) of anyone who is insured or solely because another insurer canceled a policy of automobile insurance or refused to write or renew such policy or solely because of any combination of the hereinabove mentioned factors.

(d) No insurer shall cancel a policy of automobile insurance except for the following reasons:

(1) The named insured fails to discharge when due any of his obligations in connection with the payment of premium for the policy or any installment thereof, whether payable to the company or its agent either directly or indirectly under any premium finance plan or extension of credit.

(2) The named insured or any other operator who resides in the same household and customarily operates an automobile insured under such policy has had his driver's license suspended or revoked for more than 31 days after the effective date of the policy if said policy had been in effect less than one year or after the last anniversary of the effective date if the policy had been in effect longer than one year.

(3) The named insured or any other operator who resides in the same household and customarily operates an automobile insured under such policy during such policy period is finally convicted of operating a motor vehicle while under the influence of intoxicating liquor or of any impairing drug.

(e) No insurer shall refuse to renew a policy of automobile insurance except for one or more of the following reasons:

(1) The insured has violated any of the material terms or conditions of the policy.

(2) The named insured or any other operator who resides in the same household and customarily operates an automobile insured under such policy has had his driver's license suspended or revoked for more than 31 days after the effective date of the policy if said policy had been in effect less than one year or after the last anniversary of the effective

date if the policy had been in effect longer than one year; or is or becomes subject to any physical or mental condition which impairs his ability to operate a motor vehicle.

(3) The named insured or any other operator who resides in the same household and customarily operates an automobile insured under such policy is finally convicted of, pleads nolo contendere or forfeits bail during the policy period for any of the following:

a. Any felony involving the use of a motor vehicle.

b. Homicide, arising out of the operation of a motor vehicle.

c. Operating a motor vehicle while under the influence of intoxicating liquor or of any impairing drug.

d. Leaving the scene of a motor vehicle accident in which the insured is involved without identifying himself and furnishing his address as required by law.

e. Theft of a motor vehicle or the unlawful taking of a motor vehicle.

f. A second moving traffic violation by any one person who customarily operates the insured vehicle or an aggregate of four moving traffic violations by all persons customarily operating the insured vehicle within a 12-month period any part of which falls within the policy period, whether or not the violations were repetitions of the same offense or were different offenses.

(4) The named insured fails to discharge when due any of his obligations in connection with the payment of premium for the policy or any installment thereof, whether payable to the company or its agent either directly or indirectly under any premium finance plan or extension of credit.

(5) The named insured, or any other operator who resides in his household and who customarily operates an automobile insured under said policy within a 24-month period any part of which falls within the policy period, have been involved as an operator of an automobile in four or more automobile accidents where there is evidence to indicate fault on the part of such operator.

(f) No cancellation or refusal to renew by an insurer of a policy of automobile insurance shall be effective unless the insurer shall have given the policyholder notice at his last known post-office address by certificate of mailing a written notice of the cancellation or refusal to renew. Such notice shall:

(1) Be approved as to form by the Commissioner of Insurance prior to use;

(2) State the date, not less than 60 days after mailing to the insured of notice of cancellation or notice of intention not to renew, on which such cancellation or refusal to renew shall become effective, except that such effective date may be 15 days from the date of mailing or delivery when it is being canceled or not renewed for the reasons set forth in subdivision (1) of subsection (d) and in subdivision (4) of subsection (e) of this section;

(3) State the specific reason or reasons of the insurer for cancellation or refusal to renew;

(4) Advise the insured of his right to request in writing, within 10 days of the receipt of the notice, that the Commissioner of Insurance review the action of the insurer; and the insured's right to request in writing, within 10 days of receipt of the notice, a hearing before the Commissioner of Insurance;

(5) Either in the notice or in an accompanying statement advise the insured of his possible eligibility for insurance through the North Carolina Automobile Insurance Plan; and that operation of a motor vehicle without complying with the provisions of this Article is a misdemeanor and specifying the penalties for such violation.

(g) Nothing in this section shall apply:

(1) If the insurer has manifested its willingness to renew by issuing or offering to issue a renewal policy, certificate or other evidence of renewal, or has manifested such intention by any other means;

(2) If the named insured has notified in writing the insurer or its agent that he wishes the policy to be canceled or that he does not wish the policy to be renewed;

(3) To any policy of automobile insurance which has been in effect less than 60 days, unless it is a renewal policy, or to any policy which has been written or written and renewed for a consecutive period of 48 months or longer.

(h) There shall be no liability on the part of and no cause of action of any nature shall arise against any insurer, its authorized representative, its agents, its employees, or any firm, person or corporation furnishing to the insurer information as to reasons for cancellation or refusal to renew for any statement made by any of them in complying with this section or for the providing of information pertaining thereto except as provided by this section and any applicable federal law.

(i) Notwithstanding any provision herein contained, any insured may within 10 days of the receipt of the notice of cancellation or notice of intention not to renew, or the receipt of the reason or reasons for cancellation or refusal to renew if they were not stated in the notice, be entitled to request in writing that the Commissioner of Insurance review the action of an insurer in canceling or refusing to renew the policy of such insured. Within said 10-day period the insured may also request in writing a hearing in regard to such review; otherwise, the right of the insured for a hearing shall be deemed waived. On receiving a request in writing for a review of the action of such insurer, the Commissioner of Insurance shall immediately notify the insurer involved of the insured's request and the charges involved, if known, and on receipt of said notification and within 10 days thereafter the insurer may make a request in writing for a hearing in regard to such review; otherwise, the right of the insurer to such a hearing shall be deemed waived. If neither the insurer or the insured by request in writing or the Commissioner of Insurance of his own motion requires a hearing, then in such event the Commissioner of Insurance shall make such investigation as he deems appropriate to determine if the insurer has violated the provisions of this section, and shall after appropriate findings of fact either approve the cancellation or nonrenewal of such policy or order the insurer to renew, reissue, or reinstate such policy on such terms as may be just. At the written request of the insured or insurer or on his own motion, the Commissioner of Insurance shall after notice conduct a hearing to determine if the insurer has violated the provisions of this section, and after appropriate findings of fact, shall within 40 days after receipt in writing of a request for review by the insured, either approve the cancellation or nonrenewal of such policy or order the insurer to renew, reissue, or reinstate such policy on such terms as may be just. In addition, if the Commissioner of Insurance finds after notice and hearing and after appropriate findings of fact, that the insurer has willfully violated the provisions of this section or has acted without reasonable investigation into the grounds for action of cancellation or nonrenewal, he may order the insurer involved to pay the reasonable expenses and costs of the investigation and hearing conducted by the Commissioner not to exceed the sum of three hundred dollars ($300.00) and such costs as are ordered paid by the Commissioner pursuant to the provisions of this section shall be paid as a condition of such insurer continuing to write automobile insurance business in this State. Any insured or insurer aggrieved by any order or decision of the Commissioner of Insurance may appeal said order and decision to the Superior Court of Wake County pursuant to and subject to the provisions of G.S. 58-9.3.

All examinations, investigations, and hearings provided by this subsection may be conducted by the Commissioner personally or by one or more of his deputies, actuaries, examiners or employees designated by him for the purpose. All hearings shall be held at such time and place as shall be designated in a notice which shall be given by the Commissioner in writing to the person cited to appear at least 10 days before the date designated thereon. The notice shall state the subject of the inquiry and the specific charges, if any. It shall be sufficient to give such notice either by delivering it or by depositing the same in the United States mail, postage prepaid and addressed to the last known address of such insured or insurer. The policy shall remain in full force and effect during the pendency of review by the Commissioner of Insurance or the court except where the Commissioner of Insurance has sustained the action of the insurer and except where the cancellation or failure to renew was for nonpayment under subdivision (1) of subsection (d) and subdivision (4) of subsection (e) of this section, in which case the policy shall terminate as of the date provided in the notice under subsection (f) of this section.

(j) If any provision of this section or application thereof to any person or situation is held invalid, such invalidity shall not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are declared to be severable.

(k) Each insurer shall maintain for a period of three years records of refusals to renew and cancellations and shall, on request, forward to the Commissioner of Insurance copies of every notice or statement referred to in subsection (e) of this section which it shall at any time send to any of its insureds.

(l) The provisions of this section shall not apply to any insurer who shall limit the issuance of policies of automobile liability insurance to one class or group of persons engaged in any one particular profession, trade, occupation or business nor shall any insurer be required to renew should the insured become a nonresident of North Carolina. (1957, c. 1393, s. 2; 1963, c. 842, ss. 1-3; c. 964, s. 2; 1965, c. 1135; 1967, c. 857, s. 3; 1971, c. 1205, s. 4.)

Cross Reference. — As to notice of termination of policy required to be given by insurer to Department (now Division) of Motor Vehicles, see § 20-309(e).

Opinions of Attorney General. — Honorable Edwin S. Lanier, Commissioner of Insurance, 40 N.C.A.G. 326 (1969).

It was the intent of this Article that motor vehicle owners maintain financial responsibility continuously and that the law enforce this purpose. Crisp v. State Farm Mut. Auto. Ins. Co., 256 N.C. 408, 124 S.E.2d 149 (1962).

The primary intent of the General Assembly was that every motorist maintain continuously proof of financial responsibility. Perkins v. American Mut. Fire Ins. Co., 274 N.C. 134, 161 S.E.2d 536 (1968).

Operation without Such Maintenance Is Crime. — Operation of a motor vehicle without insurance or deposit for the protection of those injured as a result of its use is a crime. Levinson v. Travelers Indem. Co., 258 N.C. 672, 129 S.E.2d 297 (1963).

Article Must Be Read into Policy and Construed Liberally. — A policy having been issued pursuant to the assigned risk plan (§ 20-279.34) and for the purpose of fulfilling the requirement of the Financial Responsibility Act of 1957 (§ 20-309 et seq.), the provisions of that act, relative to the cancellation of such policies, must be read into this policy and construed liberally so as to effectuate the purpose of the act. Harrelson v. State Farm Mut. Auto. Ins. Co., 272 N.C. 603, 158 S.E.2d 812 (1968).

Statutes Control Policy Provisions as to Cancellation. — The provisions of this Article and Article 9A, liberally construed to effectuate the legislative policy, control any provision written into a policy which otherwise would give an insurance company a greater right to cancel than is provided by the statute. Harrelson v. State Farm Mut. Auto. Ins. Co., 272 N.C. 603, 158 S.E.2d 812 (1968).

Section 20-279.22 Does Not Apply to Policies Issued under This Article. — This Article has separate, distinct and specific provisions for notice of termination of a policy issued thereunder. Thus § 20-279.22, relating to notice of termination of policies issued under Article 9A of this Chapter, has no application to insurance policies issued pursuant to this Article. Faizan v. Grain Dealers Mut. Ins. Co., 254 N.C. 47, 118 S.E.2d 303 (1961).

Forty-Eight Consecutive Months of Coverage Excluding Policy from Application of Section. — No period of continuous automobile liability insurance coverage prior to Jan. 1, 1972, written either voluntarily or under automobile assigned risk plan, would count toward completion of period of 48 consecutive months of coverage necessary to exclude a policy from provisions of section. Opinion of Attorney General to Honorable Edwin S. Lanier, Commissioner of Insurance, 42 N.C.A.G. 22 (1972).

This section was intended to protect insured from the acts of the insurer, not from his own intentional acts. Levinson v. Travelers Indem. Co., 258 N.C. 672, 129 S.E.2d 297 (1963).

Substantial Compliance with Section Required. — In order to effectively cancel a policy an insurer must substantially comply with the requirements of this section. Crisp v. State Farm Mut. Auto. Ins. Co., 256 N.C. 408, 124 S.E.2d 149 (1962).

In order to be effective, a purported cancellation must comply with the provisions of § 20-309(e) and subsection (a) of this section. Redmon v. United States Fid. & Guar. Co., 21 N.C. App. 704, 206 S.E.2d 298 (1974).

This section applies both to termination by cancellation and to termination by failure to renew. Robinson v. Nationwide Ins. Co., 273 N.C. 391, 159 S.E.2d 896 (1968).

Subsection (f) relates to the notice and warning that must be given the policyholder in the event his policy is terminated by the insurer, whether the termination is by cancellation or by failure to renew. Perkins v. American Mut. Fire Ins. Co., 274 N.C. 134, 161 S.E.2d 536 (1968); Nationwide Mut. Ins. Co. v. Davis, 7 N.C. App. 152, 171 S.E.2d 601 (1970).

An insurer may not cancel for nonpayment of premiums without following the provisions of this section and § 20-309(e). Nationwide Mut. Ins. Co. v. Davis, 7 N.C. App. 152, 171 S.E.2d 601 (1970).

Insurer Required to Give Notice to Insured Where It Cancels Policy. — Where circumstances known to the insurer indicate a definite desire on the part of the insured to renew a policy, a termination of the policy is "by the insurer," necessitating the giving to the insured by the insurer of the notice of termination required by this section. Nationwide Mut. Ins. Co. v. Cotten, 280 N.C. 20, 185 S.E.2d 182 (1971).

Purpose of Notice. — The notice gives insured reasonable opportunity to procure other insurance. Levinson v. Travelers Indem. Co., 258 N.C. 672, 129 S.E.2d 297 (1963).

If the notice fails to conform to the statute, the contract remains in force. Levinson v. Travelers Indem. Co., 258 N.C. 672, 129 S.E.2d 297 (1963).

Where the insurer failed to give the insured the required notice and warning prior to terminating a policy of automobile liability insurance, the policy continued in force and effect notwithstanding the insured's failure to pay in full the required premium. Perkins v. American Mut. Fire Ins. Co., 274 N.C. 134, 161 S.E.2d 536 (1968).

Statement to Be Placed on Face of Notice. — The statement required by this section to be placed on the face of the notice of termination is not merely formal and directory. It is intended as a firm reminder to vehicle owners of the requirements of the law, and as a notice that failure to comply constitutes a criminal offense. It is to be given at the very time when insurance protection and financial responsibility is being withdrawn. Crisp v. State Farm Mut. Auto. Ins. Co., 256 N.C. 408, 124 S.E.2d 149 (1962).

Is Essential to Valid Cancellation or Termination. — In the absence of circumstances in a civil action which might constitute a waiver or an estoppel, or render harmless the failure to include a statement that proof of financial responsibility must be maintained, it is essential to a valid cancellation or termination, especially when the suit is by a member of the class the act is designed to protect. Crisp v. State Farm Mut. Auto. Ins. Co., 256 N.C. 408, 124 S.E.2d 149 (1962).

Notice Held Sufficient. — Pursuant to the rules and regulations of the assigned risk plan, insurer by mail advised insured in Jan. 1959, that his policy would expire Feb. 22, 1959, and that in order to renew it he must pay the premium in advance by Feb. 5, 1959, gave the amount of premium, and stated that if premium had not been paid by Feb. 5, it would be assumed he did not desire coverage. It also advised that if premium was not paid by Feb. 5, 1959, insured would have to apply through the assigned risk plan if he desired further insurance coverage. Insured did not pay the renewal premium on the date specified and did not tender the premium at any later date, but applied through the assigned risk plan for further insurance. Under these conditions, it was held that there was no failure to renew on the part of insurer and it was under no obligation to give insured further notice of termination under the provisions of this section. Therefore, the coverage period of the policy ended at 12:01 A. M., Feb. 22, 1959. Faizan v. Grain Dealers Mut. Ins. Co., 254 N.C. 47, 118 S.E.2d 303 (1961).

Insurer Is Not Required to Notify Insured Where Insured Himself Terminates Policy. — This section does not require the insurer to notify the insured where the insured himself terminates the policy. Nationwide Mut. Ins. Co. v. Davis, 7 N.C. App. 152, 171 S.E.2d 601 (1970).

Where there is a cancellation by insured, insurer is not required to give notice of such cancellation to the insured. Underwood v.

National Grange Mut. Liab. Co., 258 N.C. 211, 128 S.E.2d 577 (1962); Daniels v. Nationwide Mut. Ins. Co., 258 N.C. 660, 129 S.E.2d 314 (1963).

Insured May Cancel Policy by Agent. — There is nothing in the Vehicle Financial Responsibility Act which expressly or impliedly forbids the cancellation of a policy by insured through a duly authorized agent. Daniels v. Nationwide Mut. Ins. Co., 258 N.C. 660, 129 S.E.2d 314 (1963).

Cancellation of the policy by the insured is not an act so personal in its nature that it cannot be delegated to an agent. Daniels v. Nationwide Mut. Ins. Co., 258 N.C. 660, 129 S.E.2d 314 (1963).

Substitution of Vehicle at Insured's Request Is Not Cancellation as to Original Vehicle. — Where insured requests insurer to substitute another vehicle for the vehicle insured, and insurer in compliance with the request endorses the policy and issues form FS-1, there is no cancellation of the policy but the policy does not thereafter cover the original vehicle, and no liability can attach to insurer for any injuries inflicted in the negligent operation of the original vehicle by insured or by another with insured's permission. Levinson v. Travelers Indem. Co., 258 N.C. 672, 129 S.E.2d 297 (1963).

Certification of Financial Responsibility by Insured Does Not Show Intent to Renew Policy. — Certification by an insured to the Department (now Division) of Motor Vehicles that he had financial responsibility as required by the Vehicle Financial Responsibility Act and his giving the name of his insurer in that certification is for the purpose of getting a license plate for his automobile and does not show his intent to renew the policy so as to extend its coverage. Nationwide Mut. Ins. Co. v. Cotten, 280 N.C. 20, 185 S.E.2d 182 (1971).

Notice to Commissioner of Motor Vehicles — Former Law. — As to notice of termination of policy required to be given to the Commissioner of Motor Vehicles before the 1963 amendment to this section, see Nixon v. Liberty Mut. Ins. Co., 258 N.C. 41, 127 S.E.2d 892 (1962); Levinson v. Travelers Indem. Co., 258 N.C. 672, 129 S.E.2d 297 (1963); Allstate Ins. Co. v. Hale, 270 N.C. 195, 154 S.E.2d 79 (1967). See now § 20-309(e).

Applied in Hayes v. Hartford Accident & Indem. Co., 274 N.C. 73, 161 S.E.2d 552 (1968).

§ 20-310.1: Repealed by Session Laws 1963, c. 964, s. 3.

§ 20-310.2. Motor vehicle liability insurance; companies may not fail to renew solely by reason of age; penalties provided. — No insurance company licensed in this State to do a business of insurance, which is engaged in the writing of motor vehicle liability insurance, as the same is defined in G.S. 20-279.21, shall fail to renew any such existing policy of insurance solely because the insured has attained the age of 65 years or older.

Whenever the Commissioner of Insurance shall have reason to believe that any insurance company which is licensed to do a business of insurance in this State and is engaged in writing motor vehicle liability insurance has refused to renew policies of motor vehicle liability insurance solely because the applicant has reached the age of 65 years or older, he shall notify such company that it may be in violation of this section, and, in his discretion he may require a hearing to determine whether or not such company has actually been engaged in the practice as aforesaid. Any hearing held under this section shall in all respects comply with the hearing procedure provided in G.S. 58-54.6.

If after such hearing the Commissioner shall determine that the company has engaged in the practice of systematically failing to renew policies of motor vehicle liability insurance because of the advanced age of the insureds, he shall reduce his findings to writing and shall issue and cause to be served upon the company charged with the violation an order requiring the company to cease and desist from engaging in such practices. After the issuance of such cease and desist order, if the Commissioner finds that the company has continued to engage in such practices, he shall impose upon such company a fine not to exceed the amount of one thousand dollars ($1,000) for each separate violation.

Any company aggrieved by any order or decision of the North Carolina Commissioner of Insurance may appeal such order and decision to the Superior Court of Wake County in the same manner and under the same rules and provisions set forth in G.S. 58-9.3. (1967, c. 1072.)

§ 20-311. Revocation of registration when financial responsibility not in effect. — The Division of Motor Vehicles, upon receipt of evidence that financial responsibility for the operation of any motor vehicle registered or required to be registered in this State is not or was not in effect at the time of operation or certification that insurance was in effect, shall revoke the owner's registration plate issued for the vehicle at the time of operation or certification that insurance was in effect or the current registration plate for the vehicle if the year registration has changed for 60 days. In no case shall any vehicle the registration of which has been revoked for failure to have financial responsibility be reregistered in the name of such owner, spouse or any child of the spouse or any child of such owner within less than 60 days after the registration plates have been surrendered to the Division except that a spouse living separate and apart from the registered owner may reregister such vehicle immediately in such spouse's name. As a condition precedent to the reregistration of the vehicle the owner shall pay a restoration fee of fifteen dollars ($15.00) and the appropriate fee for a new registration plate. (1957, c. 1393, s. 3; 1959, c. 1277, s. 2; 1963, c. 964, s. 4; 1965, c. 205; c. 1136, s. 3; 1967, c. 822, s. 3; c. 857, s. 4; 1971, c. 477, s. 3; 1975, c. 348, s. 4; c. 716, s. 5.)

Editor's Note. — The first 1975 amendment inserted "a restoration fee of fifteen dollars ($15.00) and" in the last sentence.

The second 1975 amendment substituted "Division" for "Department" in the first and second sentences.

Cited in Griffin v. Hartford Accident & Indem. Co., 264 N.C. 212, 141 S.E.2d 300 (1965).

§ 20-312. Failure of owner to deliver certificate of registration and plates after revocation. — Failure of an owner to deliver the certificate of registration and registration plates issued by the Division of Motor Vehicles, after revocation thereof as provided in this Article, shall constitute a misdemeanor. (1957, c. 1393, s. 4; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" near the middle of the section.

§ 20-313. Operation of motor vehicle without financial responsibility a misdemeanor. — (a) On or after July 1, 1963, any owner of a motor vehicle registered or required to be registered in this State who shall operate or permit such motor vehicle to be operated in this State without having in full force and effect the financial responsibility required by this Article shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court.

(b) Evidence that the owner of a motor vehicle registered or required to be registered in this State has operated or permitted such motor vehicle to be operated in this State, coupled with proof of records of the Division of Motor Vehicles indicating that the owner did not have financial responsibility applicable to the operation of the motor vehicle in the manner certified by him for purposes of G.S. 20-309, shall be prima facie evidence that such owner did at the time and place alleged operate or permit such motor vehicle to be operated without having in full force and effect the financial responsibility required by the provisions of this Article. (1957, c. 1393, s. 5; 1959, c. 1277, s. 3; 1963, c. 964, s. 5; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsection (b).

Applied in Underwood v. National Grange Mut. Liab. Co., 258 N.C. 211, 128 S.E.2d 577 (1962); State v. Green, 266 N.C. 785, 147 S.E.2d 377 (1966).

Cited in Griffin v. Hartford Accident & Indem. Co., 264 N.C. 212, 141 S.E.2d 300 (1965).

§ 20-313.1. Making false certification or giving false information a misdemeanor. — (a) Any owner of a motor vehicle registered or required to be registered in this State who shall make a false certification concerning his financial responsibility for the operation of such motor vehicle shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court.

(b) Any person, firm, or corporation giving false information to the Division concerning another's financial responsibility for the operation of a motor vehicle registered or required to be registered in this State, knowing or having reason to believe that such information is false, shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. (1963, c. 964, s. 6; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in subsection (b).

§ 20-314. Applicability of Article 9A; its provisions continued. — The provisions of Article 9A, Chapter 20 of the General Statutes, as amended, which pertain to the method of giving and maintaining proof of financial responsibility and which govern and define "motor vehicle liability policy" and assigned risk plans shall apply to filing and maintaining proof of financial responsibility required by this Article. It is intended that the provisions of Article 9A, Chapter 20 of the General Statutes, as amended, relating to proof of financial responsibility required of each operator and each owner of a motor vehicle involved in an accident, and relating to nonpayment of a judgment as defined in G.S. 20-279.1, shall continue in full force and effect. (1957, c. 1393, s. 6; 1963, c. 964, s. 7.)

Owner Must Show Proof of Financial Responsibility as Prerequisite to Registration. — This Article requires every owner of a motor vehicle, as a prerequisite to the registration thereof, to show "proof of financial responsibility" in the manner prescribed by the Motor Vehicle Safety and Financial Responsibility Act of 1953, Chapter 20, Article 9A. Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967).

Section 20-279.34 is incorporated by reference into the Financial Responsibility Act of 1957 by this section. Harrelson v. State Farm Mut. Auto. Ins. Co., 272 N.C. 603, 158 S.E.2d 812 (1968).

This section does not incorporate § 20-279.22 in this Article. Faizan v. Grain Dealers Mut. Ins. Co., 254 N.C. 47, 118 S.E.2d 303 (1961).

Insurance policies and insurers' certificates required by both Article 9A of this Chapter and this Article, are defined by Article 9A. Faizan v. Grain Dealers Mut. Ins. Co., 254 N.C. 47, 118 S.E.2d 303 (1961).

Quoted in Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960).

Cited in Nixon v. Liberty Mut. Ins. Co., 258 N.C. 41, 127 S.E.2d 892 (1962); Daniels v. Nationwide Mut. Ins. Co., 258 N.C. 660, 129 S.E.2d 314 (1963).

§ 20-315. Commissioner to administer Article; rules and regulations. — The Commissioner of Motor Vehicles shall administer and enforce the provisions of this Article relating to registration of motor vehicles and may make necessary rules and regulations for its administration. (1957, c. 1393, s. 7.)

Quoted in Levinson v. Travelers Indem. Co., 258 N.C. 672, 129 S.E.2d 297 (1963).

Cited in Government Employees Ins. Co. v. Lumbermens Mut. Cas. Co., 269 N.C. 354, 152 S.E.2d 445 (1967).

§ 20-316. Divisional hearings upon lapse of liability insurance coverage. — Any person whose registration plate has been revoked under G.S. 20-309(e) or 20-311 may request a hearing. Upon receipt of such request, the Division shall, as early as practical, afford him an opportunity for hearing. Upon such hearing the duly authorized agents of the Division may administer oaths and issue subpoenas for the attendance of witnesses and the production of relevant books and documents. If it appears that continuous financial responsibility existed for the vehicle involved, or if it appears the lapse of financial responsibility is not reasonably attributable to the neglect or fault of the person whose registration plate was revoked, the Division shall withdraw its order of revocation and such person may retain the registration plate. Otherwise, the order of revocation shall be affirmed and the registration plate surrendered. (1971, c. 1218, s. 1; 1973, c. 1144, ss. 1, 2; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout the section.

§ 20-316.1. Notification of Division of renewal or reinstatement of policy. — Whenever any insurance company writing automobile liability insurance within this State shall, pursuant to the laws of this State, notify the North Carolina Division of Motor Vehicles of the cancellation or termination of any automobile liability insurance policy, and such company shall subsequently reinstate or renew such policy, it shall become the duty of the insurance company renewing or reinstating the policy to immediately notify the North Carolina Division of Motor Vehicles of the renewal or reinstatement. Notification of the renewal or reinstatement shall constitute proof of continuous coverage to the North Carolina Division of Motor Vehicles, provided such reinstatement or renewal has occurred without any lapse [in] coverage. (1973, c. 1069, s. 1; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" throughout the section.

§ 20-317. Insurance required by any other law; certain operators not affected. — This Article shall not be held to apply to or affect policies of automobile insurance against liability which may now or hereafter be required by any other law of this State, and such policies, if they contain an agreement or are endorsed to conform to the requirements of this Article, may be certified as proof of financial responsibility under this Article; provided, however, that nothing contained in this Article shall affect operators of motor vehicles that are now or hereafter required to furnish evidence of insurance or financial responsibility to the North Carolina Utilities Commission or the Interstate Commerce Commission or both, but to the extent that any insurance policy, bond or other agreement filed with or certified to the North Carolina Utilities Commission or Interstate Commerce Commission as evidence of financial responsibility affords less protection to the public than the financial responsibility required to be certified to the Division of Motor Vehicles under

this Article as a condition precedent to registration of motor vehicles, the amounts, provisions and terms of such policy, bond or other agreement so certified shall be deemed to be modified to conform to the financial responsibility required to be proved under this Article as a condition precedent to registration of motor vehicles in this State. It is the intention of this section to require owners of self-propelled motor vehicles registered in this State and operated under permits from the North Carolina Utilities Commission or the Interstate Commerce Commission to show and maintain proof of financial responsibility which is at least equal to the proof of financial responsibility required of other owners of self-propelled motor vehicles registered in this State. (1957, c. 1393, s. 9; 1959, c. 1252, s. 1; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" in the first sentence.

§ 20-318. Federal, State and political subdivision vehicles excepted. — This Article does not apply to any motor vehicle owned by the State of North Carolina or by a political subdivision of the State, nor to any motor vehicle owned by the federal government. (1957, c. 1393, s. 10.)

§ 20-319. Effective date. — This Article shall be effective from and after January 1, 1958. (1957, c. 1393, s. 12; 1961, c. 276.)

Cited in Faizan v. Grain Dealers Mut. Ins. Co., 254 N.C. 47, 118 S.E.2d 303 (1961); Grant v. State Farm Mut. Auto. Ins. Co., 1 N.C. App. 76, 159 S.E.2d 368 (1968).

ARTICLE 13A.

Certification of Automobile Insurance Coverage by Insurance Companies.

§ 20-319.1. Company to forward certification within seven days after receipt of request. — Upon the receipt by an insurance company at its home office of a registered letter from an insured requesting that it certify to the North Carolina Division of Motor Vehicles whether or not a previously issued policy of automobile liability insurance was in full force and effect on a designated day, it shall be the duty of such insurance company to forward such certification within seven days. (1967, c. 908, s. 1; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department" near the middle of the section.

§ 20-319.2. Penalty for failure to forward certification. — If any insurance company shall without good cause fail to forward said certification within seven days after its receipt of such registered letter, the North Carolina Commissioner of Insurance shall be authorized in his discretion to impose a civil penalty upon said company in the amount of two hundred dollars ($200.00) for such violation. (1967, c. 908, s. 2.)

ARTICLE 14.

Driver Training School Licensing Law.

§ 20-320. Definitions. — As used in this Article:

(1) "Commercial driver training school" or "school" means a business enterprise conducted by an individual, association, partnership or corporation which educates or trains persons to operate or drive motor vehicles or which furnishes educational materials to prepare an applicant for an examination given by the State for an operator's or chauffeur's license or learner's permit, and charges a consideration or tuition for such service or materials.
(2) "Commissioner" means the Commissioner of Motor Vehicles.
(3) "Instructor" means any person who operates a commercial driver training school or who teaches, conducts classes, gives demonstrations, or supervises practical training of persons learning to operate or drive motor vehicles in connection with operation of a commercial driver training school. (1965, c. 873.)

§ 20-321. Enforcement of Article by Commissioner. — (a) The Commissioner shall, subject to the provisions of Chapter 150A of the General Statutes of North Carolina, adopt and prescribe such regulations concerning the administration and enforcement of this Article as are necessary to protect the public. The Commissioner or his authorized representative shall have the duty of examining applicants for commercial driver training school and instructor's licenses, licensing successful applicants, and inspecting school facilities and equipment.

(b) The Commissioner shall administer and enforce the provisions of this Article, and may call upon the State Superintendent of Public Instruction for assistance in developing and formulating appropriate regulations. (1965, c. 873; 1973, c. 1331, s. 3.)

§ 20-322. Licenses for schools necessary; regulations as to requirements. — (a) No commercial driver training school shall be established nor any such existing school be continued on or after July 1, 1965, unless such school applies for and obtains from the Commissioner a license in the manner and form prescribed by the Commissioner.

(b) Regulations adopted by the Commissioner shall state the requirements for a school license, including requirements concerning location, equipment, courses of instruction, instructors, financial statements, schedule of fees and charges, character and reputation of the operators, insurance, bond or other security in such sum and with such provisions as the Commissioner deems necessary to protect adequately the interests of the public, and such other matters as the Commissioner may prescribe. (1965, c. 873.)

§ 20-323. Licenses for instructors necessary; regulations as to requirements. — (a) No person shall act as an instructor on or after July 1, 1965, unless such person applies for and obtains from the Commissioner a license in the manner and form prescribed by the Commissioner.

(b) Regulations adopted by the Commissioner shall state the requirements for an instructor's license, including requirements concerning moral character, physical condition, knowledge of the courses of instruction, knowledge of the motor vehicle laws and safety principles, previous personal and employment records, and such other matters as the Commissioner may prescribe, for the protection of the public. (1965, c. 873.)

§ 20-324. Expiration and renewal of licenses; fees. — All licenses issued under the provisions of this Article shall expire on the last day of June in the year following their issuance and may be renewed upon application to the Commissioner as prescribed by his regulations. Each application for a new or renewal school license shall be accompanied by a fee of twenty-five dollars ($25.00), and each application for a new or a renewal instructor's license shall be accompanied by a fee of five dollars ($5.00). The license fees collected under

this section shall be used under the supervision and direction of the Director of the Budget for the administration of this Article. No license fee shall be refunded in the event that the license is rejected, suspended, or revoked. (1965, c. 873; 1977, c. 802, s. 9.)

Editor's Note. — The 1977 amendment deleted "shall be placed in a special fund to be designated the 'Commercial Driver Training Law Fund' and" following "this section" in the third sentence.

Session Laws 1977, c. 802, s. 53, contains a severability clause.

§ 20-325. Cancellation, suspension, revocation, and refusal to issue or renew licenses. — The Commissioner may cancel, suspend, revoke, or refuse to issue or renew a school or instructor's license in any case where he finds the licensee or applicant has not complied with, or has violated any of the provisions of this Article or any regulation adopted by the Commissioner hereunder. A suspended or revoked license shall be returned to the Commissioner by the licensee, and its holder shall not be eligible to apply for a license under this Article until 12 months have elapsed since the date of such suspension or revocation. (1965, c. 873.)

§ 20-326. Exemptions from Article. — The provisions of this Article shall not apply to any person giving driver training lessons without charge, to employers maintaining driver training schools without charge for their employees only, or to schools or classes conducted by colleges, universities and high schools. (1965, c. 873.)

§ 20-327. Penalties for violating Article or regulations. — Violation of any provision of this Article or any regulation promulgated pursuant hereto, shall constitute a misdemeanor, and any person, firm, or corporation upon conviction thereof shall be punished by a fine of not more than one hundred dollars ($100.00) or by imprisonment for not more than 30 days, or by both such fine and imprisonment. (1965, c. 873.)

§ 20-328. Administration of Article. — This Article shall be administered by the Division of Motor Vehicles with no additional appropriations. (1965, c. 873; 1973, c. 440; 1975, c. 716, s. 5.)

Editor's Note. — The 1975 amendment substituted "Division" for "Department."

§§ 20-329 to 20-339: Reserved for future codification purposes.

ARTICLE 15.

Vehicle Mileage Act.

§ 20-340. Purpose. — This Article shall provide State remedies for persons injured by motor vehicle odometer alteration, and to provide purchasers of motor vehicles with information to assist them in determining the condition and value of such vehicles. Such remedies shall be in addition to remedies provided by the federal odometer law (Motor Vehicle Information and Cost Savings Act, Public Law 92-513, 86 Stat. 947, enacted October 20, 1972). (1973, c. 679, s. 1.)

§ 20-341. Definitions. — As used in this Article:

(1) The term "odometer" means an instrument for measuring and recording the actual distance a motor vehicle travels while in operation; but shall

not include any auxiliary odometer designed to be reset by the operator of the motor vehicle for the purpose of recording mileage on trips.

(2) The term "repair and replacement" means to restore to a sound working condition by replacing the odometer or any part thereof or by correcting what is inoperative.

(3) The term "transfer" means to change ownership by purchase, gift, or any other means.

(4) The term "transferee" means any person to whom the ownership in a motor vehicle is transferred by purchase, gift, or any means other than by creation of a security interest.

(5) The term "transferor" means any person who transfers his ownership in a motor vehicle by sale, gift or any means other than by creation of a security interest. (1973, c. 679, s. 1.)

§ 20-342. Unlawful devices. — It is unlawful for any person knowingly to advertise for sale, to sell, to use, or to install or to have installed, any device which causes an odometer to register any mileage other than the true mileage driven. For the purposes of this section, the true mileage driven is that mileage driven by the vehicle as registered by the odometer within the manufacturer's designed tolerance. (1973, c. 679, s. 1.)

§ 20-343. Unlawful change of mileage. — It is unlawful for any person or his agent to disconnect, reset, or alter the odometer of any motor vehicle with the intent to change the number of miles indicated thereon. (1973, c. 679, s. 1.)

§ 20-344. Operation of vehicle with intent to defraud. — It is unlawful for any person with the intent to defraud to operate a motor vehicle on any street or highway knowing that the odometer of such vehicle is disconnected or nonfunctional. (1973, c. 679, s. 1.)

§ 20-345. Conspiracy. — No person shall conspire with any other person to violate G.S. 20-342, 20-343, 20-344, 20-346, or 20-347. (1973, c. 679, s. 1.)

§ 20-346. Lawful service, repair, or replacement of odometer. — Nothing in this Article shall prevent the service, repair, or replacement of an odometer, provided the mileage indicated thereon remains the same as before the service, repair, or replacement. Where the odometer is incapable of registering the same mileage as before such service, repair, or replacement, the odometer shall be adjusted to read zero and a notice in writing shall be attached to the left door frame of the vehicle by the owner or his agent specifying the mileage prior to repair or replacement of the odometer and the date on which it was repaired or replaced. Any removal or alteration of such notice so affixed shall be unlawful. (1973, c. 679, s. 1.)

§ 20-347. Disclosure requirements. — (a) In connection with the transfer of a motor vehicle, the transferor shall deliver to the transferee, prior to execution of any transfer of ownership document, a single written statement which contains the following:

(1) The odometer reading at the time of the transfer;

(2) The date of the transfer;

(3) The transferor's name and current address;

(4) The identity of the vehicle, including its make, model, body type, its vehicle identification number, and the license plate number most recently used on the vehicle;

(5) A statement that the mileage is unknown if the transferor knows the odometer reading differs from the number of miles the vehicle has actually traveled, and that the difference is greater than that caused by odometer calibration error;

(6) A statement describing each known alteration of the odometer reading, including date, person making the alteration, and approximate number of miles removed by the alteration; and

(7) Disclosure of excess mileage when vehicle is known to have exceeded 100,000 miles and the odometer records only five whole-mile digits.

(b) Repealed by Session Laws 1973, c. 1088.

(c) It shall be unlawful for any transferor to violate any rules under this section or to knowingly give a false statement to a transferee in making any disclosure required by such rules.

(d) The provisions of this disclosure statement section shall not apply to the following transfers:

(1) A vehicle having a gross vehicle weight rating of more than 16,000 pounds;

(2) A vehicle that is not self-propelled;

(3) A vehicle that is 25 years old or older; or

(4) A new vehicle prior to its first transfer for purposes other than resale. (1973, c. 679, s. 1; c. 1088.)

§ 20-348. Private civil action. — (a) Any person who, with intent to defraud, violates any requirement imposed under this Article shall be liable in an amount equal to the sum of:

(1) Three times the amount of actual damages sustained or one thousand five hundred dollars ($1,500), whichever is the greater; and

(2) In the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney fees as determined by the court.

(b) An action to enforce any liability created under subsection (a) of this section may be brought in any court of the trial division of the General Court of Justice of the State of North Carolina within two years from the date on which the liability arises. (1973, c. 679, s. 1.)

§ 20-349. Injunctive enforcement. — Upon petition by the Attorney General of North Carolina, a violation of this Article may be enjoined as an unfair and deceptive trade practice, as prohibited by G.S. 75-1.1. (1973, c. 679, s. 1.)

§ 20-350. Criminal offense. — Any person, firm or corporation violating any provision of this Article shall be guilty of a misdemeanor. (1973, c. 679, s. 1.)

§§ 20-351 to 20-355: Reserved for future codification purposes.

ARTICLE 16.

Professional Housemoving.

(This Article Will Expire August 1, 1979.)

§ 20-356. Definitions. — "Person" as used in this Article shall mean an individual, corporation, partnership, association or any other business entity. The word "house" as used in this Article shall mean a dwelling, building, or other structure in excess of 14 feet in width. The word "Department" as used in this Article shall mean the North Carolina Department of Transportation. (1977, c. 720, s. 1.)

§ 20-357. Housemovers to be licensed. — All persons who engage in the profession of housemoving on roads and highways on the State Highway System shall be licensed by the Department. (1977, c. 720, s. 2.)

§ 20-358. Qualifications to become licensed. — The Department shall issue annual printed licenses to applicants meeting the following conditions:

(1) The applicant must be at least 18 years of age; present acceptable evidence of good character and show sufficient housemoving experience on the application form furnished by the Department. Housemoving experience means extensive and responsible training gained by the applicant while engaged actively and directly on a full-time basis in the moving of houses and structures on public roads and highways with at least 24 months experience. Examples of the capacity in which a person may work in gaining experience include the following in building moving operations:

a. Moving superintendent,

b. Moving foreman, and

c. General mechanic and helper in the housemoving profession or trade.

(2) The applicant must furnish proof that he has (i) complied with Article 13, Chapter 20 of the North Carolina General Statutes for the liability imposed by law for the ownership, operation, maintenance or use of motor vehicles in his business operation; (ii) a permit or license bond in the amount of five thousand dollars ($5,000).

(3) The applicant must furnish proof that all of the vehicles, excluding "beams and dollies" and "hauling units," to be used in the movement of buildings, structures, or other extraordinary objects wider than 14 feet have met the requirements of G.S. 20-183.2 pertaining to the equipment inspection of motor vehicles; provided that the "beams and dollies" and "hauling units" are excluded from inspection under G.S. 20-183.2 and, further, are not required to be equipped with brakes.

(4) Exhibit his federal employer's identification number. (1977, c. 720, s. 3.)

§ 20-359. Effective period of license. — A license issued hereunder shall be effective for a period of one year from date of issuance and shall be renewable on an annual basis. (1977, c. 720, s. 4.)

§ 20-360. Requirements for permit. — (a) Persons licensed as professional housemovers shall also be required to secure a permit from the Department for every move undertaken on the State Highway System of roads; that permit shall be issued by the Department after determining that the applicant is (i) properly licensed, (ii) furnished special surety bonds as required by the Department, and (iii) complying with such other regulations as required by the Department.

(b) It shall be the duty of the applicant to see that the "beams and dollies" and "hauling units" used shall be constructed with proper material in a suitable manner and utilized so as to provide for the safety of the general public and the structure being relocated. Any violation of this duty may result in suspension or revocation of his license by the Department.

(c) A license shall not be required for individuals moving their own buildings; however, a permit will be required for all moves.

(d) Licensed housemovers shall furnish front and rear escort vehicles on all moves, one or both of which may be a marked police, sheriff or State Highway Patrol vehicle, or one or two private escort vehicles equipped with flashing amber lights depending on the number of law-enforcement vehicles escorting the move; escort vehicles shall operate where possible at a distance of 300 feet from the structure being moved; that this interval will be closed in cities and other congested areas to protect other traffic from the swing of the load at corners and turns and, the private escort vehicles shall burn their headlights and be equipped with red flags on each side at the front; in addition, the private escort vehicles shall be equipped with a sign across the front or rear bumper bearing the legend "Wide Load" or "Oversized Load Following" or "Oversized Load Ahead," whichever is appropriate, with black letters at least 10 inches high on a yellow background. (1977, c. 720, s. 5.)

§ 20-361. Application for permits. — Application must be made to the division or district engineer having jurisdiction at least two days prior to the date of move. For good cause shown, this time may be waived by the district or division engineer. A travel plan shall accompany the application. Division or district engineers are authorized to issue permits for individual moves of a structure or building whose width does not exceed 36 feet. The travel plan will show the proposed route, the time estimated for each segment of the move, a plan to handle traffic so that no one delay to other highway users shall exceed 20 minutes. The division or district engineers shall review the travel plan and if the route cannot accommodate the move due to roadway weight limits, bridge size or weight limits, or will cause undue interruption of traffic flow, the permit shall not be issued. The applicant may submit alternate plans if desired until an acceptable route is determined. If the width of the building or structure to be relocated is more than 36 feet, or if no acceptable travel plan has been filed, and the denial of the permit would cause a hardship, the application and travel plan may be submitted to the Department on appeal. After reviewing the route and travel plan, the Department may in its discretion issue the permit after considering the practical physical limitations of the route, the nature and purpose of the move, the size and weight of the structure, the distance the structure is to be moved, and the safety and convenience of the traveling public. A surety bond in an amount to cover the cost of any damage to the pavement, structures, bridges, roadway or other damages that may occur can be required if deemed necessary by the Department. (1977, c. 720, s. 6.)

§ 20-362. Liability of housemovers. — The permittee assumes all responsibility for injury to persons or damage to property of any kind and agrees to hold the Department harmless for any claims arising out of his conduct or actions. (1977, c. 720, s. 7.)

§ 20-363. Removal and replacement of obstructions. — All obstructions, including traffic signals, signs, and utility lines will be removed immediately prior to and replaced immediately after the move at the expense of the mover, provided that arrangements for and approval from the owner is obtained. (1977, c. 720, s. 8.)

§ 20-364. Route changes. — Irrespective of the route shown on the permit, an alternate route will be followed:

(1) If directed by a peace officer.
(2) If directed by a uniformed officer assigned to a weighing station to follow a route to a weighing device.
(3) If the specified route is officially detoured. Should a detour be encountered, the driver shall check with the office issuing permit on which he is traveling prior to proceeding. (1977, c. 720, s. 9.)

§ 20-365. Loading or parking on right-of-way. — The object to be transported will not be loaded, unloaded, nor parked, day or night, on highway right-of-way without specific permission from the district or division engineer. (1977, c. 720, s. 10.)

§ 20-366. Effect of weather. — No move will be made when atmospheric conditions render visibility lower than safe for travel. Moves will not be made when highway is covered with snow or ice, or at any time travel conditions are considered unsafe by the Department or Highway Patrol or other law-enforcement officers having jurisdiction. (1977, c. 720, s. 11.)

§ 20-367. Obtaining license or permit by fraud. — The permit may be voided if any conditions of the permit are violated. Upon any violation, the permit must be surrendered and a new permit obtained before proceeding. Misrepresentation of information on application to obtain a license, fraudulently obtaining a permit,

alteration of a permit, or unauthorized use of a permit will render the permit void. (1977, c. 720, s. 12.)

§ 20-368. Municipal regulations. — All moves on streets on the municipal system of streets shall comply with local regulations. (1977, c. 720, s. 13.)

§ 20-369. Out-of-state licenses and permits. — An out-of-state person, partnership, or corporation engaging in the structural moving business may apply to the Department for a license to engage in the housemoving profession in North Carolina, and obtain permits for moves by complying with the provisions of this Article and the regulations of the Department in the same manner as is required of North Carolina residents. (1977, c. 720, s. 14.)

§ 20-370. Speed limits. — The speed of moves will be that which is reasonable and prudent for the load, considering weight and bulk, under conditions existing at the time. (1977, c. 720, s. 15.)

§ 20-371. Penalties. — (a) Any person violating the provisions of this Article or the regulations of the Department governing housemoving shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than five hundred dollars ($500.00), or imprisonment for not more than 30 days or both.

(b) The Department is hereby authorized in the name of the State to apply for relief by injunction, in the established manner provided in cases of civil procedure, without bond, to enforce the provisions of this Article, or to restrain any violation thereof. In such proceedings, it shall not be necessary to allege or prove either that an adequate remedy at law does not exist, or that substantial or irreparable damage would result from the continued violation thereof. (1977, c. 720, s. 16.)

§ 20-372. Invalid section; severability. — If any of the provisions of this Article, or if the application of such provisions to any person or circumstance shall be held invalid, the remainder of this Article and the application of such provision of this Article other than those as to which it is held valid, shall not be affected thereby. (1977, c. 720, s. 17.)

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

May 1, 1978

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing recompilation of the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

RUFUS L. EDMISTEN
Attorney General of North Carolina

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